

**COMMISSION OF INQUIRY INTO ALLEGED INCIDENTS OF
CORRUPTION, MALADMINISTRATION, VIOLENCE OR
INTIMIDATION INTO THE DEPARTMENT OF
CORRECTIONAL SERVICES APPOINTED BY ORDER OF THE
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA IN
TERMS OF PROCLAMATION NO. 135 OF 2001, AS AMENDED.**

FINAL REPORT

Volume 1

The Hon. Mr T M Mbeki
President of the
Republic of South Africa
The Presidency
Union Buildings
PRETORIA.

Dear Mr President

On 27 September 2001, you appointed me to inquire into and report on incidents of corruption, maladministration, violence or intimidation in the Department of Correctional Services and in particular, to investigate as well nine (9) Management Areas. The specific terms of the mandate are set out fully in this Commission Report.

The Commission of Inquiry has already submitted eleven (11) interim reports relating to matters, which the Commission thought at the time, ought to be addressed before the filing of this Final Report.

THE HON. MR T M MBEKI
PRESIDENT OF THE
REPUBLIC OF SOUTH AFRICA.

The Commission has now considered the substantial body of evidence (both factual and opinion), which was submitted to the Commission. In the premises, the Commission once again wishes to re-affirm the views and recommendations contained in the eleven (11) interim reports.

The Commission's task has now been completed and your Commissioner has the honour to furnish you with the Final Report.

The Commission does not annex the numerous documents generated by the inquiry but recommends that they be archived so as to be available for perusal.

Signed at DURBAN on this day of DECEMBER 2005.

MR JUSTICE T S B JALI
(CHAIRMAN)

FOREWORD

This report constitutes the work of the Commission during the three (3) year period after it was constituted. The Commission would like to thank a number of people who assisted the Commission in executing its mandate.

The Commission is indebted to a number of Judge Presidents and Chief Magistrates who allowed the Commission to use various courthouses, at times to the inconvenience of their own courts. The Commission would like, in particular, to mention the following:

- **Judge President C.M. Somyalo**, Eastern Cape Provincial Division (St Albans Management Area);
- **Judge President B.M. Ngoepe**, Transvaal Provincial Division (Pretoria Management Area),
- **Judge President F. Bam**, Land Claims Court (Leeuwkop and Johannesburg Management Area);
- **Judge President R.M.M. Zondo**, Labour Court and Labour Appeal Court, (Durban-Westville Management Area);
- **Judge President J.M. Hlophe**, Cape Provincial Division (Pollsmoor Management Area);
- **Judge President J.P. Malherbe**, Orange Free State Provincial Division (Bloemfontein Management Area);
- **Mr T.C. Mabaso**, Chief Magistrate, Durban (Durban-Westville Management Area);
- **Mr C.S. Ngcobo**, Chief Magistrate, Pietermaritzburg (Pietermaritzburg Management Area);
- **Mr J. Botha**, Chief Magistrate, Dundee (Ncome Management Area).

The Commission's work would not have been possible without the support the Commission received from a number of people and organisations for which the Chairman of the Commission is greatly indebted.

The Commission pays tribute to those members, past and present of the Department of Correctional Services, the prisoners, and members of the public who under difficult circumstances testified before the Commission and took time off from their busy schedules to assist the Commission in its task.

The Commission also wishes to thank and acknowledge the strong general support it has received from the following institutions and organizations:

- Law Faculty of the University of Cape Town;
- The Office of the Inspecting Judge;
- Civil Society Prison Reform Initiative (CSPRI);
- South African Prisoners' Organisation for Human Rights (SAPHOR);
- Centre for Conflict Resolution (Cape Town);
- South African Police Services (SAPS);
- National Institute for Crime Prevention and Reintegration of Offenders (NICRO);
- Childline;
- Gay and Lesbian Organisation of Pretoria (GLOP);
- The Lesbian and Gay Equality Project;
- South African Law Society;
- University of Witwatersrand Aids Law Project;
- Treatment Action Campaign (TAC), and
- The legal practitioners and representatives who appeared before the Commission and assisted the Commission to execute its mandate.

During the tail-end of the Commission's work, the Commission had to obtain assistance from a number of organisations and people who assisted with research and the editing of the report. The Commission is indebted to those people.

Finally, the Commission expresses its gratitude to the members of staff who gave so much of their time and effort in order that their special skills and

experience may be utilized so as to uphold the values enshrined in our Constitution.

The Commission had to travel around the country for a number of years and these members of staff were away from their families during that period. The Commission is also indebted to members of their families and their contribution is greatly appreciated.

MR JUSTICE T S B JALI
CHAIRMAN OF THE COMMISSION.

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CHAPTER 1

COMMISSION OVERVIEW

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CHAPTER 1

COMMISSION OVERVIEW

1. INTRODUCTION

This is the final report of this Commission of Inquiry into alleged incidents of corruption, maladministration, violence or intimidation in the Department of Correctional Services¹ appointed by the State President in 2002. It contains the Commission's findings, recommendations and evidence obtained during the existence of the Commission and its hearings

This, the first Chapter of this report, provides a general overview of the Commission, detailing its establishment and its Terms of Reference, the gathering and hearing of evidence, the interim reports submitted, the institutional culture in the Department as well as a brief overview of the Management Areas investigated by the Commission.

Chapter Two analyses the historical background to prisons in our country, as well as the significant events that have occurred in the Department of Correctional Services over the last ten to fifteen years and have resulted in a major change in the institutional culture, which the Commission believes are, to a large extent, directly responsible for the numerous difficulties and challenges currently facing the Department.

¹ Hereinafter referred to as “the Department”

The remaining Chapters deal, in the main, with various areas of concern identified by the Commission that warrant action by the Department. Furthermore, the Commission's investigation into selected areas of the logistics and procurement sections of the Department are also dealt with. Previous investigations conducted into the Department as well as the implementation of the Commission's interim reports will also be examined.

Further Chapters deal with misconduct and maladministration emerging from certain Management Areas for which interim reports were not submitted. A detailed report on each of the Management Areas investigated by the Commission during its tenure is also incorporated.

2. ESTABLISHMENT OF THE COMMISSION

The State President of the Republic of South Africa appointed the Commission of Inquiry in terms of Proclamation No. 135 of 2001² to investigate and report on incidents of corruption, maladministration, violence or intimidation within the Department.

In appointing the Commission, the President acted under the power vested in him in terms of section 84(2) of the Constitution of the Republic of South Africa Act No. 108 of 1996, read together with section 1 of the Commission's Act No. 8 of 1947.

The full terms of reference as set out in the Proclamation, as amended, are as follows:

"1. To inquire into and report on –

(a) alleged incidents, of corruption relating to –

² See Government Gazette No. 22718 dated 27 September 2001.

- (i) *the procurement of goods and services for the Department of Correctional Services;*
 - (ii) *recruitment and appointment, promotion and dismissal of employees for the Department of Correctional Services;*
 - (iii) *the treatment of prisoners;*
 - (iv) *dishonest practices and illicit relationships between employees and prisoners leading to unlawful activities;*
- (b) *alleged incidents of non-adherence to departmental policy and deviation from national norms and standards;*
 - (c) *alleged incidents of violence or intimidation against employees of the Department which affect the proper functioning of the Department;*
 - (d) *the extent of implementation of recommendations of past investigations relating to the Department.*
2. *To make recommendations as to steps that can be taken in order to prevent the future occurrence of such incidents.*
3. *To make recommendations as to steps that can be taken against any employee who in terms of the findings of the Commission is implicated in impropriety against the employer.*
4. *Although these terms of reference apply generally to the Department of Correctional Services, the Commission is required to prioritise its inquiry by focusing on the prisons in the order listed hereunder:*
- (a) *Pietermaritzburg Management Area;*
 - (b) *Durban-Westville Management Area;*
 - (c) *Ncome Management Area;*
 - (d) *Johannesburg Management Area;*
 - (e) *Pollsmoor Management Area;*

- (f) *Pretoria Management Area;*
 - (g) *St Albans Management Area;*
 - (h) *Leeuwkop Management Area;*
 - (i) *Bloemfontein Management Area.*³
5. *To inquire into and report on any other matter which in the Commission's opinion is relevant to the terms of reference of the Commission.*
 6. *These terms of reference may be added to, varied or amended from time to time.*
 7. *The Commission shall be subject to and conducted in terms of the provisions of the Commission's Act, 1947 (Act No. 8 of 1947), as amended.*
 8. *The Commissioner shall commence with his duties forthwith.*⁴

The President appointed Mr Justice T.S.B. Jali as the Chairperson of the Commission. Hence the Commission has commonly been referred to as the "Jali Commission of Inquiry".

Due to the magnitude of the task and the number of documents the Commission would collect, it was deemed necessary to set up an office to serve as the Commission's head office. The Chairperson also considered it necessary to be assisted by two Commissioners and thus appointed Advocate T.A. Sishi of the Durban Bar and Advocate E.J.S. Steyn, Senior Lecturer in

³ During May 2002 the Commission became aware of certain acts of corruption that had been captured on video at the Grootvlei Prison, a prison situated in the Bloemfontein Management Area. The Commission approached the State President to extend its terms of reference to include the Bloemfontein Management Area. The Terms of Reference were accordingly amended, in terms of Government Gazette No. 23 558 dated 27 June 2002.

⁴ A copy of the Terms of Reference and Regulations governing the Commission are annexed hereto as Appendix "A".

the Law Faculty at the University of Cape Town. The offices that were rented through the Department of Public Works were at Embassy Building, 199 Smith Street, Durban. These premises operated as the head office of the Commission throughout its duration.

The first appointees of the Commission were administrative staff and investigators, who were appointed in November and December 2001 to commence investigations into the Durban-Westville Management Area.

Members of the administrative staff were Mr C. Frank (Commission Secretary), Mrs S.P. Lumley, Mrs L. Moopanar, Ms B.M. Koloko, Ms L.Y. Vanker and Ms S.P. Mlaba.

Members of the original investigating team were Advocate J. Brauns SC, Advocate V. Soni SC, Mr M. Magigaba, Mr S.D. Moloji, Mr I.B.G. Ngcobo and Advocate N. Joubert.

A researcher, Ms C. Goodenough, was also appointed in March 2004 to June 2005.

A second set of staff appointments was made when the Commission was investigating the Johannesburg, Leeuwkop and Pretoria Management Areas. Additional investigators were appointed to assist in investigating the Management Areas in Johannesburg and Pretoria. The additional members of the investigating team were Advocate G. Barlow, Mr D. Goqo, Advocate L. Halam, Advocate B. Shabalala, Mr L. Hlabisa, Mr M. Pakiry and Ms T. Hlophe. Advocate Barlow was the Head of Investigations for the Pretoria Management Area. Administrative staff members were also appointed for Gauteng (Johannesburg and Pretoria), namely, Ms M. Kester and Mr G.S. Phoshoko.

It was also deemed necessary to set up offices in Johannesburg for the purposes of serving as a base, storing all the documents and to provide space

for consulting with witnesses and implicated officials. An office was accordingly opened at J.H. Isaacs House, Cradock Street, Rosebank, Johannesburg. The Johannesburg office was operational for the period June 2003 to June 2004.

The last Management Area investigated was Ncome in KwaZulu-Natal, which had its own Head of Investigations, namely, Advocate S.K.D. Mdladla.

The Commission also used the services of forensic auditors, Manase and Associates, to assist with certain aspects of the Commission's investigations.

The circumstances that led to the establishment of the Commission are fully dealt with later in this report. However, it is appropriate to state at this stage that the recruitment of staff was not easy at the commencement of the investigations because of the violence and intimidation associated with the Department coupled with the uncertainty regarding the duration of the Commission. It was also not possible to ascertain the duration of the Commission at the outset since the level of corruption could not be anticipated before the investigations commenced.

3. INVESTIGATIONS, HEARINGS AND INTERIM REPORTS

3.1 Order of Investigations

Notwithstanding the order of investigations suggested in the Proclamation, the Durban-Westville Management Area was the first Management Area to be investigated. The order of investigations was influenced by, among other things, external factors such as the availability of venues and the leads on corruption. The Commission commenced the gathering of evidence and information at the Durban-Westville Management Area with effect from the 1 December 2001. The hearings were conducted in the same order as the investigations.

Although the Terms of Reference make specific reference to the investigation of certain Management Areas, it is apparent from paragraph four of the Terms of Reference that the Commission was required to investigate the Department of Correctional Services generally. As a result, the Commission also investigated the Department's Head Office while it sat in Gauteng.

At the commencement of the Commission, contact was made with the various Provincial Commissioners and Area Managers to advise them of the establishment of the Commission. They were also informed of the specific time that the Commission would be at the various Management Areas and that they would be notified in due course about the Commission's programme as it affected them. In some Management Areas, the Commission posted letters on the notice boards and in some of the dining halls. The National Commissioner of Correctional Services, we were made to understand, also advised the Provincial Commissioners about the establishment of the Commission.

3.2 Gathering of Evidence

The Commission's *modus operandi* in gathering evidence and advising members of the public about the Commission's work in the various Management Areas included, amongst others, placing advertisements in the media,⁵ conducting radio interviews,⁶ receiving telephone reports from various members of the public in response to the advertisements and interviews and

⁵ Durban-Westville – *The Daily News*, *Ilanga* and *The Sunday Times*;
Pietermaritzburg – *The Natal Witness* and *Ilanga*;
Bloemfontein – *The Citizen*, *Volksblad* and *Express*;
Port Elizabeth – *Ilizwi* and *The Herald*;
Cape Town – *Die Burger*, *The Cape Argus* and *Vukani*;
Johannesburg and Pretoria – *The Sowetan*, *Beeld* and *The Pretoria News*.

⁶ Interviews were conducted with a number of radio stations including *Radio Ukhozi*, *P4 Radio* and *East Coast Radio* (Durban); *Radio Naledi* and *Radio Oranje* (Bloemfontein); *Cape Talk*, *KFM* and *Radio Islam* (Cape Town) and *Radio Metro* and *SAFM* (Johannesburg).

receiving reports from members of the public and prisoners on the Commission's toll free number.

The Commission's toll free number was a major source of information regarding corruption within the Department. It quickly became apparent that most prisoners and officials were less anxious to talk to the officials of the Commission on the toll free number than they were to talk in person, as it gave them a sense of security.⁷ Some prisoners and officials only gave leads anonymously and indicated that they would not want to testify, while others gave both leads and indicated a willingness to testify. The complaints received, however, were not confined only to the nine (9) Management Areas under investigation. As word spread in the Department about the existence of a toll free number, people called the Commission with complaints about other Management Areas as well.⁸ The toll free number was also used to communicate with some of the Commission witnesses.⁹

When the Commission was about to investigate a particular Management Area, formal notification would be sent to the Area Manager advising him or her of the dates when the investigators would be arriving and requesting certain submissions. These submissions were to be made to the Commission by the Area Manager, the various Heads of Prisons and the various Heads of Departments. The officials were thus requested to submit their presentations before the Commission arrived so that the Chief Investigator could analyse

⁷ See the Chapter dealing with the establishment of the Office of a Prison Ombudsman to investigate corruption for more details on leads received.

⁸ See the report on all the other complaints the Commission received from Management Areas not specified in the Terms of Reference for investigation. The report is annexed hereto marked Appendix "B".

⁹ The toll free number was operational whenever the Commission offices were open, which was five and a half days a week. Two alternating members of staff manned the phone. They took detailed statements from callers and passed the information on to the investigators, who then followed it through if it related to the nine Management Areas under investigation. However, if it related to the other Management Areas, this was passed on to the relevant agencies within the Department, including the Office of the Inspecting Judge, who were to follow up on those leads.

the submissions and check that all the required information was available prior to the start of the hearings.

During the first week of each investigation in an area, the procedure was that the investigators would meet with all the stakeholders in the Management Area, including prison management, unions, prisoners and staff members, to introduce themselves, explain the investigation procedure and answer any questions that might arise. Investigators then conducted interviews and took statements from various people who had knowledge of corruption or maladministration within the Department. In accordance with the views expressed by the Supreme Court of Appeal, copies of those statements were served on all those people implicated.¹⁰ Thereafter, evidence was led in open Court¹¹ to comply with the provisions of the Commission's Act.¹²

All members of the Commission endeavoured to approach their task with an open mind. An added assurance of impartiality was provided by the fact that the investigators had to present whatever evidence they had collected before the Commissioners. In cases where a member of the investigating team was not sure what approach to adopt with regard to a particular matter, the approach was discussed with the Chief Investigator for direction and guidance. If the matter was not resolved, it was further discussed with all other Commission members to ensure total openness and impartiality in evidence gathering and that the approach was in accordance with an inquisitorial process.

¹⁰ *Du Preez and Another v The Truth and Reconciliation Commission* 1997 (3) SA 204 (SCA).

¹¹ Even though it was not compulsory to use courts, every attempt was made to sit in a court environment for reasons of safety and the welfare of prisoners.

¹² See Section 4 of Act No. 8 of 1947.

3.3 Commission Hearings

For purposes of the safety of the witnesses and prisoners, it became necessary for the Commission to conduct its hearings within courthouses, with provisions being made for the prisoners to have their meals during these sittings in order not to violate their rights.

The Commission is indebted to a number of Judge Presidents and Chief Magistrates who allowed the Commission to use various courthouses, at times to the inconvenience of their own courts.

As already stated, two Commissioners assisted the Chairperson of the Commission. For seconding Advocate E. Steyn to the Commission for a period of two and a half years, the Commission is indebted to the Dean of the Faculty of Law at the University of Cape Town, Professor H. Corder. When Advocate Steyn had to return to her duties at the University of Cape Town, the Commission appointed another Commissioner, Advocate S. Poswa-Lerotholi of the Durban Bar, who assisted with the Ncome Management Area hearings.

The first two weeks of the hearings in each Management Area were spent listening to presentations from the Provincial Commissioner (where applicable), the Area Manager, Heads of Prisons and the Heads of various Departments within the Management Area. However, the presentations were not limited to the Heads of Prisons and senior officials.

Where there was a need to hear other stakeholders, those stakeholders were also given an opportunity to make their submissions.¹³ The unions were also

¹³ For example in Pollsmoor the various Non-Government Organisations running projects within the prison were also allowed to give presentations to the Commission.

invited to give presentations. This invitation to the unions to give presentations was honoured at some Management Areas, for example, Durban-Westville and Pietermaritzburg Management Areas. Most unions in other Management Areas only responded when they were implicated by witnesses.

Commission hearings were held in open court with *viva voce* evidence being led. In cases where oral evidence could not be led, documentary evidence was tendered, which the Commission accepted.

In accordance with regulations governing this Commission, the people who were implicated by the various witnesses were given an opportunity to cross-examine witnesses to test the veracity of their contentions and to lead evidence in rebuttal.¹⁴ Those who could afford legal representation and who elected to be so represented were also given an opportunity to be represented by their legal representatives before the Commission.¹⁵

At no stage was the right to legal representation refused to any of the implicated people who applied for it, even though in terms of the Regulations this right could be exercised only at the discretion of the Chairperson of the Commission. As a result, up to sixty-five (65) legal representatives appeared before the Commission.¹⁶

The sittings of the Commission and hearing of evidence with respect to the various Management Areas covered the period 2 February 2002 to the 12 May 2005 and were held as follows:

¹⁴ See Regulation 9 of Regulations published in Government Notice No. 22 718 of the 27 September 2001 (“the Regulations”).

¹⁵ See Regulation 10 of the Regulations.

¹⁶ The names of these representatives are contained in Appendix “C”.

	Management Areas	Dates
1	Durban-Westville	4 February - 30 April 2002; 7,8,17,18, 24 June 2004
2	Pietermaritzburg	15 April - 15 June 2002
3	Bloemfontein (Grootvlei)	18 June - 2 August 2002
4	St Albans	12 August - 27 September 2002; 31 May - 2 June 2004
5	Pollsmoor	11 November - 6 December 2002; 17 February - 14 March 2003; 9 – 12 May 2005
6	Leeuwkop	9 April - 26 June 2003; 27 – 31 October 2003
7	Johannesburg	1 August – 2 October 2003 20 – 31 October 2003 29 March – 2 April 2004 19 April, 21 - 22 April & 30 April 2004
8	Pretoria	4 November 2003 – 19 March 2004 20 April & 23 - 28 April 2004 3 - 27 May 2004
9	Ncome	26 July - 23 September 2004

The Commission did not hear evidence continuously as it sat in accordance with the High Court calendar for the Natal Provincial Division. The Commission thus took recess at the same time as the High Court. The recess periods were used for the drafting of interim reports, which were submitted to the President and the Minister of Correctional Services.

3.4 Interim Reports

During the hearings the Commission adopted the procedure of issuing interim reports. These reports were attempts to deal with incidents of misconduct that the Department needed to attend to on an urgent basis.

The urgency that led to the Commission following this format was the Commission's realisation during the hearings that the Department is experiencing a total breakdown in the disciplinary system, which required recommendations for immediate intervention. This breakdown was highlighted in the Commission's First Interim report in which it made certain recommendations as to how to address the problem.

The Commission submitted eleven (11) interim reports during the sittings, which were with respect to all the Management Areas except the Ncome Management Area. The interim reports deal with illegal drug dealing, medical aid fraud, favouritism in appointments, extortion, unlawful financial transactions with prisoners, fraudulent matric certificates, unlawful visits, theft, fraud, assault of prisoners, irregular appointments, irregular transfers and parole transgressions amongst other things.

No interim report was submitted on the Ncome Management Area because it was the last area the Commission investigated. However, the Commission's findings and recommendations on Ncome form part of this Final Report.¹⁷

¹⁷ See Chapters dealing with the Ncome Management Area in Volume Two (2).

The eleven (11) interim reports that the Commission has submitted are hereby incorporated and form part of this final report. For ease of reference, the interim reports form part of this report.¹⁸

4. INSTITUTIONAL CULTURE

The Commission, in accordance with its Terms of Reference, investigated nine (9) Management Areas. The incidents of corruption and maladministration that the Commission came across in the various prisons will be discussed in greater detail later in this report. However, these incidents were influenced by a particular and generalised institutional culture, which the Commission observed in all nine (9) Management Areas investigated.

4.1 Department's Rules and Regulations

The most noticeable feature of the institutional culture the Commission observed was that corruption and maladministration were rife in most of the Management Areas investigated. There is a large group of employees within such Management Areas who featured in almost all the incidents of corruption and maladministration and who are predominantly driven by greed and the need to make easy money. This became apparent in the nature of the corruption that is endemic within the Department. Despite this, the Commission also observed that there were members in the Department who are law-abiding and who sought to comply with the rules and regulations of the Department.

The investigations also revealed that many employees consciously and systematically disregard Departmental rules and regulations. The failure or refusal to comply with rules and regulations of the Department became apparent in the manner in which these employees consciously and deliberately flouted regulations relating to security, searching of members,

¹⁸ See Volumes 3 and 4 of this report.

searching of visitors, visitation rights, procurement of goods for the prisoners, the relationship between prisoners and warders, recruitment and appointments, promotions, merit awards, transfer, parole, disclosure of private work, treatment of prisoners, use of State assets and others. This appeared to be done with impunity in that there was little evidence of disciplinary action being taken against the transgressors.

It became apparent to the Commission that besides the initial training members receive after recruitment, there are no systematic training and development programmes for members to acquaint themselves with the rules and regulations of the Department at a later stage. Even when circulars and information are disseminated, there is no effective mechanism to ensure that such information is properly disseminated and reaches all staff members. This obviously might, on some occasions, have detrimental consequences for the Department.¹⁹

The disregard for rules and regulations was also apparent in the attitude of some of the members towards the Commission, Commission staff and the work of the Commission. There is a clear lack of accountability by officials, including, management.

4.2 Work Ethic, Competence and Discipline

The Commission's general observation was that there appeared to be a poor work ethic prevailing in most of the Management Areas investigated. There is a general breakdown of organisational standards and norms. Many correctional officials are not dedicated to their duties with a high level of absenteeism and truancy being a major problem.

¹⁹ In Pretoria the rules and regulations regarding the writing of examinations by prisoners and members of the community were changed and such information was not properly disseminated. This had serious negative consequences for the Department (See, for example, the Chapters dealing with Misuse of Examination Centres and Sexual Violence in Prisons).

There also appears to be a general culture of violating prisoners' constitutional rights with prisoners being deprived of their full visitation rights, being served lunch and supper together at midday²⁰ and thereafter being locked in their cells often merely because members want to leave work early to attend to their own private affairs.²¹

It is also clear that many officials occupy responsible senior positions without having the necessary competence and experience for such positions. This lack of competence leads to a situation where the senior official is unable to command the respect of subordinates, which ultimately results in a general breakdown of discipline, law and order.

The lack of discipline is of serious concern to the Commission as it is the Commission's view that unless disciplinary issues are addressed urgently and dealt with as recommended by the Commission, the Department faces the prospect of anarchy in its work place. This particular aspect will be dealt with in more detail later in this report.²² The anarchy has manifested itself in the prevalent abuse of power by senior officials towards junior officials, female staff members and those who are vulnerable.²³

The lawlessness and failure to respect any form of authority is not only confined to the failure to respect colleagues but also the Commissioner and the Minister of Correctional Services.²⁴ It is also evident that Departmental officials do not respect orders of the High Court of South Africa and the Supreme Court of Appeal.

²⁰ See also Chapter dealing with Treatment of Prisoners.

²¹ See the Chapter dealing with Treatment of Prisoners and the section on Johannesburg Management Area where officials are alleged to leave their posts when big soccer matches are being played and the evidence of Mr Golden Miles Bhudu, a Director of SAPHOR in Leeuwkop Transcript Vol. 40, page 3 327 who alleged this also occurred in the old days whenever there was a Springbok rugby match.

²² See Chapters dealing with Disciplinary Inquiries and Sexual Violence in Prisons.

²³ See Chapter dealing with the Abuse of Power.

²⁴ This aspect will be dealt with in more detail later in this Report.

The failure to respect the Orders of the High Court can best be demonstrated by the Department's failure to honour the various orders of the High Court directing them on to how to deal with, amongst others, the interpretation and application of the parole provisions and guidelines. The reason the Department provided for not abiding by the Parole orders was that there were conflicting Judgments from the Cape Provincial Division and the Natal Provincial Division.²⁵ There is, however, no merit in this reason as the Department's legal advisors should have advised the Department about the South African legal system and how it operates under these conditions. It may be that the Department treated these legal advisers the same way it has treated other professionals within the Department, which is to ignore their advice.²⁶

At the Pretoria High Court, in what is commonly referred to as "The Boeremag Trial", the Judge in the trial was so infuriated that he stated that it is scandalous that the Department had ignored his order to return a laptop computer to one of the accused. As a result, the Judge ordered the Head of Prison, Mr Baloyi, to come to court to appear in a contempt investigation.²⁷ The prison officials were even reported in court to have said that the court would not dictate to them.²⁸

This once again was an indication of how the Department reacts to orders emanating from the High Court and various other courts. The reports, which

²⁵ See the Chapter dealing with Parole where this issue is discussed in more detail.

²⁶ In this regard, see the Chapter dealing with Abuse of Power on the manner in which the Department deals with psychologists, the Chapter on Parole on how the advice of doctors in respect of the release of terminally ill prisoners is ignored, the Chapter on Recruitment regarding the psychometrist and later in this Chapter

²⁷ See the Court record in the abovementioned trial, pages 3 705 et seq. The details were also briefly reported in "*This Day*" newspapers of Wednesday, the 25 February 2004: "Boeremag trialist gets back his laptop computer".

²⁸ "Hulle sê hulle laat hulle nie voorskryf deur 'n Hof nie". (Record of the trial at page 3707).

the Commission has received from various Magistrates and Judges, clearly indicate that the Department has difficulty in complying with Court Orders.²⁹

Legal advice of Departmental advisers and Orders of the High Court and Supreme Court of Appeal are disrespected and ignored.

It is this culture of lawlessness that has led to members of the Judiciary in some of the Divisions of the High Court declining to do prison inspections because Judges fear for their safety. However, the absence of judicial supervision of the conditions and treatment of prisoners means that prisoners have lost the possibility of independent oversight of their conditions.³⁰

Another example of failure or refusal to comply with Court Orders can best be illustrated by the Marimuthu³¹ case. In this matter, officials ignored the court order and released Mr Marimuthu on correctional supervision, notwithstanding the Supreme Court of Appeal's refusal to entertain his appeal, in which he was seeking correctional supervision.

Under these circumstances, it is clear that Departmental officials and, in particular, the members of the traditional custodial sector, regard themselves as being the highest authority in the country with respect to anyone who has been incarcerated. The abuse of power by officials is embedded and also manifests itself in the manner in which officials treat their colleagues, especially those who are not from the traditional custodial sector. This trend becomes apparent in a number of areas, for example:

²⁹ Prisoners sometimes are not delivered to courts on time for criminal hearings especially when the staff members are holding their meetings or Union meetings. As a result, there can be undue delays in commencement of trials. This fact has been conveyed to the Area Managers in the various Management Areas but it still persists.

³⁰ See the Chapter dealing with the Judicial Inspectorate for more details on the problems of oversight into prisons. On 21 October 2002, the Judge President of the Natal Provincial Division wrote a letter to the Commission explaining why prison visits had been stopped. For details of the letter, see the Chapter dealing with the Durban-Westville Management Area.

³¹ See the Chapter dealing with Conversion of Sentences to correctional supervision, which details the circumstances surrounding the release of Mr. Marimuthu.

a) Psychologists and Psychometrists

Psychologists are supposed to assist the Department in dealing with psychological issues and psychometrists are supposed to assist in recruitment procedures. However, the evidence before the Commission was that psychometrists end up acting as clerks in the interviews. They also act as clerks for warders who do the interviews and are involved in the selection process. The warders may not necessarily be qualified to carry out the job.³²

b) Medical Doctors and Nurses

Medical personnel, relying on the expertise they have due to their training, make certain recommendations about prisoners, which warders often ignore, irrespective of whether the medical doctor is a general practitioner, a district surgeon or a specialist.³³ It is not unheard of for warders to override a medical decision a specialist has made, and even do this in matters where another medical practitioner would not easily disagree.

c) Social Workers

The recommendations of social workers are often overlooked and the Department's officials decide whether or not a person will get parole. Even when social workers are of the view that a person has not

³² See the Fifth Interim Report on the Bloemfontein Management Area and the setting out of the role played by psychometrists in that recruiting process. See also the Chapter dealing with Recruitment in this report.

³³ See the case of *Stanfield v Minister of Correctional Services* 2004 (4) SA 43 (C) where medical evidence was challenged by the warders in the Department of Correctional Services. Similarly, in the matter dealing with the application for release on medical grounds of Mr Stanley Nkosi at Leeuwkop Prison and Mr du Plooy at Pretoria Local Prison, where the Provincial Control Officer and the Area Manager at Leeuwkop and Pretoria Prisons, respectively, overrode the medical evidence although they had no medical qualifications. (See Chapter dealing with Parole).

undergone the necessary programmes for him or her to get parole, officials sometimes override their professional assessments.³⁴

d) Lawyers

Similarly, advice from lawyers is often ignored. Members of the Department decide on legal interpretation and the way in which they are going to apply the provisions of the Correctional Services Act without regard to the legal advice offered.³⁵

e) Human Resource Matters

The Department appoints consultants and specialists in this area, who make recommendations, which the members ignore and instead do as they please. Mr Theron of Pollsmoor Prison stated in no uncertain terms that the Human Resources Directives given to them by the Department on recruitment were regarded as nothing more than pieces of paper.³⁶

This abuse of power and general state of challenging any form of authority gives the impression that in the Department, the job of warder is the only job in the public service that allows one to work in all fields, as long as prisoners or prisons are involved, without training and regardless of whether such work requires professional expertise or training in other Departments or the private sector.

³⁴ See the evidence of Mrs Bhamjee in the Conversion of Sentence Chapter.

³⁵ In this regard see the matters brought before court by the Department where it is clear that legal advice and parole judgments have been ignored. See also the manner in which the Marimuthu matter was handled. See also the evidence of Mr J.B.T. Chaka at the Ncome Management Area regarding how his advice was ignored: Ncome Transcript Vol. 10 pages 942-980.

³⁶ See Mr Theron's evidence – Pollsmoor transcript – Vol.34 pages 2 675-6 (5.3.03.)

4.3 Obstacles to the Commission's Work

Although Commission investigators found a high level of co-operation from some Departmental members, it also became apparent that there was a great deal of resistance to the investigations.

Notwithstanding that the unions were invited to make submissions to the Commission at each Management Area, there was very little or no information at all that emanated from this sector. It appeared that whenever the Commission asked members of the Department to provide certain information, they were afraid, in varying degrees, of complying with the request.

Senior officials sometimes harassed those who did provide information.³⁷ Furthermore, most senior Departmental officials frustrated the Commission's work by attempting to prolong the hearings in the hope that the Commission would eventually leave the Management Area without dealing with that particular issue. In some cases, officials were subpoenaed but refused to appear before the Commission.³⁸

Non-co-operation was also evident in the behaviour of some officials who suddenly went on leave unannounced after the Commission had approached them to submit information. Other officials chose to work out of town to avoid the Commission's investigators. Then there were a number of officials who made their co-operation conditional upon the Commission meeting certain demands. Some of these officials demanded monetary compensation for their assistance and others demanded transfers before they would be of assistance to the Commission.

³⁷ An element of interference and examples of members of the Department obstructing and hindering the work of the Commission are dealt with in Chapter Six of the Fifth Interim Report of the Commission.

³⁸ See the Sixth Interim Report in this regard.

The Commission's investigators also encountered great resistance from many officials at the Department's Head Office. In some instances, officials that were requested to provide information would either delay the submission or not submit the information at all. In other instances, some officials who gave statements to the Commission later reneged on the statements and subsequently alleged that the Commission's investigators had put words into their mouths. When requested again to write a statement in their own hand, giving their own version, there was again a failure to co-operate. The Commission also viewed this as an indication of an attempt not only to discredit the integrity of the Commission but also to discredit the integrity and professionalism of some of the Commission members and investigators.

Throughout the Commission's hearings, some senior officials made a concerted effort to discredit the Commission and its investigators. Investigators were threatened with death.³⁹ The attacks on the Commission increased in intensity and severity when the Commission was investigating the Bloemfontein, Port Elizabeth and Pollsmoor Management Areas and the prisons within Gauteng. It was at its most severe when the Commission was in St Albans⁴⁰ and Leeuwkop Management Areas.

A number of disparaging and defamatory press statements were released with the intention of discrediting the Commission. False statements with no substance were also released in the name of a union.⁴¹

Notwithstanding all of the above, the Commission's staff members carried on with their work and tried to avoid issues that sidetracked them from the objectives of the investigations.

³⁹ See the Second Interim Report on Westville Management Area and the Fifth Interim Report on the Bloemfontein Management Area at page 136.

⁴⁰ See also the section dealing with the Mr Bones matter in the Chapter on St Albans Management Area.

⁴¹ See the false media statement about the union not being given a fair hearing released by the Police and Prison Civil Rights Union (Popcru), on 30 May 2003, a media statement in SABC News of 12 May 2004 about the length of time the Commission had taken to investigate and the income of the Commission investigators in the *Mail and Guardian* online of the 17 May 2004.

4.4 Intimidation and Fear

Intimidation and fear is prevalent in the Department of Correctional Services, including Head Office. As a result, even the people holding management positions are not completely committed to the enforcement of the Departmental regulations because they fear reprisal from other members. This is the case even if they are not corrupt because fear drives them to avoid enforcing the rules and regulations.

The prison staff is in dire need of urgent intervention to give them direction and support. Morale is very low and members are disillusioned. This cannot be allowed to continue if the Department is expected to operate in an efficient and corrupt free environment where rehabilitation of prisoners is a priority.

Besides the generally known violence and intimidation associated with the Department of Correctional Services, the one incident which put the fear of death into a number of members in the Department was the murder of a senior departmental official, Ms Thuthukile Bhengu.⁴²

This shocked most of the law abiding members in the Department because, even though the sinister forces operating in the Department had been violent towards male and female members previously, at no stage had a female member been murdered. In the eyes of the ordinary law abiding members, it gave the impression that the sinister forces within the Department were prepared to go to any extent to achieve their objectives. As a result, very few members were prepared to risk their lives and co-operate with the Commission.

The establishment of the Commission could not have been at a worse time insofar as intimidation and fear was concerned. Indeed, the murder of Ms

⁴² See also the Chapter dealing with the Pietermaritzburg Management Area.

Bhengu may have been one of the contributing factors which influenced the establishment of this Commission.⁴³

5. MANAGEMENT

5.1 Visionary Leadership

There is clearly a lack of visionary leadership in the Department, especially in management at Management Area level. Management appears to react to rather than lead or direct situations. This reactive tendency suggests that management staff lack the necessary skill or capacity needed to move the Department forward. No organization can succeed where managers do not have vision for the organization or strategise and plan properly.

The lack of capacity in leadership also contributes to inefficiencies, maladministration, corruption and the wastage of resources apparent in the Department. This is partially expressed in the state of neglect of some of the prisons, which are in a state of disrepair, are not fully operational and need to be renovated.

In some Management Areas there is a fusion of the roles of management and the Union, Popcru. This, once again, leads to a dysfunctional management.

5.2 Record Keeping / Management

Generally, most Management Areas have been found to be very poor in record keeping or management of information, in particular, the keeping and

⁴³ 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 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.

managing of prisoner and staff information. This was an issue of concern brought to the attention of the Commission by senior members of the Department's staff. The improper keeping of information was not confined to one Management Area.⁴⁴ It was generally accepted that the Department's attendance register, in most Management Areas, cannot be relied upon.⁴⁵

The information relating to staff records and attendance is critical in a facility like a prison because it has a bearing on prison security. Similarly, normal security requirements demand that each and every prisoner is accounted for at all times in any prison. Notwithstanding that, the Commission found that in some Management Areas, management could not actually account for the number of prisoners in custody because of poor record keeping. There were discrepancies in the records kept in some institutions within the Management Areas.

The keeping of records in Management Areas caused the Commission concern as the management of any correctional facility should, at all times, be in a position to account for each and every inmate incarcerated and the whereabouts of every official who is on duty. The situation was more alarming when the staff could not account for firearms in the Arsenal in one Management Area.⁴⁶ There is clearly an urgent need to upgrade the management of information in most Management Areas.

Furthermore, it has become apparent to the Commission that the late discovery of some of the "escapes", which are referred to in the Chapter

⁴⁴ In particular, St Albans, Johannesburg and Ncome Management Areas.

⁴⁵ In this regard see the Sixth Interim Report dealing with Mr Mataka. The evidence was clear that on some of the days when he purported to be at work, he was in fact attending his trial in the Gauteng Province. Similarly, there was a query in the evidence with regard to the Attendance register relating to Mr Baloyi at St Albans, who was alleged to be on leave but was in fact attending some meetings in the Department. Similarly, it also became apparent that on days when major union activity was to take place, most of the union leadership would have been recorded as having been on leave on that particular day when, in fact, they were at work. (See evidence relating to St Albans and the removal of Mrs Tseane in this regard.)

⁴⁶ Even the Arsenal Register was not up to date at Ncome Management Area. (See Chapter dealing with Ncome Management Area – The Arsenal).

dealing with prison security,⁴⁷ was as a result of poor record keeping. The “disappearance” of some of the prisoners was only discovered a number of days after they had escaped. With proper record keeping and daily verification of prisoner information, controls and monitoring, such escapes could have been discovered earlier. They might even have been intercepted.

The mismanagement of prisoner information is not only confined to sentenced prisoners, it is also a problem with regard to awaiting trial prisoners. The “Gaol Returns”, which used to be furnished to the Department of Justice on awaiting trial prisoners, are no longer being furnished. These Returns provided information to the Department of Justice that clearly set out the status of the hearings with regard to an awaiting trial prisoner.⁴⁸

When the Commission requested the information regarding “previous investigations into the Department”, which are referred to in the Terms of Reference, the Department could not supply a complete list, let alone provide the Commission with all the copies of those investigations they had identified. In order to identify the reports and obtain copies thereof, the Commission members had to use their own resources and rely on previous news reports so as to recall who had investigated the Department. Pursuant upon that, an approach was made to some of the people individually to obtain copies of the previous reports. This was another indication of the state of affairs in the Department.

6. OVERVIEW OF MANAGEMENT AREAS

Notwithstanding the general institutional culture prevailing in the Department as a whole, the Commission also found a distinct institutional culture and some areas of concern in each of the Management Areas investigated. The

⁴⁷ See the Chapter dealing prison security and in particular the escapes relating to Mr Sydney Thloloe (a.k.a. Biza).

⁴⁸ For more details on the discussion on the ‘Gaol Returns’ see the Chapter dealing with Overcrowding.

brief overview of the Management Areas which follows provides an understanding⁴⁹ of the challenges the Commission encountered and that the Department faces insofar as each of these Management Areas is concerned.

6.1 Durban-Westville Management Area

This was the first Management Area the Commission investigated. The Commission received co-operation from the senior managers in the Management Area and the Provincial Commissioner.

Both local branches of the Public Servant's Association⁵⁰ and Popcru testified before the Commission. The Commission found it interesting that Popcru was of the view that the only corruption they were aware of in this Management Area was the poor work performance by a company that had been contracted by the Department to paint one of the prisons within the Management Area. They contended that the paint was peeling. As far as they were concerned, there was absolutely no corruption in this Management Area.

This submission was made to the Commission notwithstanding that the Commission investigators found drug dealing, medical aid fraud, sexual harassment, abuse of power and nepotism.⁵¹

The Commission interviewed a number of members who had participated in the medical aid fraud. The statements emanating from those interviews were passed onto the other investigating agencies.⁵²

Whilst there was intimidation of members and witnesses, as expected, there were also unexpected threats, which surfaced in the Commission hearings, like the threat to kill the Chief Investigator of the Commission. There was even

⁴⁹ For more details on each Management Area see the full detailed Chapters on each Management Area later in this report.

⁵⁰ Hereinafter referred to as "PSA".

⁵¹ Interim Reports have been submitted in this regard.

⁵² The Directorate for Special Operations of the National Prosecuting Authority (Scorpions) and the Special Investigation Unit (SIU).

an attempt to bribe the Commission investigators so as to suppress evidence.⁵³ This was a clear indication of the culture which feeds into corruption within the Management Area.

6.2 Pietermaritzburg Management Area

This was the second Management Area the Commission investigated. From the Commission's investigations, it became apparent that the general level of intimidation and political climate made the Management Area almost ungovernable. Furthermore, the said level of intimidation and fear had been exacerbated by the killing of Ms Thuthukile Bhengu, who was murdered for refusing to appoint one of the warders' girlfriends during one of the recruitment drives, allegedly because of a fraudulent matric certificate. Her killing resulted in members being scared to testify and disclose corruption to the Commission.

The level of fear and intimidation amongst the members was apparent to both the investigators and the Commissioners.

While Pietermaritzburg Prison suffered from many of the same issues of mismanagement, corruption and overcrowding seen in the other prisons investigated, it was unique in the way in which it had been rendered unmanageable as an intended or unintended consequence of Operation Quiet Storm.

It was clear to the Commission that the problems at Pietermaritzburg Management Area were highly politicised. This might be a historical fact but is still prevailing and issues are still being defined along political lines and the pre-1994 political tensions still exist.

⁵³ See the Second Interim Report in this regard.

6.3 Bloemfontein Management Area

This was the third Management Area the Commission investigated. The impetus of the investigation in Bloemfontein was the video tape, which had been compiled by the four (4) prisoners.⁵⁴ The said video tape depicted warders committing acts of corruption. However, it was the first time that such blatant acts of corruption were shown on television in South Africa. Even prior to the screening of the video there was a lot of tension in this Management Area. Investigators of the Commission were threatened to the extent that they had to have police escorts into the prison for the first time since the Commission began.

The Commission was further subjected to intimidation in that evidence was led of a member who insulted one of the Commissioners, by calling her a “bitch”.⁵⁵ The insults had racial connotations towards the other Commissioners as well.

The investigations into the Management Area were hampered by interference from Head Office, which created even greater tension in the Commission hearings. The Commission believes this interference by the Head Office made its task thereafter even more difficult, as this tension also spilled over to the next two (2) Management Areas the Commission had to investigate immediately thereafter, namely, St Albans and Pollsmoor.

The Commission found that the following factors contributed to the corruption and maladministration in the Bloemfontein Management Area: drug and alcohol trafficking and other illegal sales, sodomy, recruitment practices, abuse of prisoners, management malpractices and management rivalry.

⁵⁴ Messrs Gayton Mackenzie, Moosa Mia, Petrus Sekutoane and Samuel Grobbelaar. They were also assisted by Messrs Kenneth Kunene, William Smith and Gideon van Niekerk.

⁵⁵ For more details see the Fifth Interim Report at pages 100-101. Also see Bloemfontein Transcript, volume 4 pages 235-260.

6.4 St Albans Management Area

St Albans was the fourth Management Area the Commission investigated. The investigations in this Management Area were prominently around the secret meetings, which senior managers held to decide the fate of the various members outside the formal management structure, the abuse of power by senior officials against the junior officials, fraud, filling of jobs, ethnicity etc.

For the first time during the Commission hearings, senior management staged a walk-out when they had to testify to refute serious allegations which had been made against them by a witness who was a former member of the cabal that was making decisions. The evidence of the witness was also corroborated by a number of other witnesses, who had been, one way or the other, victimised by this clique or senior management of the province. The individual members of the Commission were openly attacked in the media.⁵⁶ It then became clear to the Commission that it had touched “the untouchables”. These senior managers had never been asked to account for their actions. Their abuse of power had never been challenged. In fact, they were feared by the entire Department in the Eastern Cape.

The institutional culture, as elsewhere, is one that is rife with corruption and maladministration. The problems within the Management Area also had political connotations and divisions between employees’ complicated matters. The Eastern Cape as it is currently recognised in terms of section 103 of the Constitution includes districts, which were formerly part of the Transkei and Ciskei homelands and the Republic of South Africa. Consequently, the employees of the Department are from those areas. Notwithstanding the fact that the members now belong to the same province of the Eastern Cape, they still subscribe to the old apartheid divisions and decisions are scrutinised according to whether they favour one or the other of these old geographical regions.

⁵⁶ The walk-out was on 18 October 2002 and the media releases were in the *Daily Dispatch* and *Die Burger*.

In addition to the above sectionalism, there is also strong trade union rivalry, which affects the functioning of the Management Area.

The Commission also heard testimony about how the Department had failed to take action against a senior official who allegedly sexually harassed several female colleagues. These incidents were symptomatic of the general problem of sexual harassment of female staff members in the Province. There were even allegations of sex for jobs, which could not be proven because witnesses were scared to testify.⁵⁷

6.5 Pollsmoor Management Area.

This was the fifth Management Area that the Commission investigated. The Commission's investigations at Pollsmoor Management Area concentrated mostly on the two (2) recruitment drives,⁵⁸ which had been riddled with irregularities, procurement practices, maladministration at the workshop, gangs, sexual abuse in the female prison and other general problems within this Management Area.

The member who was implicated in the recruitment practices adopted the strategy of walking away from the proceedings when the time came for him to testify about what had happened. He did so after having employed the services of a senior counsel to cross-examine all the other witnesses and when the time came for him to testify and be cross-examined, he chose to walk out.

It was apparent to the Commission that Pollsmoor had a major drug problem, which was influenced by the general gang culture within Pollsmoor and the Western Cape generally. However, penetrating and breaking through the code of silence within the gangs in the Western Cape was very difficult. As a result, very little in the form of evidence on gang members and their activities

⁵⁷ For more details see Chapter dealing with Abuse of Power.

⁵⁸ For more details see the Chapter on Recruitment.

was revealed. The only break through for the Commission was made when one of the former gang members came forward and offered to testify *in camera*.⁵⁹

Pollsmoor Management was one of the most difficult areas to investigate. At best, the Commission can describe it by reference to a “laager”. 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.

The management in this Management Area has succeeded in having a meaningful relationship with the community through non-governmental organizations.

6.6 Leeuwkop Management Area

This was the sixth Management Area the Commission investigated. There was definitely a positive approach towards the Commission, which came from the Provincial leadership of the Department. However, the same cannot be said with regard to some of the managers within the Department and the leadership of the unions.

The co-operation of the Provincial leadership assisted insofar as general investigations were concerned whenever problems were encountered it was easy to get them resolved within a short space of time.

When allegations were raised against the leadership of Popcru they, as well, came before the Commission with their legal representative, to cross-examine the Provincial Commissioner and witnesses, who had also made allegations against them. However, when their turn came to testify, they elected not to do so and also left the hearings. This decision was again followed by a big press release and a radio talk show,⁶⁰ which sought to mislead the public about not

⁵⁹ For more details see the Chapter on Gangs.

⁶⁰ This was on the Vuyo Mbuli show on S.A.F.M.

being afforded an opportunity to put their side of events to the Commission. They had received more than a month's notice and they had elected to avoid cross-examination, a procedure which was followed with other witnesses.

The Commission found a lot of corruption relating to the dealings between prisoners and warders and other transgressions.⁶¹

6.7 Johannesburg Management Area

This was the seventh Management Area the Commission investigated. At the time that the Commission arrived in this Management Area, the Special Investigation Unit had already been there six (6) months earlier. In the circumstances, there was a problem in the investigations in that the evidence had already been taken by the SIU. However, there were other matters the Commission investigated, which had not previously been investigated.⁶²

The general culture at the Johannesburg Management Area was almost similar to the culture at Leeuwkop insofar as the attitude to the Commission was concerned. However, it was clear to the Commission that there is a lot of fear and intimidation amongst the warders. This was especially so when the Commission investigators started making enquiries about the warder, Mr Thloloe (aka Biza). Witnesses were once again, intimidated.⁶³

Corruption and maladministration were apparent to the members of the Commission, which heard of corrupt members trying to make easy money, all compounded by a lack of discipline which meant transgressions were carried out with impunity. Prisoners were in agreement that "money talks at Johannesburg Prison". With money, a prisoner can get whatever he or she wants.

⁶¹ See the Commission's Eighth Interim Report.

⁶² See the Ninth Interim Report.

⁶³ See the Chapter on Prison Security.

Allegations of serious drug and alcohol smuggling at the prison were confirmed during the Commission's hearings by inmates.⁶⁴

6.8 Pretoria Management Area

The Pretoria Management Area was the eighth Management Area that was investigated by the Commission.

The institutional culture the Commission observed was the high levels of corruption and maladministration. In particular, the general culture the Commission observed was that, while many members within this institution were law-abiding and sought to comply with the Department's rules and regulations, the majority of those who featured in the incidents of corruption and maladministration were predominantly driven by greed. This became apparent in the nature of the corruption that was endemic within the prison.

The Commission also observed tribal or ethnic tensions in the Pretoria Management Area. This could be attributable to the fact that there are a number of Nguni and non-Nguni speaking members at the prison. This also affects the functioning within the Management Area. This defines the culture of the prisons, including the way members interact with the various prisoners. Depending on the tribal group to which you belong, the treatment you receive as a prisoner might be influenced by the tribal background of the member dealing with you.

C-Max, the super maximum prison, forms part of this Management Area. Here the Commission was shocked to hear of members abusing inmates and particularly that new inmates were being subjected to an "initiation ritual" of running the gauntlet while several members assaulted them as well as being shocked with electrical shields.⁶⁵

⁶⁴ See Ninth Interim Report.

⁶⁵ For more details see Chapters on Treatment of Prisoners and C-Max Assaults.

The exorbitant annual cost to the Department of the overtime system and the reluctance of management to implement the seven (7) day shift system to address the problem was dealt with at the Pretoria hearings. The system was being abused with some senior managers enriching themselves by undertaking menial guard duties at the prison on weekends to earn extra income.⁶⁶

6.9 Ncome Management Area

This was the last Management Area the Commission investigated. The state of affairs was complicated by the fact that most of the prisoners had been moved to other outlying prisons because of the drought and resulting water shortages. For the same reason, some of the members were not available to testify before the Commission. However, there was very little tension insofar as the members who were testifying before the Commission or those who were being investigated were concerned.

Several incidents of misconduct and maladministration were discovered at Ncome Prison, including unlawful pecuniary dealings with prisoners, the illegal taking out of prisoners from prison, poor controls of the Ncome arsenal and the absence of any control whatsoever over prisoners' private cash.⁶⁷

This concludes the Commission's brief overview of the Management Areas investigated.

7. Concluding Remarks

The Nine (9) Management Areas the Commission investigated were, according to the information furnished to the Commission in 2001, selected because they were amongst the most problematic ones in the Department.

⁶⁶ For more details see Chapter on Non-Adherence to Overtime Policy.

⁶⁷ For more details see the relevant sections in the Chapters on Ncome in Volume Two (2) of this Final Report.

The Commission did, in fact, find that corruption and maladministration, violence and intimidation were prevalent at these management areas. Accordingly, the reading of this report should be seen in that context.

It is the Commission's view that to remedy the problems within the Department, management needs to intervene urgently in seven (7) areas, namely, recruitment of staff, disciplinary inquiries, training of personnel, treatment of prisoners, anti-corruption measures, anti-gang strategies and labour relations.

The Commission will deal with each of these areas in more detail in subsequent sections of the report. Addressing these areas will assist the Department in achieving its goal to rehabilitate prisoners as it ought to do in terms of the Correctional Services Act and the Department's White Paper on Corrections and to restore a culture of law and order.

The evidence before the Commission suggests that the problems in the Department as described in this Report have a history and can only be understood in terms of that background.

The next Chapter therefore examines this background before turning to deal with the various problem areas identified through the evidence obtained from the various sources.

CHAPTER 2

HISTORICAL BACKGROUND

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CHAPTER 2

HISTORICAL BACKGROUND

1. INTRODUCTION

For the purposes of understanding the current problems in the Department, it is necessary for the Commission to sketch the historical background. This section divides the historical period into two stages, pre-1994 and post-1994. Although these are distinctive periods in the history of the Department, aspects of the pre-1994 period remain critical influences in the post-1994 issues that are the subject matter of this investigation.

2. THE PRE-1994 STAGE

After the Union of South Africa, the Prisons and Reformatories Act No. 13 of 1911, which established prisons as part of the Department of Justice, governed the prison system in the four provinces of the Union.

An important institutional factor during this period was the military nature of the Department, which was structured along military lines with members being trained at the South African Police Training College. This structure was put in place after the appointment of General Len Beyers, who was Director of Prisons during the Second World War.¹ The Department was fully militarised with the rewriting of the Prisons Act in 1959. The structure, mode of dress and the institutional culture was military in every respect, indicated by a rank structuring similar to that used in the army and the requirement that members salute other members.

¹ See the evidence of Mr G.J. Fourie in Head Office Exhibit 'A', Transcript Vol. 1 pages 1-93.

The ranks were as follows:

- Probationary Officer
- Warder
- Sergeant
- Warrant Officer
- Lieutenant
- Captain
- Major
- Lieutenant Colonel
- Colonel
- Brigadier
- Major General
- Lieutenant General
- General

This military structure emphasised the safe custody of prisoners and bolstered apartheid separatism in the Department.²

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.

² See A. Dissel: "The Passing-out-Parade: Demilitarisation of the Correctional Services", in *Acta Criminologica* 10 (1), 1997, page 19.

This alignment with the “securocracy,” however, encouraged a culture of secrecy in the way the Department performed its functions, which has carried over into the post-1994 period. This 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.

A second important institutional factor in the prisons’ system during this period was the founding of the Police, Prison and Civil Rights Union (Popcru) in 1989 in the Western Cape. Popcru subsequently became a union with members from the Department of Prisons and the Department of Police, as it was then known, across South Africa. Because of its military culture, the Department did not recognise unions and it became a disciplinary offence for any member to associate him or herself with a trade union.³ As a result, the union operated illegally during the pre-1994 period, although evidence before the Commission is that some officials made attempts to deal or negotiate with the union before 1994.

The pre-1994 period was also defined by its lack of emphasis on the rehabilitation of prisoners.⁴ It has been the Commission’s impression that the only form of rehabilitation encouraged was the use of prisoners as prison labour. However, this often became the use of prisoners as labour for the State generally and even for the personal gain of members. Far from helping rehabilitation, members seem to have been encouraged to distrust prisoners, beat them into submission and ensure that they, at all times “knew their place”.

These regimental and authoritarian attitudes and approaches in the Department created fertile ground for the establishment of gangs, which members either encouraged or overlooked. Indeed, some members saw gangs as an institution

³ See regulations 71(1)(ii)-(kk), which were introduced on 30 March 1990.

⁴ However, some Departmental members appointed before 1994 tried to convince the Commission that rehabilitation was, in fact, a focus.

that ensured prisoners were disciplined and compliant.⁵ The result was that gang activities became rife in prisons; smuggling and general corruption was institutionalised, the sodomising of prisoners became a common occurrence and general lawlessness pervaded prisons.

There is a belief amongst prisoners that some warders belong to prison gangs.⁶ For the gangs to thrive within a prison system, they have to have some form of co-operation from the warders to provide them with contraband. It seems that the warders either actively participate in gang activities or are sympathisers with certain gangs, either unwittingly or because of the benefits they derive from being gang members.

This then was the culture and state of affairs in the Department before 1994, which fed into the post-1994 period.

3. THE POST-1994 STAGE

The 27 April 1994 election brought about a Constitutional State and democracy in South Africa. The advent of democracy resulted in the urgent need to transform Government Departments and other State enterprises, particularly those that had been part of the State security machinery in the apartheid era. Accordingly, the highly militaristic Department of Correctional Services required transformation to bring it into line with the democratic principles enunciated in the Interim Constitution⁷ and again later in the Final Constitution of the Republic of South Africa.⁸

⁵ See the Chapter dealing with gangs for more details.

⁶ See in general the Chapter on Gangs and also the evidence of Mr X at Pollsmoor Transcript page 1 410 and that of Mr David Nkuna at Leeuwkop Transcript Vol. 33 pages 2 604-5.

⁷ Act No. 200 of 1993.

⁸ Act No. 108 of 1996.

This transformation in the Department was to be manifested in three (3) areas:

- (a) Trade Unionism.
- (b) Demilitarisation.
- (c) Affirmative Action.

3.1 Trade Unionism

Section 27 of the Interim Constitution⁹ gave workers the right to join trade unions. The right to trade unionism was also recognised in the Final Constitution of the Republic of South Africa Act.¹⁰ As a result, the Department had to recognize trade unions operating within the Department.

⁹ Section 27 provides as follows:

Labour Relations –

- (1) Every person shall have the right to fair labour practices.
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (3) Workers and employers shall have the right to organise and bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining.
- (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1).

¹⁰ See section 23 which provides as follows:

Labour Relations –

- (1) Everyone has the right to fair labour practices;
- (2) Every worker has the right-
 - (a) to form and join a trade union;
 - (b) to participate in the activities and programmes of a trade union; and
 - (c) to strike.
- (3) Every employer has the right –
 - (a) to form and join an employers' organisation; and
 - (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right –
 - (a) to determine its own administration, programmes and activities;
 - (b) to organise; and
 - (c) to form and join a federation.
- (5) Every trade union and every employers' organisation has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

In October 1994, the Department signed a Recognition Agreement with, *inter alia*, the Police, Prisons and Civil Rights Union (POPCRU) and the Public Servant's Association (PSA), thus recognising for the first time trade unions and their right to participate in collective bargaining.

These two unions, which were also organised in other Government departments, were the major players within the Department. The third union, the National Education, Health and Allied Workers Union (Nehawu), was also recognised across the public service. In the Department of Correctional Services, Nehawu organised medical staff within the prisons.

The most powerful union amongst those recognised in the Department was Popcru. At the time of writing this report, Popcru is still the most powerful union within the Department, with a membership of 22 577. This represents approximately 64% of the Department's work force. Popcru is followed by PSA, which had 9 918¹¹ members on 31 January 2005, a decline of two hundred and sixteen (216) members from November 2004.

The Commission has found that it is the influence that Popcru is able to wield that has led to various problems in the Management Areas and in the Department. These issues are dealt with later in the report.

3.2 Demilitarisation

The Department of Correctional Services was thus operating in a military structure with a military-style culture at the advent of democracy in 1994. This culture did not accommodate or encourage the protection of human rights, which

(6) National legislation may recognise union security arrangements contained in collective agreement. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

¹¹ In November 2004, PSA membership was 10 134.

were now enshrined in the Constitution.¹² In fact, the new era of human rights was at odds with a militarised institution accustomed to using force and authority to maintain and exercise its power. The post-1994 era therefore ushered in an urgent need to revisit the culture within the Department.

Responding to this need in 1996, Dr Siphon Mzimela, the then Minister of Correctional Services, resolved to demilitarise the Department through the removal of the various ranks, changing the structure and mode of dress. The removal of the ranks led to changes in the way employees were referred to. This was reinforced by changes in the dress code, including the adoption of a standardised uniform and the removal of insignia, which removed all physical evidence of seniority.

On 21 August 2002, the then Minister of Correctional Services, Minister Ben Skosana, stated the following in a media briefing:

“Demilitarisation of the Department in 1996 was a first but significant step in our efforts to bring about transformation and a new look at the running of Departmental affairs. Demilitarisation was a sequel to a major redefinition of the character of this Department marked by a change of name from the Department of Prisons to the Department of Correctional Services. This change of name was not just a cosmetic arrangement but it represented taking on a new and broader set of responsibilities that located the Department firmly within the national agenda.”¹³

The Department therefore clearly regarded demilitarisation as the beginning of its transformation. The descriptions of new positions retained a hierarchy but were no longer linked in any way with military ranking. Instead, they were aligned with

¹² See A. Dissel: “The Passing-out Parade: Demilitarisation of the Correctional Services”, in *Acta Criminologica* 10 (1), page 17.

¹³ See <http://www.pmg.org.za/briefings/briefings>

terminology used throughout the Public Service. The new positions, which are still in place at the time of writing of this report, were described as follows:

- Student Correctional Official
- Correctional Official Grade 111
- Correctional Official Grade 11
- Correctional Official Grade 1
- Senior Correctional Officer
- Assistant Director
- Deputy Director
- Director
- Deputy Commissioner
- Chief Deputy Commissioner
- Commissioner.

There is a view, which is supported by some of the most senior officials within the Department, that the demilitarisation process contributed to a great extent to the problems that subsequently ensued in the Department. According to evidence before the Commission, junior members no longer respected senior members because all members “looked the same”, with seniority not being distinguishable. It was also stated that demilitarisation in itself discriminated against junior members because it deprived them of the opportunity to hold military rank. It also appears that demilitarisation was inadequately planned, resulting in members not knowing what their new responsibilities were in a non-military system.¹⁴

While there may be merit in these arguments about the difficulties which demilitarisation created, the Commission is nevertheless of the view that demilitarisation was an unavoidable consequence of the transformation of the

¹⁴ See Luyt: “The Transformation of Corrections in the new South Africa”, Vol 14 (3), *Acta Criminologica* 2001 at page 27, also J. Sloth Nielsen: “Overview of Policy Developments in SA Correctional Services 1994-2002”, at page 13, CSPRI Research Paper No. 1, July 2003.

Department. It was not possible for the Department to continue functioning as a military machine under a State governed by a Constitution that entrenched human rights. However, the members of the Department were not prepared adequately for the transformation. Examples of this lack of preparation include the absence of training on how senior staff members were expected to deal with junior staff in a non-military environment. It is clear that officials were not capable of disciplining junior staff and that interactions between junior and senior members were strained because senior members could no longer threaten junior members with old military methods of discipline.

This lack of preparation was also exacerbated by the new presence of trade unions that were on hand to protect junior members' rights. Many senior members felt that they had lost the tools they'd had to exercise discipline and control and were simultaneously being threatened by the sudden power junior members had to challenge their decisions.

Compounding matters was the reality that the backgrounds of most senior staff members did not facilitate their transition to working in a democratic environment. In addition to this, the Department of Public Service and Administration, in its report on the investigation into allegations of corruption, maladministration, bribery and sexual harassment at the Department of Correctional Services, dated August 2000, made the following findings:

“Staff assume that the process of demilitarisation was embarked upon to create a humane environment conducive to rehabilitation of prisoners but view the process now as being reduced to the abolishment of the military style rank structure in the internal operations of DCS. Many blame this process for the poor state of professionalism and discipline. Other staff members argue that the decay cannot be put at the door of demilitarisation only and that other factors such as the abolishment of strict appointment/promotion criteria, specifically the abolished promotion

examinations and the poor delineation between management responsibility and union involvement, contributed more to the prevailing situation.”¹⁵

It became clear to the Commission that when the demilitarisation was implemented, no new management principles and procedures were put in to replace the military system staff were familiar with. There is scant evidence of attempts to train members in better ways of dealing with the demilitarised environment or to develop new civilian methods to maintain order and discipline. This unstructured approach led to workplace tension, unhappiness and eventually to a drop in the morale of senior members.

3.3 Affirmative Action

The Interim Constitution of the Republic of South Africa recognised the need to implement affirmative action.¹⁶ While it regulated in favour of equality, it went on to state that measures put in place for purposes of rectifying old discrimination problems would be recognised. This was then referred to as the Affirmative Action Clause. This spirit was also carried into the Final Constitution.¹⁷ As a result, affirmative action became a constitutional imperative as the country sought to transform the work force.¹⁸ The Department of Correctional Services was no exception, given that management was predominantly white while black members were found mostly in junior positions, even though they make up almost 90% of the country’s population.

The Department’s reaction to affirmative action was tabled in the 1994 White Paper, which stated:

¹⁵ See page 22 of the Public Service and Administration Report.

¹⁶ See section 8 of Act No. 200 of 1993 and section 9(2) of Act No. 108 of 1996.

¹⁷ See section 9(2) of Act No. 108 of 1996.

¹⁸ See section 195 (1)(i) of Act No 108 of 1996. It has also become a business imperative in South Africa.

“[The Department] recognizes the principle of establishing a personnel corps broadly representative of the SA community and on a practical level to accept the Linda Human Document on Affirmative Action”.¹⁹

However, the Linda Human proposal on affirmative action did not meet favour with the unions, who argued that it would delay the transformation of the Department. It has become clear to the Commission that the unions equate the transformation of the Department with affirmative action rather than with the broader principles of human rights contained in the Constitution. There has been no attempt on their side to consider the transformation of the Department in any other way.

Indeed, there has been very little transformation of Departmental culture and work ethic generally. The approach to corrections, rehabilitation and the issue of human rights, as well as the delivery of services to the public, *per se*, have not been considered as transformation priorities. This will become apparent in the rest of the report as the various issues are discussed individually.

This combination of changes, namely, demilitarisation, union dissatisfaction with the Department's affirmative action proposal and the new rights workers now had to protect themselves from a management accustomed to military-style discipline, led to a radical work force ready to make demands on the Department. If their demands were not met, workers resorted to illegal means to achieve what they sought, which resulted in a breakdown of law and order that manifested itself in various forms. The most notable form the Commission has come to recognise was the unions' refusal to recognise any legitimate structure the Department set up or to respond positively to such initiatives. Members sought only to respond to the instructions of the trade union leadership and indeed this appears to have continued to be the trend to date.

¹⁹ See 1994 White Paper at page 19.

Whereas a military culture existed prior to 1994, this culture has changed, with union influence, to one of demand since 1994. The unions have demonstrated this attitude in their responses to this Commission, whose staff received little or no co-operation from them.

But the demand attitude that flowed from unionisation in the context described was not the only problem. It seemed that some union members were also happy to disregard the instructions of their own union when they did not agree with these instructions.

Clearly, lawlessness had set in. This situation was the consequence of the Department not thinking through its transformation programme properly and therefore it was not in a position to implement transformation in any systematic and managed way, compounded by the Department's failure to communicate this transformation plan to the broader public, employees or, indeed, even to this Commission.

The absence of a coherent approach to transformation in the Department at the time allowed the unions and various members of the Department, acting on or outside of union instruction, the opportunity to press for their demands and views with respect to transformation. The Department had no processes or structures in place to deal with these demands, which only fanned the flames of lawlessness raging through the Department.

The Commission will now deal with a number of operations, which various members embarked upon with or without the approval of the trade unions with a view of imposing their own views about transformation on the Department. It is also interesting to note that all of these operations had to do neither with transformation, as envisaged in the new democratic order, nor with issues of human rights or the safe custody of prisoners, which is the core business of the Department.

4. BREAKDOWN OF LAW AND ORDER

When one scrutinises the problems the Department experienced across the country and particularly in KwaZulu-Natal, the Eastern Cape and Gauteng, it is clear that the problems originated as early as 1996 and are still in existence. The failure to deal decisively and timeously with these compounding problems has exacerbated the situation. The Department became dysfunctional and this led to increased levels of corruption within the Department.

In the evidence before the Commission a number of factors were identified as causes of the general lawlessness within the Department. Some of these factors were also identified in previous investigations into the Department, including, amongst others, the introduction of trade unionism, demilitarisation and the conflict between the different political parties, especially in the KwaZulu-Natal Province.²⁰ It is, however, the Commission's view that while these factors created a state of confusion within the Department, the main catalyst for the general breakdown of law and order were the operations that certain organisations or renegade members of such organisations within the Department embarked upon.

4.1 Operation Quiet Storm

Operation Quiet Storm, together with all the other Operations that were brought to the attention of the Commission, and which will be dealt with later in this report,²¹ were the "strategic initiatives" of Popcru. These "initiatives" were meant to push the Department in a particular strategic direction, which had been

²⁰ The African National Congress (ANC) and the Inkatha Freedom Party (IFP) fought for the control of the management structures within the Department of Correctional Services. This was a spillover from the political conflict within the broader community, which was divided between the two parties. This obviously had a negative effect on the general running of the Department.

²¹ These initiatives included Operation Thula, the role played by CORE, Amagqugula and other garage meetings in the various provinces.

decided by Popcru. It is clear from the evidence led before the Commission that it was at secret meetings where decisions were made about to which positions Popcru members should be appointed. The positions targeted were strategic senior positions. Accordingly, Popcru influence was infused in that fashion into the Department.

The existence of Operation Quiet Storm first emerged in the Pietermaritzburg Management Area and was extended to other Management Areas in the KwaZulu-Natal Province. It is the Commission's view that this Operation provides a better understanding of the problems the Department experienced.²² Specifically, it casts light on why there was a sudden upsurge in violence and intimidation within the Department after 1996 and on the management crisis experienced in KwaZulu-Natal and later in the rest of the country.

Operation Quiet Storm has had a wide-ranging and negative effect across the entire spectrum of the Department of Correctional Services. It is the Commission's view that this operation provides answers to earlier allegations made before other Commissions that union affiliation influenced the appointment of staff.²³ It also gives insight into what went wrong in the province of KwaZulu-Natal and later other provinces where prisons were plagued by problems, which several inquiries had failed adequately to identify the causes of. Instead, the various inquiries and investigators were "sent around in circles" without reaching any root cause as to why there was so much lawlessness in the Department.

In dealing with the question of Operation Quiet Storm, the Commission heard evidence from (a) Mr Philemon Ntuli, (b) Mrs Thandi Kgosidintsi, (c) Mr Raphepheng Ephraim Mataka; and (d) Mr Derrick Bembuhle Nyandu.

²² See the Chapters on Trade Unionism and Pietermaritzburg Management Area for a general picture of union activity and the relationship between Operation Quiet Storm and Popcru objectives.

²³ See, for example, DPSA Report at page 25 "In particular allegations are rife that union affiliation and the 'profile' of staff members within such unions influenced employment decisions."

4.1.1 The Evidence

The witness Mr Philemon Ntuli, the former Provincial Liaison Officer in KwaZulu-Natal and an office bearer of Popcru, identified the nub of the problems when he testified before the Commission. He testified that Popcru in KwaZulu-Natal had planned a fast-track affirmative action programme, codenamed “Operation Quiet Storm”, aimed at taking over the top leadership positions in the province’s prisons. The plan developed from the strategy, which was hatched in 1996,²⁴ following a meeting at the Pietermaritzburg Offices of Popcru. The plan had as its aim, the transformation of the Department. Mr Philemon Ntuli testified that the aim of the plan was to remove “reactionary forces” from positions of authority and replace them with “progressive people”²⁵.

The aforesaid meeting was attended by Popcru officials, paid up members and sympathisers from various regions around KwaZulu-Natal as well as a representative from the national office of Popcru.²⁶ Discussions at the meeting were led by Mr Ngubo, Mr Nhlanhla Ndumo and Mr Nhlanhla Zondi²⁷ and a plan, which was code-named Operation Quiet Storm, was formulated.

Mr Ntuli states in his affidavit to the Commission:

²⁴ Although Mr Ntuli testified that the meeting was held in 1997, it is apparent from other evidence that the meeting most likely took place before October 1996. October 1996 was the month during which the Waterval Prison was taken over by Popcru under the auspices of Operation Quiet Storm.

²⁵ “Progressive people” in this context obviously was a euphemism for “Popcru members”.

²⁶ Mr Mataka, who was then the Secretary General of Popcru, tried to deny that they attended such a meeting.

²⁷ Messrs Ndumo and Ngubo appeared before the Commission and also tried to deny the existence of Operation Quiet Storm.

“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.*
- 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.’²⁸*

The people attending the meeting identified candidates for the positions of National Commissioner (Mr Khulekani Sithole) and KwaZulu-Natal Provincial Commissioner (Mr Maxwell Ntoni). In addition, the following people were identified to be Mr Ntoni’s lieutenants in KwaZulu-Natal in order to strengthen the capacity of management:

- a) Mr Ngubo, who would be in charge of the inspectorate.
- b) Mr Ndumo, who would be in charge of personnel and matters such as appointments, recruitment and promotions.

²⁸ As per Durban Exhibit “QQ”.

- c) Mr Thami Memela, who would take control of security.
- d) Mr Nhlanhla Zondi, who would deal with staff issues.
- e) Mr Philemon Ntuli, who would handle the communications section.
- f) Mr King Khumalo, who would handle health and social matters.

It was also agreed at the meeting, according to Mr Ntuli's evidence, that Operation Quiet Storm would immediately target Pietermaritzburg, Westville, Waterval, Empangeni, Ncome and Sevontein prisons.

The members decided that the then chairperson of the Parliamentary Portfolio Committee for Correctional Services in the National Assembly, Mr Carl Niehaus, would be approached. The purpose of this meeting was to set out Popcru's view of transformation and indicate that for such transformation to succeed it was necessary for Mr Sithole to be appointed as National Commissioner and Mr Ntoni as Provincial Commissioner. He further testified that "a censored version" of the plan was presented to Mr Carl Niehaus, who approved of it as a pilot project, provided that the Popcru members went about their action in a disciplined manner. Mr Ntuli explained in detail that the people who went to see Mr Niehaus were himself, Mr N. C. Ndumo and Mr R. E. Mataka, the then Secretary General of Popcru.

Within a day of the plan being hatched, Popcru members began to force officials to leave the Provincial Office and to hold senior officials hostage, among other things. It was Mr Ntuli's evidence that when faced with such actions, most senior staff at the prisons simply never returned to work and were then replaced by Popcru appointees.

The large majority of the selected appointments were made in the course of the following months. However, Mr Ntuli states that there were also a number of problems that arose after the implementation of Operation Quiet Storm. These included:

- i. A conflict of interest between Popcru members who had become managers and Popcru union leadership.
- ii. A number of Popcru members felt resentful towards Popcru management whom they accused of not doing enough for them, despite the fact that they owed their positions to the sacrifices made by the general Popcru membership.
- iii. Some managers who had ascended to their positions on a Popcru ticket began abusing their positions, both in management and in Popcru, to promote their own selfish ends. Some of them were corrupt and were involved in cover-ups.
- iv. Some managers were charged with criminal offences and they used Popcru resources and money to fund their defence.
- v. Some managers appointed their relatives and associates to positions in the Department.
- vi. Some people were granted promotions through two or three ranks a year.
- vii. Some managers were allegedly receiving bribes to appoint persons to positions.
- viii. There was a split in Popcru in KwaZulu-Natal when some members supported appointments but the “clique”²⁹ opposed them.

The appointments did not always occur in the manner in which those who orchestrated Operation Quiet Storm intended. This resulted in friction between the parties involved. For example, Mr Funukubusa Alfred Mbanjwa told the Commission that Popcru allocated him a position but when his superior left, he acted in the superior’s position and was subsequently appointed to that post. Popcru officials were unhappy because Mr Mbanjwa had accepted a more senior position, which had not been “allocated” to him.

²⁹ The reference to the “clique” by the witness was to Messrs Ngubo, Ndumo, Memela and others. (See also the Pietermaritzburg Management Area where management ‘cliques’ are discussed).

Describing the outcome of Operation Quiet Storm, Mr Ntuli states in his affidavit:

“The split in Popcru has weakened the organisation. As a result, it is unable to play its rightful role in ensuring that the management is held accountable. By the same token, some of those who benefited from the implementation of ‘Operation Quiet Storm’ have entrenched their power. With no foil to keep this unbridled power in check, not surprisingly, corruption is rife. So is nepotism, favouritism and bribery. So powerful are these persons that the entire work force serves in absolute terror of them. People are too afraid and intimidated to challenge their actions – no matter how unlawful, wrongful, irregular or improper. They rule with an iron fist. No one dares challenge them.”³⁰ (Own emphasis).

It was also apparent that even though Quiet Storm was conceived and driven from the Pietermaritzburg Management Area, it spread to the rest of the Province because the end result was that there were forced removals and strike actions all over KwaZulu-Natal. As a result, the Department had to embark on litigation to try and stop this spate of unlawful actions that were taking place in the Province. The Management Areas that were mainly affected by Operation Quiet Storm were Pietermaritzburg, Ncome, Eshowe, Durban Westville, Sevontein, Waterval, Empangeni and Stanger.

When Messrs Ndumo and Ngubo appeared before the Commission, they tried to deny the existence of Operation Quiet Storm. Theirs, however, was a bare-faced denial, and Mr Ndumo even denied that he had ever heard of “Operation Quiet Storm”. His denial, however, had no merit as it will be shown later in this Chapter. Accordingly, the Commission rejects his denial.

³⁰ As per Durban Exhibit “QQ”.

Mr R.E.Mataka,³¹ the former Provincial Commissioner of the Eastern Cape and the former Secretary General of Popcru, also testified before the Commission.³² The main thrust of his evidence was that he had known Mr Ntuli since 1996. He denied everything Mr Ntuli testified about, claiming that it was false. He also denied that he traveled with Mr Ntuli to Cape Town to consult with Mr Carl Niehaus and discuss the Popcru plan for KwaZulu-Natal prisons.

Contrary to all the evidence before the Commission, Mr Mataka testified that the transformation of prisons in the country was an “orderly affair” and that Popcru had played a “responsible” role in making prisons more “progressive”. According to him, the union acted at all times within its constitution. It was Mr Mataka’s contention that the national leadership of Popcru only heard of Operation Quiet Storm when it was already happening and did not, even then, endorse it. In fact, Mr Mataka testified that such strong-arm tactics as displayed by some union members in KwaZulu-Natal were confined to isolated incidents in the province itself and were in direct conflict with the union’s objectives.

However, he did confirm that after the incident at Waterval, he met the two (2) members whom he regarded as leaders of Popcru in the Province, namely Messrs Ndumo and Ngubo, and had a lengthy discussion with them about the problems in KwaZulu-Natal.

The fallacy of Mr Mataka’s evidence was brought to light by the evidence of Mr Derrick Thembokuhle Nyandu, an organiser for Popcru. Mr Nyandu testified that he had heard of Operation Quiet Storm but that he could not remember whether he wrote about it. His evidence was that he was never present at any meeting where it had ever been discussed. In fact, according to his testimony, he only heard about the Operation in the office and considered it to be a rumour. The

³¹ He was the Provincial Commissioner of the Eastern Cape Province at the time he appeared before the Commission.

³² At the time of writing the final report, the Department no longer employed Mr Mataka. He was dismissed for having committed fraud. For more details refer to the Commission’s Sixth Interim Report.

collapse of Mr Nyandu's version will be best illustrated by the proven facts regarding the Waterval Prison take-over incident.

The existence of "Operation Quiet Storm" as a Popcru campaign is, in itself, not an issue that this Commission needs to concern itself with, as it is the right of every trade union to organise and strategise and engage in any legitimate activity aimed at any legitimate objective like transformation and affirmative action in a lawful manner. The problem, however, was the criminal nature of Operation Quiet Storm. Furthermore, faced with a barrage of denials from Mr Mataka, the Provincial Commissioner of the Eastern Cape at the time, of his testimony and Mr Charles Ndumo,³³ a senior officer in the Department, the Commission needs to make a finding on whether Operation Quiet Storm existed or was as Mr Ndumo commented in his evidence in Durban, a "figment of Mr Ntuli's imagination".

4.1.2 The Waterval Siege

The evidence points to the fact that the Waterval Prison was taken over by approximately sixty four (64) members of Popcru, on 24 October 1996, which included, amongst others, Messrs Russell Ngubo and Charles Ndumo. They remained at Waterval overnight, that is until 25 October 1996.

At all relevant times, Mr Derrick Nyandu, (also known as Babah Nyandu), was an employee of the Department who had been appointed as an Organiser in 1993 and later as a Provincial Organiser for Popcru in 1996. Mr Nyandu testified and confirmed this fact. He also confirmed that he was the owner of the diary, extracts of which were filed as an exhibit in the Commission.³⁴ The said diary had the name "Babah Nyandu". Mr Nyandu confirmed that he was also known as Babah Nyandu. Inside the diary there were the following inscriptions;

³³ Both Messrs Mataka and Ndumo are senior Popcru members.

³⁴ See Exhibit 'WWWW9'.

1. Under the date 24 October 1996, it was written “Waterval Meeting – N.C. and B.R”. Mr Nyandu confirmed that “N.C.” referred to Mr Nhlanhla Charles Ndumo and the letters “B.R.” referred to Mr Russell Ngubo.;
2. The entry of 4 November 1996, had the following inscription – “Sevontein Prison – Operation Quiet Storm”.

It is interesting to note that the date of 24 October 1996, is the date when Waterval was invaded by members of Popcru. It is also of significance that Mr Nyandu, who denied any knowledge of Operation Quiet Storm, had this entry in his diary for 4 November 1996.

When the police went in to arrest the members of Popcru who were inside the Waterval Prison, they found a note, which was filed as an exhibit with the Commission.³⁵ Mr Nyandu confirmed that the note was in his handwriting. It read as follows:

“Press Alert – Press Alert

Press Conference – Operation Quite (sic) Storm

We invite your association/organization to attend our press conference scheduled to be held on 25 October 1996.

Venue :

Time : 13H00.

Background

Seeing that the Department of Correctional Services is dragging its feet in affirming our members to managerial positions, POPCRU has embarked on an operation called “OPERATION QUITE (sic) STORM”. This operation’s purpose is to make sure that before the end of November

³⁵ Exhibit ‘WWWW8’.

*1996, in six prisons we have successfully managed to place our members in positions.
Your presence will be highly valued.
Regards.”*

The note purported to allocate the various senior positions at Waterval Prison to different members as follows:

“Waterval Posts Allocation

The Commander – Mbongwa
Head – Management Services – Nkumzwayo (Assisted by Venter)
Head – Personnel Services – Buthelezi
Head of Prison Med. B – Ndlovu
Head of Prison Med. A – Sibisi
Assistant Head Med. B – Mhtingo³⁶
Assistant Head Med. A – Mthethwa
Internal Custodial Services – Musekini (Own emphasis)³⁷

It is once again interesting to note that Mr Nyandu, who was an organiser of Popcru who alleged in his evidence, under cross-examination, that he had never heard of Operation Quiet Storm, although he had “Operation Quiet Storm” written not only in his diary, but also in the press release, which he had prepared to send off either to “Press Alert”³⁸ or to read out in a press conference. It was also clear from the entry in his diary, that he was to meet Messrs Ngubo and Ndumo at Waterval Prison, which was the same day that the prison was taken over by members of Popcru. This was quite a coincidence.

³⁶ The spelling is not clear on Exhibit ‘WWWW8’.

³⁷ The rest of the note is not clear as to whom the other positions were allocated.

³⁸ Press Alert was a system or organisation which was used during or about 1994/95/96 to distribute information to various media organisations in the country.

One should also take cognisance of the fact that they took over the prison from 24 to 25 October 1996. The said note, which was to be read out at the press conference was referring to a conference which was scheduled for 25 October 1996.

The Commission received other affidavits that supported the evidence about Operation Quiet Storm. An affidavit from a member of the South African Police Service, Inspector Godfrey Thembinkosi Nyembe, who was called to Waterval Prison as a hostage negotiator on 24 October 1996 because Popcru members were holding management hostage, states:

“At about 21:40 I also got involved in the negotiations with the POPCRU delegation which was led by Mr Ndumo from Pietermaritzburg where he made mention to me that they are busy with ‘Operation Quiet Storm’ whereby they were demanding keys to the Prison from the Commanders, this was done for them to get higher posts in the Correctional Services.”³⁹
(Own emphasis)

Mr Nyandu confirmed that he and Mr Mataka communicated but according to him, not regularly. Mr Nyandu was very vague when questioned as to whether he had told Mr Mataka on 28 October of the work stoppage at Waterval Prison and about the rumours of Operation Quiet Storm. In contrast to his earlier testimony, he could not confirm the nature of the conversation that he had with Mr Mataka nor that he would have said that Mr Ndumo and Mr Ngubo were involved in the Operation.

When asked whether he had been at Waterval Prison at the time of the hostage situation, he responded that he had no recollection of a hostage situation but that he remembered that he had asked for a meeting with the management to address the problems at Waterval. According to him, the said meeting had

³⁹ As per Pietermaritzburg Exhibit ‘WWWW3’.

carried on until the union managed to persuade management to agree to some of the demands. It was his testimony that the individuals who were arrested at Waterval Prison had paid their bail themselves and that the union only assisted where the members were short of money.

The cumulative effect of the aforesaid evidence clearly points to the fact that Mr Nyandu, as the organiser of Popcru, was fully aware of the taking over of the Waterval Prison. This was part of Operation Quiet Storm. Similarly, the organisation Popcru was aware of Operation Quiet Storm. It is even stated in his own “press release” that it was a Popcru operation. It clearly was not a figment of Mr Ntuli’s imagination.

4.1.3 Were Popcru members on a frolic of their own?

Another question that needs to be asked is whether Popcru knew about Operation Quiet Storm. In this regard, the Commission will refer to the minutes of a meeting, which was held to try and resolve the issue of the various interdicts, which had been obtained by the Department.

The meeting, which was a Continuation of Workshop, was held on 20 November 1996 at the Tennis Lounge Recreation Hall in Durban.⁴⁰

According to these minutes there were seven (7) items on the Agenda, which were proposed by Popcru.⁴¹ Item No. 6 of the Agenda is of interest. It reflects the following:

“6. Chasing away of commanders (operation quietstorm).”

⁴⁰ The minutes were filed with the Commission as Exhibit ‘WWWW12’.

⁴¹ It is apparent from the minutes that POPCRU was represented by Messrs Nxele, Ndumo, Ntuli, Makhatini and Zondi. The four (4) were senior members of Popcru.

It is appropriate to quote from the minutes so as to understand what was discussed under this particular item:

“Mr Sithole informs the meeting that management has been negotiating all along, and the actions taken came as a direct instruction from the President. ...

What commanders and management want is to continue with their work in harmony. Nobody wants to see colleagues with interdicts and criminal charges, but unfortunately POPCRU laughs at issues such as “quietstorm”, yet during last week a member informed management that “quietstorm” will continue.....

POPCRU say that they do not regard their actions as illegal actions, they feel that management broke an agreement, which caused the actions taken by POPCRU...” (Own emphasis).

The parties then went on to discuss the issue of the withdrawal of the interdicts and the payment of costs. After much discussion, it was clear that Popcru was not prepared to take full financial responsibility for the eviction of the various senior managers from the different management areas, and the interdicts which followed thereafter. It was, therefore, finalised as follows:

“Mr Sithole asked to what extent conflict can be paid for, looking at the time spent etc., the only thing that will allow parties to reach anything, the final offer is department pays 70% and POPCRU pays 30%.

Mr Nxele acknowledges the commitment by both parties and they settle with the percentage of 70% and 30%.”

It is clear from the above that the Department would pay seventy (70%) per cent of the costs for the interdicts and Popcru would pay thirty (30%) per cent, and not the individuals who were involved.

After discussing the issue of transformation and the transformation forum, they then went on to discuss the issue of Operation Quiet Storm. The minutes record the said discussion as follows :

“OPERATION QUIETSTORM

Mr Sithole appeals to POPCRU to stop with this action. It is something which is not attainable, and forums have now been put into place, fortunately it is not accompanied by any cost, so negotiation will be quick.

POPCRU : Agree that a commitment should be made and also agree that “operation quietstorm” should be stopped, however they ask for a commitment from management that they will sincerely consider the withdrawal of criminal charges. They request further that POPCRU and Management, at National level, visit commands such as Stanger, Waterval etc in order to investigate the situation. Frurthermore, they request that commanders ensure a good and acceptable working environment for members, and that they not intimidate members by means of their position, political affiliations etc.”

Besides the fact that management capitulated in these negotiations, for reasons which will become apparent later in this report,⁴² it was clear that Popcru accepted financial responsibility for the actions of their members, which had been taken in the name of Operation Quiet Storm. Obviously they accepted responsibility because it was their initiative to transform the Department in this unlawful manner. If the members were on a frolic of their own, the Union would have refused to pay the costs.

⁴² See the section dealing with CORE and the role played by Sithole and also the chapter dealing with Trade Unionism.

In the light of the foregoing, it is clear that Operation Quiet Storm was a Popcru operation and the individual members were not on a frolic of their own.

If one takes the evidence of Mr Ntuli and the evidence with which Mr Nyandu was confronted, it is clear that Operation Quiet Storm was real. This is also confirmed by the various newspaper articles where Mr Ndumo himself referred to Operation Quiet Storm as a Popcru initiative.

The Echo (supplement to the *Natal Witness*) of 31 October 1996 quoted Popcru spokesman, Mr Nhlanhla Ndumo as calling for then President Nelson Mandela to intervene in the KwaZulu-Natal prisons crisis. The article states:

“According to Ndumo, three months ago POPCRU embarked on Operation Quiet Storm where the union went on to forcefully replace five prison commanders in Sevontein, Stanger, Westville, Ncome and Empangeni prisons.

Ndumo described the situation in prisons in KwaZulu-Natal as out of control and said that as long as management resists change POPCRU will force it to happen.

Change is taking place in prisons in other provinces and only this province is refusing to effect affirmative action.” (Own emphasis)

In the light of the foregoing, Mr Mataka’s evidence was rejected by the Commission as being false and an attempt by him to distance Popcru from the activities of the KwaZulu-Natal (Midlands) branch of Popcru in implementing Operation Quiet Storm. It became apparent that Popcru had never distanced itself from the operation and had never done anything to discipline Messrs Ndumo and Ngubo for their actions if Mr Mataka was to be believed. In actual fact, it has been clearly shown in this report that Popcru knew everything and

Operation Quiet Storm was its initiative. Even if one were to believe that Operation Quiet Storm was not sanctioned by Popcru, the national leadership condoned and encouraged it by knowingly remaining silent as events, which were well publicised, unfolded.

Mr Mataka's denials, as the Commission has already stated, were a mere attempt to distance the union from this operation because it has consequences for the union that are adverse both legally and financially. However, such denial is contrary to the union's statement in 1996 and the union's failure to distance itself from the "mutiny".⁴³

Lastly, if one considers Mr Nyandu's testimony regarding the payment of bail for some arrested members at Waterval, it has to be asked why the union would have paid their bail if the members were on a frolic of their own? Either the members were participating in a union initiated operation or the union condoned their unlawful actions and hence the payment of the bail of the arrested members.⁴⁴ The same principle applies with regard to the payment of legal costs, referred to above.

4.1.4 The Findings

Despite the vehement denials from Mr Mataka and other Popcru members, on proven facts above, the Commission finds overwhelming evidence that:

- (a) Operation Quiet Storm was conceived in 1996 as part of Popcru's transformation plan.

⁴³ See articles which appeared in the *Natal Witness* dated 30 October 1996. See articles which appeared in the *Natal Witness* of 17, 19 and 26 October 1996, where the union's role is explained. In the *Natal Witness* of 17 October 1996, Mr Ntuli, who was then the Popcru Provincial spokesman, was quoted as this this was "a popular revolt by Popcru."

⁴⁴ After the evidence of Mr Nyandu, Mr Dutton formally withdrew as his legal representative. Mr Dutton also handed in a statement by Mr Wills, which was marked as Exhibit 'WWWW13'. The Evidence Leader also submitted a statement made by Mrs Graham, which was handed in and marked as Exhibit 'WWWW11'.

- (b) It was spearheaded by senior Correctional Services members, Mr Russell Ngubo and Mr Nhlanhla Charles Ndumo, in KwaZulu-Natal.
- (c) Mr Mataka and Mr Nyandu, both senior officials of Popcru, had full knowledge of Operation Quiet Storm and its illegal nature.
- (d) The campaign was carried out with the full knowledge and support of Popcru.
- (e) The unlawful taking of hostages at the prison at Waterval Management Area was not a labour matter.
- (f) The illegal nature of Operation Quiet Storm was known or foreseeable to all those who were involved, including Popcru.

Questions which need to be asked, however, are what impact did it have on the Department of Correctional Services and what can be done to prevent such tactics in the future?

4.1.5 Impact of Operation Quiet Storm

The main feature of the Operation was that there was a lot of violence or threats of violence against employees of the Department in all the Management Areas. The plan the union approved was not only highly risky in its implementation but also criminal in nature. The campaign's objectives were to be achieved by calculated action intended to render the prisons ungovernable. Sit-ins were organised and unwanted personnel were systematically targeted and hounded out of office by either intimidation or violence. In some cases, the unwanted individuals were removed by force from their offices and never again allowed to enter the prison premises.

A media release issued by the Department of Correctional Services on 18 October 1996, describes the Department's response to the "illegal sieges" at various prisons in KwaZulu-Natal:

“These actions are nothing less than mutiny ... It is astonishing that POPCRU members can arrogate themselves the right to remove the legitimate management and replace them by (sic) persons enjoying union favouritism. It is extremely arrogant.

The Department can simply not allow a situation whereby a trade union or staff members cripple management by hi-jacking the command and control of prisons and thereby placing the well-being of fellow employees, prisoners and the community at risk. Under no circumstances can a trade union be allowed to dictate to the Department which employees should be appointed to managerial positions.

Many attempts to normalize the situation (sic) at the affected prisons by means of constructive negotiations and dialogue have been in vain. In a further attempt to normalize the situation, starting today at the Ncome Area of Command, the Department has send (sic) a high-level delegation of management to the affected prisons. The objectives are to regain command and control and to restore the legitimate management of the prisons into their positions. The regaining of control is not negotiable whatsoever.”⁴⁵

Notwithstanding the Department’s assertion regarding the Union being “arrogant”, or seeking to “dictate to the Department” about appointments, the will of the union eventually prevailed.

Operation Quiet Storm, however, was not only confined to KwaZulu-Natal. Whilst the Commission was sitting in Gauteng, the then Provincial Commissioner of Gauteng, Mr M. Z. I. Modise testified that when he was based in the Northern Cape, he had received information about a meeting that the union, Popcru in Bloemfontein, Free State had called. Only a few selected Provincial Correctional

⁴⁵ As per Pietermaritzburg Exhibit ‘WWWW1’.

Officials (PCO's) were invited but he was not included. He learned afterwards, however, that Operation Quiet Storm was discussed at the meeting. According to this evidence, it is clear that Operation Quiet Storm was meant to be a national operation, which union members countrywide were to embark upon.⁴⁶

Operation Quiet Storm introduced a culture of lawlessness in the Department in that it became the norm for unwanted members to be forcibly removed from their positions and for unlawful actions to occur with impunity. This culture spilled over to other provinces.⁴⁷ It should have been obvious to the Department that these actions were bearing fruit from a poisoned tree.

The general workforce in the Department began to perceive senior management as condoning this lawlessness due to the number of unlawful and illegal activities emanating from Operation Quiet Storm. Law and order had broken down in the Department, as neither senior management nor the Department took decisive action against those who transgressed the law. Even disciplinary inquiries were no longer effective.⁴⁸

It also bears mentioning that with regards to the Waterval forced removal and the taking over of the prison by Messrs Ndumo, Ngubo and sixty two (62) others, the Department intervened when the Director of Public Prosecutions sought to prosecute all the people involved and charge them with "sedition" and other charges. The then Commissioner of Correctional Services met with the Director of Public Prosecutions and negotiated that the matter be treated as a labour issue and thus that the members not be criminally prosecuted.

On reading the record referred to, it became clear to the Commission that referring to this as a labour matter was far from the reality of what had occurred.

⁴⁶ See the evidence of Mr Modise in the Leeuwkop transcript – Volume 10 at page 868.

⁴⁷ Operation Quiet Storm was rolled out nationally to, at least, Eastern Cape, Free State and Gauteng Provinces.

⁴⁸ See Chapters on Disciplinary Inquiries and the Pietermaritzburg Management Area.

It was clearly a criminal matter and such charges should have been pursued against those who were involved.⁴⁹

The main impact or by-product of Operation Quiet Storm was that members of the union were never reluctant to forcibly remove appointed members of senior management if they were not happy with the appointments. Clear evidence of these Operation Quiet Storm activities was demonstrated to the Commission in the example of union members removing Mrs Thandi Kgosidintsi from the Provincial Head Office at Pietermaritzburg while she was the Provincial Commissioner. Mrs Kgosidintsi's evidence, for example, demonstrated the naked barbarism and violence to which those who were victims of Operation Quiet Storm were subjected by the members of Popcru. In addition to being threatened and spat upon, the degree of barbarism is best demonstrated by the following evidence of Mrs Kgosidintsi before the Commission:

“And was any other unsavoury things done in your office?

Yes there were.

What were they?

At least one person urinated on the carpet, on the floor.

In your presence?

In my presence, yes. I couldn't recall who it was now but one of the people did.

And in the vicinity of your office, was anything similar to that done?

Afterwards when we were leaving, it was reported to me that some of the groups that left my office went to Mr M G Buthelezi's office and defecated on his carpet – on the carpet in his office and wrote on the wall. That I also saw. There was writing on the wall with faeces.

Eventually your torture ended, thankfully.

Yes.⁵⁰

⁴⁹ See *Utrecht* Cas No. 93/10/96 (Exhibit 'WWW 6'.) See also Pietermaritzburg Transcript – Volume 25 at page 2 447.

It should not be forgotten that all of the aforesaid was done in the name of appointing “progressive people” into the Department.⁵¹

Other examples include the removal of Mrs Nokulunga Tseane, while she was the Provincial Commissioner of the Eastern Cape Province, the removal of Mrs Grace Molatedi, while she was the Area Manager at the Bloemfontein Management Area⁵² and the removal of Mr David K. M. Baloyi when he was appointed Area Manager of the Bloemfontein Management Area.⁵³ In addition, there were many other people who were removed from their posts in other parts of the country.

Hostage taking of senior officials by junior members of the Department was another by-product of Operation Quiet Storm. This by-product of Operation Quiet Storm was adopted and carried out in other provinces as well. For example, members of the Department in Gauteng held the Gauteng Provincial Commissioner, Mr Zacharia Modise⁵⁴ and other senior officials, hostage.

While KwaZulu-Natal Popcru implemented Operation Quiet Storm, other provinces⁵⁵ also went on similar operations. Some had different names and some were not named at all. However, it is clear that the *modus operandi* was the same and the intentions were similar. This then corroborates the evidence of

⁵⁰ See the Chapter on the Pietermaritzburg Management Area and Mrs Kgosidintsi’s evidence, Pietermaritzburg Transcript, Volume 13 pages 1 240-1 241.

⁵¹ The Department did not pursue the High Court Application it had instituted against the members who committed these crimes. Thus most of them are still in the State’s employ.

⁵² See Bloemfontein Transcript, Volume 16, pages 1 467-1 470 and Chapter on Bloemfontein Management Area.

⁵³ See Mr Baloyi’s affidavit in Head Office Exhibit ‘T’ and Chapter on the Bloemfontein Management Area.

⁵⁴ See the Transcript dealing with Mr Modise’s evidence at the Leeuwkop Management Area, Volume One.

⁵⁵ The other Management Areas outside KwaZulu-Natal which had unrest resembling Operation Quiet Storm were: Upington, Bloemfontein, St Albans, Johannesburg, Modderbee, and Krugersdorp.

Mr Modise, who said that he had heard that Quiet Storm was meant to be a national operation.

4.2 Operation Thula

Operation Thula, which was conducted in the Bloemfontein Management Area, was also a Popcru-driven campaign, aimed at influencing management and rendering the prison ungovernable. The timing of its commencement in relation to Operation Quiet Storm is still not clear to the Commission.

According to the evidence of Mr Kosana,⁵⁶ who testified at the Bloemfontein Management Area, Operation Thula was to achieve its objectives by:

- (a) Ignoring instructions from senior management.
- (b) Proliferating contraband into the prison.
- (c) Ignoring escapes.
- (d) Organising members to take leave simultaneously to make it difficult to run the prison.
- (e) Turning the prison into a “G Hostel”.⁵⁷

As can be seen from the objectives, Operation Thula was clearly aimed at making the Department ungovernable.

However, the Commission never received evidence from any other member of the Department to corroborate Mr Kosana on Operation Thula. This, however, was not unique to Operation Thula. There were also only a few witnesses who were prepared to testify on Operation Quiet Storm. This confirmed to the Commission that Popcru had instructed that a code of silence be maintained

⁵⁶ Bloemfontein Transcript Volume 20 pages 1 932-2 040 and Volume 21 pages 2041 – 2150.

⁵⁷ “G Hostel”, according to the evidence, is a hostel in Welkom, which is filthy and ungovernable.

around these operations, as the witnesses had informed the Commission.⁵⁸ The Commission's attempts to corroborate the evidence were met either by denial or refusal to discuss the operation. Many of the members/informants who wanted to divulge information became unwilling when they heard that their identity would have to be revealed in order to act against those implicated. Vital leads were lost in the process.

Furthermore, as already indicated in this Chapter, management's lack of intervention with regard to unlawful activities led to members being reluctant to talk about matters discussed at various meetings that were considered confidential, whether or not the union sanctioned the meetings.

4.3 Secret Management Meetings

It also became clear to the Commission that most of the decisions taken at management level within the Department were not decisions taken at such management meetings but had been decided upon at other secret venues. This was a main feature of the way the Department operated and, possibly, still operates.

In order for discipline and order to prevail in any organisation it is imperative that appointees to positions have the necessary qualification and experience for the relevant post. Appointees who are the outcome of clandestine meetings and whose appointments are based on union loyalty or any other patronage will never enjoy authority or the respect of those under them.

As it was at such secret meetings that posts were discussed and allocated to various people, it is not surprising that these secret meetings led to dissatisfaction and contributed to the lawlessness within the Department.

⁵⁸ It was evident that there was a "code of silence" borne out either by members' loyalty to the organisation or fear of reprisals for their own involvement in some of the actions. The code of silence in the Department is enforced through intimidation and assault.

A more detailed account of the effect of these secret meetings is given later in the report in the Chapter on recruitment problems. This section, however, summarises evidence that surfaced about the key aspects of two (2) very important secret structures that appear to have made management decisions in the Department, namely “Amagqugula” and CORE.

4.3.1 Amagqugula

At the St Albans Management Area hearings, evidence was led about the existence of secret or garage meetings (Amagqugula) held at the various shop stewards’ homes to discuss the management of the Department. In particular, these meetings were held to discuss vacant posts that had been advertised and their allocation to the various members of the union. These related mostly to positions of influence within the Department. This effectively rendered the formal selection process redundant since they became a mere rubber-stamping of decisions already taken elsewhere.⁵⁹

They held secret meetings where policy and practice was resolved and the fate of individuals determined. They removed people from positions by intimidating them or manipulating the disciplinary process to ensure that some people were protected while others were targeted. When they did not like someone who was occupying a position and they could not get the person out by manipulating the system, they simply sent in their “storm troopers” and bypassed any legitimate process to achieve their own ends.

The Commission heard evidence from Correctional Official Mr Thembile Goodman Matshoko, who was a shop steward for Popcru until 1999. He was subsequently expelled from the union. Mr Matshoko testified before the

⁵⁹ Port Elizabeth Transcript, Volume 14.

Commission on condition that the information that he provided was not used to incriminate himself.

Mr Matshoko said that from 1994 Popcru's role was to transform the Department of Correctional Services to be representative and to make sure that those who were disadvantaged in the past were given opportunities. Mr Matshoko said:

"After [national commissioner] Mr Sithole took over the department then definitely we were engaged as a union in a programme where we were shifting the power from whites into blacks. So, what happened is that we used different strategies there, because what happened is that black managers started now to surface and be in positions of power and what happened is that it was one of our strategies as a union which was introduced by Mr Nweba and Mr Mpemva, the strategy of secret meetings which were called 'amagqugula'.⁶⁰

Mr Nweba and Mr Mpemva chaired the meetings and gave instructions to the shop stewards who were in attendance.

Mr Matshoko said that the first meetings were held in about 1996/1997 when Mr Nweba, who was Deputy Director responsible for the Inspectorate, and Mr Mpemva, who was the Provincial Head of Personnel, were appointed to the Eastern Cape provincial office. The appointment of Mr Mpemva to head personnel was key because it enabled him to influence merit awards and promotions and have a broad influence over personnel. His appointment was discussed at a secret meeting about a month before he was appointed to the post. Mr Matshoko said:

"POPCRU had played a vital role in influencing that appointment of Mr Mpemva ... What happened is that after his appointment there it was

⁶⁰ See Port Elizabeth transcript at page 1 427.

*welcomed that now for the first time we have got our own blood or brother who's in that position, so everything will go well with us in terms of promotions and in terms of merit awards and all matters pertaining to personnel.*⁶¹

Mr Matshoko told the Commission that the meetings were not exclusively an activity of Popcru in the Eastern Cape. Instead they stemmed from Popcru's national office where there was a national alliance called "igqugula" where people would hold secret meetings to discuss how the department should be run nationally.

In addition, Mr Matshoko told the Commission that the president of Popcru, Mr Cebekhulu, during a visit to Gwamagqaki Hall, said: "You can have whatever qualification, but if we don't want to put you in the post you won't get there and we will just appoint people as we screened them."⁶² He later clarified his comments during cross examination:

*"The point that I'm making is that even though the requirements were set by the department, but POPCRU had an indirect influence over those as the president of POPCRU stated in his national tour that you can have whatever qualifications, but if we don't want you in a post you won't get there ... What he intended to mean is that people will not be appointed in positions within the department without the approval of POPCRU and that's what transpired after the meetings, because people having those RVQ15s and so on, they never got promotions."*⁶³

It was not only people who were anti-Popcru who became the victims of the Amagqugula. Even Popcru members who questioned Mr Mpemva or Mr Nweba were seen as threats. "Mr Nweba and Mr Mpemva were prominent in this

⁶¹ See Port Elizabeth transcript at page 1 439 – 1 440.

⁶² See Port Elizabeth transcript at page 1 879.

⁶³ See Port Elizabeth transcript at pages 1 880 and 1 926.

province and what happened is that anyone who would question their power or their authority will be dealt with accordingly.”⁶⁴

The Union Popcru, appointed a legal representative to cross-examine Mr Matshoko and represent the individual Popcru members, who were implicated. The line taken by the said legal representative cross-examining Mr Matshoko, was the denial of the existence of the garage meetings. However, when the time came for Popcru and the various members of Popcru who were implicated by Mr Matshoko to testify, they walked out of the Commission’s hearings.

In the light of the foregoing, the Commission accepted Mr Matshoko’s evidence as truthful. Mr Matshoko performed very well under cross-examination and convincingly withstood the cross-examination by Popcru’s Attorney. He was frank in the manner in which he disclosed the events and it was clear to the Commission that his testimony was reliable and was not a fabrication.

It became clear to the Commission that the secret meetings to allocate vacant posts had become a generalised practice in the Department even though no one was prepared to come forward to testify about the existence of such meetings or discussion groups in other Management Areas. The forced removal of management had become the order of the day. The union was doing as it pleased in this regard. The result of this erosion of formal management authority in the Department, particularly over recruitment, is that formal processes could not be seen as anything other than a sham.

It is clear that the lawlessness had now penetrated all the provinces and had become the order of the day within the Department. The Head Office of the Department was not isolated from the activities taking place at the various Management Areas in the provinces. In fact, the evidence points to the fact that

⁶⁴ See Port Elizabeth transcript at page 1 493.

the then National Commissioner was sometimes consulted about these discussions.

4.3.2 CORE

The Commission received several complaints about the existence of a powerful group of senior officers who effectively took control of the Department of Correctional Services.

Several people were approached for information. The majority of members spoke on condition that their identity is not revealed for fear that they might be killed. It is for this reason that only a few written statements or affidavits were obtained. In addition, many of these witnesses refused to testify in the hearings, even if they were able to take place behind closed doors. The information the investigators obtained was given to them with the assurance that it was correct. The Commission will deal with this information in so far as it has been corroborated by other evidence.

The picture that emerges from the information given is sketched out below. The origins of Core can be traced to certain meetings held late in 1997. It would appear that two or more senior officials met informally and decided to approach other like-minded persons in the Department. Evidence led before the Commission, at the time of Commissioner Sithole's reign in the Department of Correctional Services, shows that a body of hand picked members of staff would meet after hours in secret to discuss the management of the Department. It would appear that these individuals met to determine what each of the sections of the Department was doing about transformation. They felt it was necessary to establish a Core of persons who would drive the transformation process forward. Not surprisingly, the group became known as Core.

The informants were quite coy about who the real brain was behind the group that was eventually called Core. Some say it was Mr Zwi Mdletshe,⁶⁵ the former President of Popcru, while others say it was Mr Lucky Mathebula,⁶⁶ who was based at Head Office. Still others think it was Mr Khulekani Sithole, who was the National Commissioner at the time. Whatever the dispute about the “father” of Core, there is unanimity that all three (3) were important members of the group, which met after hours in the Department to discuss management issues.

However, the evidence shows differences in the details of who belonged to Core, how Core emerged and even what the group that met secretly was called. For instance, some of the members gave the Commission the names of the members of the group⁶⁷ but this may not be a closed list. Some members also referred to Core as Commissioner Sithole’s “kitchen cabinet.”⁶⁸ The evidence also suggested that in addition to the Core group, there were those members who were only consulted on issues coming out of the discussions.

Further evidence of the existence of Core and the issues discussed emerged from the details given of the debates. For instance, evidence shows that some of the Core members favoured asking Mr Steven Korabie⁶⁹ to become a member of Core while others opposed this. Those opposing felt that if Mr Korabie did join Core, he would be appointed the next Commissioner because of his status in the Department when Mr Mataka had already been earmarked as the next Commissioner.

⁶⁵ He was then a Deputy Director in the Department.

⁶⁶ He was then the Director of Corporate Planning.

⁶⁷ See Head Office Exhibits “D” to “G”.

⁶⁸ See the evidence of Mrs Kgosidintsi (Pietermaritzburg Transcript Volume 13 page 1 186)

⁶⁹ Even though he never became a member, one of the informants said he was regularly consulted on issues emanating from Core meetings.

The existence of Core and the secret meetings was thus never in dispute. Even some of the senior Departmental officials, who were not invited to these meetings, were aware of the existence of the group.⁷⁰

However, it needs to be kept in mind that no formal meetings were held, not even after Core was formed, nor were minutes kept. In light of the fact that there was no legal basis for such meetings, this approach was not surprising. Nor was it entirely unexpected that these meetings were shrouded in secrecy and were also completely closed, except to those specifically invited.

The difference between the formal decision-making processes and these meetings was the role the management team, which met after hours, played.⁷¹ Despite the secrecy, some of the members of this management team said in evidence that the meetings were ordinary advisory meetings and there was nothing sinister about them.⁷²

Those involved with Core justified its existence on the following basis:

A group of dedicated persons had to ensure that the transformation process in the Department of Correctional Services was accelerated. The task of Core's members was to identify areas in the Department of Correctional Services where transformation had not taken place, determine what the obstacles were, work out how they could be overcome and map the way forward.

The eight (8) officials involved were based at the Head Office of the Department of Correctional Services or within close proximity of that office. Their task was to provide "natural leadership" for transformation but they were aware that they needed "representatives" in the various provinces. To this end, a network of

⁷⁰ See the evidence of Mr G.J. Fourie, filed as Head Office Exhibit "A".

⁷¹ See the role of this management team as set out in the *Sunday Times* article "Rotten to the Core" dated 5 March 2000.

⁷² See Head Office Exhibit "E".

“provincial leaders” was created in the provinces. Again, the criterion was perceived commitment to the transformation process. One of the original founders of Core was the main contact person for the provincial leaders. It should consequently come as no surprise that most, if not all, of the provincial leaders were “powerful” in Popcru, whether because they held positions in the union or were highly regarded because of their past contributions to the strength of the union.

One of the more important tasks of both the national and provincial leadership was to identify persons who would drive the transformation in the direction determined by Core. These identified individuals then had to be placed or deployed into powerful positions, through which they could exercise control of the section concerned. At the same time, those individuals who were seen as obstacles to transformation had to be rooted out.

However, there is a different view, expressed by those Departmental members who make reference to the sinister intentions⁷³ of the group. Some members also described Core as a group akin to the “Broederbond”.

Further investigations by the Commission also revealed that the reference to the meetings as being simple advisory meetings without any sinister motives was not how other members of the Department viewed Core. According to these members of the Department, Core existed to ensure its members occupied strategic positions within the Department.⁷⁴

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.

⁷³ See the evidence of Mr Moloi – Head Office Exhibit “B”.

⁷⁴ The Commission’s investigations pointed to people occupying the former Minister’s and Commissioner’s Administrative offices, Human Resources section, Finance section etc.

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 taken at these secret meetings. Not only were the members of Core intelligent, they were also scheming and ruthless.

As a result of the power they ended up wielding in the Department, any disagreement with their views led to victimisation of the person who disagreed. The *modus operandi* followed was that any progress in the careers of the dissenting individuals, would be brought to an immediate halt. They would be punitively transferred or they would be disciplined and inevitably dismissed from the Department. In this regard, evidence refers to a number of people the group had dealt with in such a manner.⁷⁵

What Mr Moloi found out about Core is succinctly put in paragraph nine (9) of his affidavit, setting out the general state of fear within the Department and how members of the Department feared Core specifically. The fear was also exacerbated by the fact that the unions failed to protect their members against the actions of Core or failed to enforce their rights against the Department when they were being victimised more effectively. He went on to state:

“When complaints are made to us about corruption, irregularities or malpractices in human resources matters, these are made in very general terms. As to why they did not ascertain all the facts, they say CORE prevents them from doing so. In the same vein, they say, with a shrug of the shoulders, that CORE is even more powerful than the legal remedies available to them. So, there is no sense in protecting themselves through the use of such remedies. It will only lead to more victimization, as evidence by the litany of CORE’s victims.”

⁷⁵ See the evidence of Mr Sipiwe Moloi, one of the Commission investigators, in the affidavit filed under Head Office, Exhibit “B”.

It is this state of fear and intimidation within the Department that those who allege Core was merely an advisory body to the Commissioner of Correctional Services at the time do not refer to.

The ruthlessness of the members of Core can best be illustrated by the manner in which they engineered the removal of Ms A and Mr B⁷⁶ from the Department. In this connection, the following background is worth noting:

- Ms A was seen as a “transformation blocker”.
- Mr B was seen as her protector. You could not touch her without touching him.
- At the time, suspicions had been raised about Core’s secret existence. People in the Department, especially whites, could see a pattern in the decisions taken by the Department, particularly those of the Commissioner.
- Ms A began questioning a number of decisions the Commissioner had taken.
- This suited whites, who began rallying behind her.

At the time, Ms A had clearly become an obstacle to the union’s transformation plans and had to go. She had done nothing dismissible by promoting views Core disapproved of, so some other means had to be found to get rid of her. Because Mr B was her protector, the same applied to him.

Investigations were done to find something to pin on Ms A. Very few Department of Correctional Services employees go through life without doing something or the other that can come back to haunt them. In this case, investigations revealed that Ms A and Mr B had abused their travel claims. They were confronted with

⁷⁶ Ms A and Mr B were both senior officials who were employed in the Department. Their names are known to the Commission.

these and given a choice either to leave the Department without sullyng their reputations or face inquiries and criminal charges with respect to the fraud.

It was common knowledge that staff abused their transport claims and it would seem it is a practice that continues to date.⁷⁷ Given that such activities are illegal and are further subject to the sort of additional abuse described above, the Commission is of the view that the Department must take the abuse of transport claims much more seriously than it does.

Neither Mr B nor Ms A was willing to fight back. The only issue left was to find a means for them to leave the Department of Correctional Services. In Ms A's case, it was agreed that she would simply resign, but to protect her reputation, it was further agreed that the reason given would be irreconcilable differences with the Commissioner, which was there for all to see from the frequent clashes between them. In Mr B's case, he was given the option of either being exposed for fraud or taking a severance package. Not surprisingly, he opted for the latter.

Core ensured that it had people in key positions so that its plan could be implemented. For example, one member⁷⁸ was asked to be the facilitator of all the strategic sessions held by Department of Correctional Services. He, in fact, used those occasions to gather information for Core.

As regards appointments, Core had to approve all these from Director level upwards. Interview and appointment procedures were merely processes that had to be complied with but they did not shape outcomes. Core produced the lists in terms of which appointments were made.

Among the more prominent senior employees affected by the decisions made by Core were the following:

⁷⁷ See the investigation by this Commission into Mr Mataka's fraudulent claims in its Sixth Interim Report.

⁷⁸ The member's name is known to the Commission.

- The appointment of Mr Mataka as the Provincial Commissioner of Limpopo;
- Member Z's⁷⁹ appointment as a Director at Modder Bee prison;
- The removal of the Area Manager of the Johannesburg Prison.

The decision with respect to senior employees was not made by Core itself but was “delegated” to the “provincial leadership”, which Core had identified in respect of posts below Director level. Again, interviews were held and short lists compiled but these were simply sham formalities to create a sense of propriety. Notwithstanding the delegation, Core retained the right to approve or reject lists drawn by the “provincial leadership”.

As already stated, Core’s members were master strategists and manipulators. A further basis for this conclusion was the manner in which they dealt with Correctional Officers Union of South Africa (COUSA). This was the union that had broken away from Popcru. It was beginning to be seen as a serious rival to Popcru. Something had to be done to protect Popcru. Core came to Popcru’s rescue. They decided that COUSA should be dissolved and merge with Popcru. The other terms of the merger could only be achieved because of their close association with the then National Commissioner.

Clearly there had to be a close link between Popcru and Core. Popcru was by far the most powerful union in Department of Correctional Services. It had similar aims to Core as far as transformation went and some of its members were also members of Core.

⁷⁹ Member Z was a senior official in the Department and Member Z’s name is known to the Commission.

However, whilst Popcru was a “public” body, Core was a “secret group”. So when non-Department of Correctional Services people wanted things done they approached Popcru. For example, if public figures wanted relatives appointed by the Department of Correctional Services, they approached members, who then requested Core to approve such requests. Often this could be done without much difficulty but sometimes posts had to be created. Given their positions in the Department, it was easy for Core members to perform these tasks.

On one occasion, during a recruitment drive, because of all these requests, the intake exceeded the Department’s capacity to train recruits. It then became necessary to reduce the training course to three (3) months. The Department of Correctional Services was also forced to get the University of South Africa (Unisa) to develop short courses for training purposes and, to cater for the training, the Department bought a Protea Hotel.

Core made all these decisions. The Management Board merely rubber-stamped what Core had already determined.

As often happens with secret organisations, cracks began to appear in Core. Envy, resentment and other vices no doubt played a role. The original Core no longer operated as a unit. In fact, a different Core, which took over the real decision-making, was formed but the pretence was maintained that the original Core was still intact and in control. This charade could, however, not last. Those excluded from the new Core soon got a taste of their own medicine. They were hounded out of the Department over a period of time after being removed from their positions of power.

Dr Sithole had been removed as Commissioner but the notion of a group of persons who have *de facto* if not formal control over the Department, notwithstanding that the power should rest with the Management Board, survives even today.

It could be argued that since this was a body set up by the former Commissioner of Correctional Services, Dr Sithole, who no longer holds this position, it may no longer be effective. However, the evidence before the Commission suggests that Core has not disbanded. While the Commissioner may not convene it, the members appear still to be meeting secretly to make certain decisions, which need to be attended to by members of Core within the Department. This is clearly demonstrated by the manner in which some decisions, which should have been implemented years ago, have been frustrated simply because they go against the views of members of Core union policy.⁸⁰

Regarding decisions that were frustrated because they went against members of Core, officials of the Department often quote Mr Mataka's case as an example. According to the evidence collected, it was clear that the Department of Public Service and Administration had identified him as early as 1999 as being involved in corrupt activities. However, instead of being disciplined for these actions, he was moved from the Head Office to become the Provincial Commissioner of Limpopo and later to become the Provincial Commissioner of the Eastern Cape.

According to the members, it was an open secret that he was "the heir apparent" to the "crown" of being the National Commissioner. This was going to be achieved because of his affiliation with Core and it was going to be achieved at all costs, despite transgressions he may have committed within the Department.⁸¹

However, as noted, a few employees at Head Office who were Core members gave the impression to the investigators that there was nothing unbecoming

⁸⁰ See the chapters dealing with Recruitment, Disciplinary Inquiries, Overtime Payments, Transfers of Staff etc.

⁸¹ See the manner in which the Department dealt with his transgressions, which were uncovered by the Commission. In this regard, refer to the section dealing with the Department's response to the Sixth Interim Report in the Chapter on the Implementation of Interim Reports hereinafter.

about Core's meetings. In light of this, it is necessary that a thorough investigation of Core, its strategies and its role be done so as to bring the Department back under the control of the legal decision making body, its Management Board and not some secret structure.

4.4 Failure To Discipline Perpetrators

The Department's failure to deal with the people involved in Operation Quiet Storm⁸² exaggerated the power of the founders and increased the fear of them throughout the Department. This fear, unfortunately and to the amazement of the Commission, was evident even at national government level. As a result of the Department's inaction, the organisers of Operation Quiet Storm lost all respect for law and order.

It is apparent from the evidence led that Messrs Ngubo, Ndumo and Memela, the original organisers and supporters of Operation Quiet Storm⁸³, have no respect for law and order or any authority in the Republic. It may be this approach to law and order, which has led to their current situation.⁸⁴ The failure by the State to

⁸² The same would apply to Core members and the participants in Amagqugula and Operation Thula insofar as their actions were unlawful.

⁸³ Mr T.O. Memela was not mentioned as one of the founders of Operation Quiet Storm but all the evidence points to the fact that he was one of its supporters and operated with Messrs Ndumo and Ngubo in a number of matters. Mr T. O. Memela in the Pietermaritzburg Management Area was regarded as Mr Ngubo's right hand man. According to the evidence before the Commission, notwithstanding the fact that other people were part of the "A" team, the most trusted lieutenants of Mr Ngubo were Messrs Memela and N. C. Ndumo. (Refer to the chapter on Pietermaritzburg Management Area for more details.)

⁸⁴ Mr Russell Ngubo and Mr T.O. Memela were convicted and sentenced on 22 July 2005, by the Judge President of KwaZulu-Natal as follows:

1. Mr B.R. Ngubo was convicted of:
 - (i) defeating the ends of justice by attempting to intimidate a witness not to give information to the police;
 - (ii) the murders of Mr Nash Ngubane and Mr Mshengu.

prosecute them after the take-over of the Waterval Prison, may have contributed to this attitude.

This disrespect for authority and the law generally is evidenced in the following incidents regarding Correctional Services:

- (a) During or about 1998, the then Minister of Correctional Services, Dr Siphon Mzimela, was quoted in the press as telling members of the Pietermaritzburg Prison that he was considering closing the prison. It is generally reported that Mr Ngubo⁸⁵ responded that the prison would not be closed and threatened Minister Mzimela with death. This was clear insubordination. *The Natal Witness* reported:

“Ngubo insisted The Natal Witness publish the following statement which he verified twice:

‘This old man (Mzimela) is about to die. His days are numbered. He is mad and he is too old. He must go to hell. There is no one who is going to be transferred from this prison - no prisoner and no warder will be transferred.’

Mr Ngubo denies this and no action was taken against him.

- (b) Mrs Kgosidintsi, who had been appointed Commissioner of Correctional Services in KwaZulu-Natal, was assaulted, humiliated, spat upon and

He was sentenced to an effective sentence of twenty five (25) years’ imprisonment; and

2. Mr T.O. Memela was effectively sentenced to twenty (20) years’ imprisonment for kidnapping and murder of Mr Nash Ngubane.

They were convicted and sentenced together with a Mr Thulani Xaba, who was a member of the VIP Protection Unit of the South African Police Service when the crimes were perpetrated. The main State witness, in the case, who was an accomplice, Mr Nhlanhla Ngubane, was also a member of the South African Police Service (VIP Protection Unit). The abovementioned crimes were committed during or about September 1995.

⁸⁵ As he was quoted in the *Natal Witness* “Warders defy prison closure” dated 8 June 1998.

chased out of KwaZulu-Natal by a group led by Mr Ngubo. This incident was widely publicised in the media. It was also conveyed to the Department. The action preferred was a high court application for an interdict.⁸⁶ The matters were, however, settled in a manner that creates a bad public impression of the Department in that it showed lack of courage and weak leadership. Effectively, the Department capitulated to the forces of Mr Ngubo and others and no effective disciplinary action was ever taken against the perpetrators.⁸⁷

- (c) Similarly, in response to Operation Quiet Storm storm-troopers taking over prisons, the Department lodged a number of interdicts against the members who were participating in Operation Quiet Storm. However, when it came to the crunch, the Department capitulated and agreed to:
- (i) withdraw the interdicts;
 - (ii) withdraw the suspensions of the perpetrators; and
 - (iii) pay seventy (70%) per cent of the legal costs, which had been incurred in trying to protect law abiding employees.

Once again it was a clear capitulation by the Department in favour of people who had committed criminal acts against the Department's employees. Obviously, this encouraged the current state of lawlessness within the Department.

- (d) Mrs Kgosidintsi also testified that when the new Minister, Mr B. Skosana, who, at the time, had recently been appointed, came to introduce himself to the members of the Department at Durban-Westville in 1998, a group led by Mr Ngubo assaulted Dr Sithole, the National Commissioner at the

⁸⁶ See *Minister of Correctional Services and Another v Russell Ngubo and 33 others* (NPD Case No. 616/1999)

⁸⁷ See the Chapter on the Pietermaritzburg Management Area, on how she was humiliated by junior members of staff. See also Pietermaritzburg, Volume 13.

time.⁸⁸ Once again, no sanctions were brought against Mr Ngubo and others. However, Minister Skosana issued a statement to the effect that the assault on Commissioner Sithole had nothing to do with him but was related to the issues between the Commissioner and those who attacked him.

- (e) The various Commissions or investigations that the Department has sanctioned have not received any co-operation from Messrs Ngubo, Memela and Ndumo. Even this Commission, which is a Judicial Commission of Inquiry appointed by the State President, has not received any meaningful co-operation from these three (3) men.⁸⁹

The failure of the Department to deal properly with the allegations of Mrs Kgosidintsi, a very senior official, discourages good labour relations and does not enforce a sense of discipline within the Department. Indeed, it reinforces the belief rightly or wrong that senior officials, and indeed the Minister at the time himself, feared the three (3) men. This, in the view of the Commission, is a clear indictment of the Department, which failed to act decisively. It is either that the then Minister was not being properly advised or there were individuals still operating within Departmental structures who owed their allegiance to the “achievements” of Operation Quiet Storm or any other secretive structure.

The conclusion reached by the Commission that Messrs Ngubo, Memela and Ndumo have no respect for any law or authority applies also to their attitude to their own union. According to the evidence, for example, at the height of Operation Quiet Storm, the then President of Popcru called the executive of the union in KwaZulu-Natal together with the three (3) men, to a meeting. Their response to this invitation was to be contemptuous of their then President.

⁸⁸ Mrs Kgosidintsi could also identify a certain Mr Mnguni who was the Chairperson of Popcru in Pietermaritzburg. (Pietermaritzburg Transcript Volume 13, pages 1 178-1 184).

⁸⁹ There are other examples of their disrespect for the law, which are dealt with in the Chapter dealing with the Pietermaritzburg Management Area.

The fear engulfing the Department also extended to the national level. When the Minister of Correctional Services called a meeting to try and resolve the KwaZulu-Natal problems, he was intimidated and was forced to hold the meeting dealing with the problems of Pietermaritzburg outside the district of Pietermaritzburg.⁹⁰ The three (3) men were thus effectively running the Department in the province with impunity and had clearly become a law unto themselves with even the Minister not being welcome in Departmental premises at Pietermaritzburg. In the Commission's view, this was the worst form of abdication of responsibility by the National Office of the Department of Correctional Services, which had the effect of entrenching the importance of these men and affirming a culture of intimidation within the Department. The failure to prosecute them for, inter alia, sedition and intimidation after the Waterval siege, was a dereliction of duty by the senior management.

Similarly, in the other provinces, those who committed criminal acts of intimidation, assault, crimen injuria and even theft, against senior officials like Mrs N. Tseane, Mrs G. Moletedi, Mr D. Baloyi, Mr M. Z. I. Modise and other senior officials, were never disciplined by the Department. Even those who were disciplined by law abiding members who sought to enforce the law, were later reinstated by senior government officials on the basis of what was referred to as "humanitarian grounds".⁹¹

It is interesting to note that the humanitarian consideration only applied to members of Popcru and did not apply to the victims of their unlawful actions.

To date, the Commission has not heard any evidence to indicate that there was any form of apology or counselling or any acceptable form of social or restorative

⁹⁰ The meeting was held at Majuba Lodge, Newcastle. (See Pietermaritzburg Transcript Volume 14, pages 1 252-1 255).

⁹¹ For more details on this see the chapter dealing with the Bloemfontein Management Area and the Chapter dealing with Disciplinary Inquiries.

justice or an humanitarian gesture by the Department to the victims of the aforesaid actions. These renegade members are still in the Department and reining them in must be the most difficult task for any manager. Thus, the same level of mismanagement and corruption, still prevails.⁹²

The Commission is of the opinion that as a result of the Minister and Commissioner of Correctional Services failing to stamp their authority and defusing the situation in the affected Management Areas, any senior Government official who tried to deal with renegades in the Department was disregarded and treated with contempt. It was clear that the union reigned and that Departmental management were merely tolerated as long as they did not interfere with the plans or objectives of the union.

Instead of dealing with the problems emanating from the various management areas, the Department has been caught up in an “investigation paralysis”. Decisive action to address the general lawlessness that was clear to everyone was avoided by the Department, which chose rather to appoint Commissions of Inquiry or Investigative Boards whenever there was a crisis that required tough decisions. In total there have been more than twenty (20) investigations into the Department in the last ten (10) years. Of these twenty (20), this Commission has identified that seven (7) were concerned with issues that arose because of undue union influence.⁹³

The Department’s failure to deal with the culprits through the criminal justice system can in itself be seen as “protection” of members, who should have been disciplined and dismissed.

⁹² One should not forget that these acts of violence referred to in this report are merely a sample of everything that has happened in the rest of the country, which begs the question, how many of these renegade members are still in the Department?

⁹³ See Appendix ‘D’ for a breakdown of these previous investigations. See also the chapter dealing with Previous Investigations.

The paralysis in the Department fueled the corruption and criminal conduct taking hold, as the Department failed to send out a clear message to the perpetrators that they needed to respect law and order and that they were not above the law.

5. CONCLUDING REMARKS

Unions were apparently in control of the day to day running of the Department of Correctional Services, with Popcru being the most powerful and influential. The power of the Department's management had been successfully emasculated by the union, which had succeeded in ensuring that union sympathisers were appointed to almost all strategic positions. As a result, the Department found itself in a position where it could not make and enforce decisions regarding work conditions or that might affect employees because these were likely to be frustrated by union sympathisers in the higher echelons of the Department.⁹⁴

As a result of this distribution of power, the entire management system of the Department, including the capacity to exercise discipline, was ineffective. Employees did not have to comply with the rules and regulations of the Department. Instead, their survival in the Department depended merely on currying favour with the union.

For the Department to succeed in implementing the Government's vision with regard to Corrections, it is imperative that management retake control of the entire Department and acts in the interests of the Department.

The power wielded by the union has resulted in corruption festering because control systems protecting the Department's interests are being ignored, with

⁹⁴ For example, see the chapters dealing with the implementation of the Seven Day establishment (overtime ban) and Disciplinary Code.

those who are corrupt taking advantage of the absence of proper discipline and the lack of enforcement of the various control procedures.

The ineffectiveness of management in the Department has also created opportunities for gangs to prosper and further insinuate themselves into the Department,⁹⁵ with the role played by members in this regard being destructive.

Accordingly, it is the Commission's view that the primary challenge for the Department is the unbridled negative influence by members especially those belonging to the majority union. To deal with this, the Department will have to develop a special and effective strategy to reclaim its power and authority, which will necessitate a major change in the mind set of most employees.

Any strategy for reclaiming power and authority will have to address the main factors that have led to the emasculation of Departmental management and

consequently to incompetence and ineffective rehabilitation programmes within the Department. These factors include:

- 5.1 The appointment of not suitably qualified personnel (or people who lack strategic and visionary leadership qualities), which was the product of interference with a fair recruitment process.
- 5.2 Appointments based on loyalty to the union instead of competency for the job.

⁹⁵ The role of the gangs will be shown clearly in the chapters on Sexual Violence in Prisons and Gangs in Prison.

- 5.3 The Department's failure to recruit and bring in outside skills at management level. It has been clear to the Commission that the officials within the Department believe that for anyone to be promoted to a senior position, one must have come up through the ranks. Officials have been heard to say that anyone who has not worked in a prison does not know anything about prisons. This attitude limits the pool of possible management recruits to the Department and excludes fresh blood from outside the Department that may bring new and innovative ideas to meet the challenge of Corrections in the future. In these circumstances, even the transformation process is restricted to former employees, whose knowledge of dealing with prisoners is limited to what they were taught during their training to be Correctional officials.
- 5.4 The Department has perceived the transformation process as the replacement of white officials with black officials. Transformation of the mindset of the members to incorporate a human rights culture and to adopt new procedures and processes required by this, has taken time to settle in, if it has settled at all.
- 5.5 Re-introducing an effective disciplinary system. Respect for law and order is a fundamental component of any Correctional system in any open and democratic society.

The Chapters, which will be dealt with hereinafter, are an attempt by the Commission to address the lawlessness and mismanagement in the Department, which has permeated almost all operational areas.

CHAPTER 3

TRADE UNIONISM

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CHAPTER 3

TRADE UNIONISM

1. INTRODUCTION

The advent of democracy in South Africa not only introduced democracy into the general life of South Africans but also in the work place. In both the Interim Constitution and the Final Constitution, the workers' right to join trade unions was entrenched in the South African Bill of Fundamental Rights.¹

As discussed in the second Chapter, this not only brought major changes to the outlook within the Department, but also introduced a new dimension where ordinary workers who had been employed as warders were now entitled to join trade unions.² This is notwithstanding the fact that in the previous dispensation,

¹ Section 27 of Act 200 of 1993 and section 23 of Act 108 of 1996.

² See section 4 of the Labour Relations Act No. 66 of 1995 dealing with employees' right to freedom of association:

"4. Employees' right to freedom of association. –

- (1) Every employee has the right-*
 - (a) to participate in forming a trade union or federation of trade unions; and*
 - (b) to join a trade union, subject to its constitution.*
- (2) Every member of a trade union has the right, subject to the constitution of that trade union-*
 - (a) to participate in its lawful activities;*
 - (b) to participate in the election of any of its office-bearers, officials or trade union representatives; and*
 - (c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office; and*
 - (d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.*
- (3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation-*
 - (a) to participate in its lawful activities;*

the Department of Correctional Services had been regarded as an “essential service” and thus the workers were not allowed to strike. The right to strike was also enshrined in the Constitution, which gave workers the right to strike irrespective of the nature of the Department’s work.

The fact that the workers now had the right to join trade unions led to an upsurge in trade unionism in the Department of Correctional Services, and a number of unions³ started organising and recruiting members.

Trade unionism, coupled with the concept of affirmative action, led to a situation in the Department where members who had been ordinary warders were promoted to senior management positions in extraordinary ways. According to the evidence, which was led before the Commission,⁴ the Department had to look within the ranks of trade union leadership to identify candidates for leadership positions in the Department. This obviously led to a situation where trade union membership was “the ticket” to a senior management position.⁵

The issue of union membership being a ticket to senior management positions has led to a number of complaints, which members of the Department raised with various investigating bodies, including this Commission. In particular, it has been alleged that the union, Popcru, has taken control of the Department. As this

(b) *to participate in the election of any of its office-bearers or officials; and*

(c) *to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office”.*

³ In section 213 of the Labour Relations Act 66 of 1995 (“the Labour Relations Act”) a trade union is defined as follows:

“ ‘trade union’ means an association of employees whose principal purpose is to ‘regulate relations’ between employees and employers, including any employers’ organizations.”

⁴ See the evidence of Mr G.J. Fourie (a.k.a. Hardy Fourie) in Head Office Transcript - Vol.1 at page 24.

⁵ The issue of trade union membership giving access to senior positions within the Department has been the subject of investigation by a number of agencies, which have looked into the Department of Correctional Services, for example, the Public Service Commission investigation, the Department of Public Service and Administration investigation etc.

allegation, if shown to be correct, can have a serious impact on the functioning of the Department, the Commission is of the view that it is important to consider its veracity.

In this Chapter, the Commission will also consider the anomaly that exists in the Department of managers and workers belonging to the same union, and highlight potential tensions and conflicts of interest. After examining practices in other countries, and the legal implications, the Commission will make recommendations to address the problem.

2. UNION MEMBERSHIP

As at 31 January 2005, union membership in the Department at all levels was as follows:

●	POPCRU	22 577 (63,59%)
●	PSA	9 918 (27,934%)
●	NUPSAW	950 (2,676%)
●	DENOSA	305 (0.86%)
●	SAPAWU	185 (0,521%)
●	HOSPERSA/INDEMNITY	56 (0.158%)
●	NEHAWU	35 (0.099%)
●	SASAWU	4 (0.0112%)
●	SADNU	4 (0.0112%)
●	PSCBC (Agency Shop Fees For Non-Unionised Members)	1 470 (4.140%)
	TOTAL	35 504 (100%)

It is clear from the above that Popcru is the union with the most members, which has always been the case.⁶ Popcru's dominance can be seen in all the service areas of the Department, including the more strategic positions like personnel, management services and prison administration.⁷ At some stage, staunch Popcru supporters were even strategically placed in the Minister's office.

2.1 The Issues

A number of factors, which have a bearing on union representation within the Department, have reinforced the perception in some quarters that Popcru is in effect running the Department. These factors include the following:

- (a) The existence of the Agency Shop Agreement,⁸ which was concluded by the parties to the Public Service Co-Ordinating Bargaining Council on 26 May 1998. This agreement obliges the employer to deduct an agency fee equal to 1% of the employee's basic salary to a maximum of sixty rand

⁶ In 2001, when the Public Service Commission investigated the Department, the representation was as follows:

POPCRU	45%
PSA	23%
DENOSA	0%
SAPAWU	0%
HOSPERSA	0%
NEHAWU	0%
SADNU	0%
INST OF PUBLIC SERVICE	0%
PSCBC	32%

⁷ See Mr Matshoko's evidence – St Albans Transcript, Volume 14, page 1 439.

⁸ See section 25 of the Labour Relations Act 66 of 1995. Section 25(1) provides as follows: "25 Agency shop agreements-

(1) *A representative trade union and an employer or employer's organization may conclude a collective agreement, to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof.*"

- (R60,00) from all employees, who do not belong to any of the unions who are signatories to the Agreement.⁹
- (b) Senior members of the Department with management responsibilities, including Provincial Commissioners, belong to unions, which is an unusual phenomenon, given that the unions also negotiate with management for junior workers' rights. This, on its own, has the potential to create problems and will be dealt with later in this Chapter.
- (c) There was also an allegation that the agency fees may be higher than the normal subscriptions to the union. The problems associated with this Agreement will be dealt with later in this Chapter.¹⁰

These are some of the factors that led to the complaints the Commission received alleging that Popcru is “effectively running the Department” or influencing the management of the Department.

⁹ Signatories to this Agreement are:

1. South African Police Union (SAPU);
2. Police, Prisons and Civil Rights Union (POPCRU);
3. South African Democratic Teachers' Union (SADTU);
4. South African State and Allied Workers Union (SASAWU) ;
5. Suid Afrikaanse Onderwysers Unie (SAOU);
6. National Professional Teachers Organisation of South Africa (NAPTOSA);
7. National Education, Health & Allied Workers Union (NEHAWU);
8. Public Servants Association (PSA) ;
9. Democratic Nursing Organisation of South Africa (DENOSA);
10. Health & Other Services Personnel Trade Union of South Africa (HOSPERSA);
11. National Union of Public Services and Allied Workers (NUPSAW);
12. National Public Service Workers Union (NPSWU); and
13. Public and Allied Workers Union of South Africa (PAWUSA).

¹⁰ In *Solidarity and Others v Minister of Public Service and Administration* (2004) 6 BLLR 593 (LC) the court declared the said Agency Shop Agreement to be void *ab initio*. (The matter is currently pending before the Labour Appeal Court).

2.2 The Public Service Commission Investigation

A similar complaint about Popcru effectively running the Department was also raised with the Public Service Commission when it investigated the Department in 2001. The Public Service Commission, after investigating the allegations, concluded that it was not “easy and straightforward” to assess these allegations.

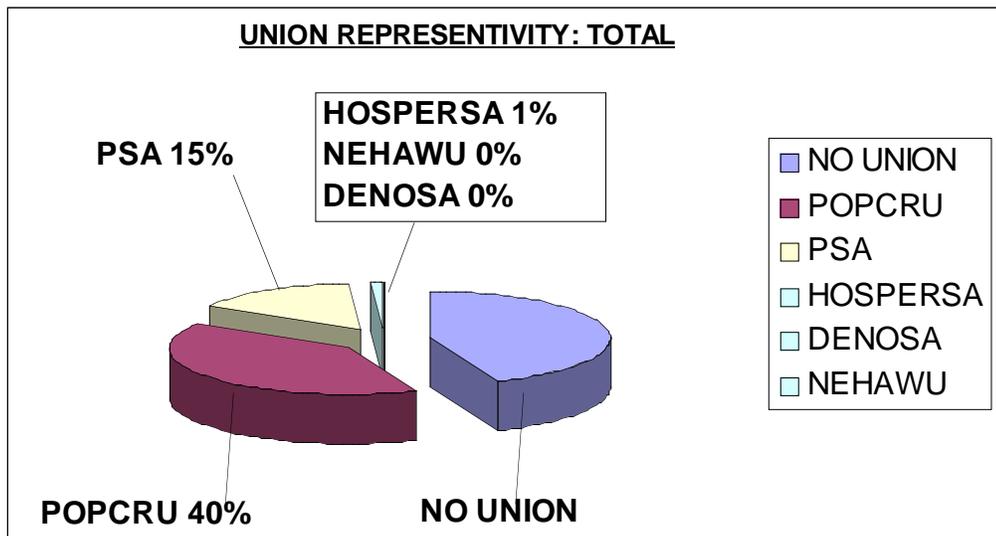
The Public Service Commission nevertheless came to certain findings and conclusions, which confirm Popcru’s monopoly of union membership and managerial positions in the Department, as the following extract indicates.

“FINDINGS

In comparison to other trade unions recognized by the Department, POPCRU seems to have the majority of members as is evident from the graph below ...

POPCRU also has the majority of members at managerial levels (Deputy Director and higher) as depicted by the graphs below. It must be noted that a very large portion of managers do not belong to any trade union. This should serve to neutralize any undue influence that managers belonging to POPCRU may wish to exert. However, such dynamics also require in-depth analyses, which the Commission could not attend to, due to time limitations and the inherent complexity of such investigation. (Graphs per rank level and per province, including Head Office, appear at Annexures K11-K43).

9.17.2



As far as POPCRU's membership in key positions such as Head of Personnel, Area Manager, Head of the Prison, Provincial Commissioner, Deputy Commissioner and Chief Deputy Commissioner goes, the following graph¹¹ shows that POPCRU has a majority:

¹¹ The bar graph in the original document/report has been excluded. The information in the graph is the same as the information in the table.

DEPARTMENT OF CORRECTIONAL SERVICES
UNION MEMBERSHIP OF PERSONNEL ON MANAGERIAL LEVEL
(Key positions)

	HOSPERSA	NEHAWU	POPCRU	PSA	NO UNION
AREA MANAGER	1	0	82	44	6
PROVINCIAL CONTROL OFFICER:FUNCTIONAL SERVICES	0	0	5	3	1
PROVINCIAL CONTROL OFFICER : OPERATIONAL SUPPORT	0	0	7	1	1
PROVINCIAL CONTROL OFFICER : RESOURCE MANAGEMENT	0	0	7	2	1
HEAD OF PRISON	1	0	130	75	8
DEPUTY COMMISSIONER	0	1	5	0	19
CHIEF DEPUTY COMMISSIONER	0	0	4	2	7
COMMISSIONER	0	0	0	0	2

The above analysis does not provide any evidence that POPCRU is manipulating the functioning of the Department. It does, however, show that POPCRU would indeed be in a strong position to do so if this had been its intentions.

Incidents were reported where POPCRU members prevented their colleagues from taking up their work in the Eastern Cape, and their insistence to have the Provincial control Officer of KwaZulu-Natal

transferred. Reports were also received of officials of the Department that were formally seconded to POPCRU. Although this is permissible in terms of Public Service Coordinating Bargaining Council Resolution 8 of 1998, it did not help to dispel many officials' concerns that POPCRU is exerting undue influence over the Department.

It may be considered that certain officials in key positions, who happen to be POPCRU members, may be pursuing their own agendas without the official sanction of POPCRU. When the beneficiaries of their partisan actions also happen to be POPCRU members, it may seem to be a POPCRU-driven process.

PROPOSALS

It is proposed that the Department should engage in a consultative process with its recognized unions to co-plan a strategy to curb mismanagement and maladministration.” (Own emphasis)

The Public Service Commission found that there was no conclusive evidence to suggest that Popcru was manipulating the appointments. While this Commission accepts the Public Service Commission's findings, it is clear that at the time of the investigation, the role Operation Quiet Storm¹² played in the Department had not been brought to the notice of the Public Service Commission.

In reading the definition of a trade union in section 213 of the Labour Relations Act, it is clear that the purpose of a trade union is the lawful “regulation of relations between the employer and its employees”. Such regulation of the relationship must be lawful both in terms of the manner in which a trade union seeks to regulate the relationship and the content of such regulation. If that is the

¹² See the Chapter on Historical Background which deals with Operation Quiet Storm in greater detail. The reference to Quiet Storm in this Chapter also includes “Operation Thula” and “Amagqugula” as discussed in the Chapter on Historical Background, above.

case, then the appointment of employees, their promotion and the termination of the contract of employment are matters that fall within the power of the employer. However, the employer must exercise this power lawfully and, to this extent, its managerial prerogative is limited by the regulatory framework and whatever agreement the employer may have with the union.

2.3 The DPSA Gauteng Investigation

Popcru has, obviously, denied that this is the role it plays within the Department. However, its denial can at best be dealt with by referring to the contents of the report by Mr Govender, of the Department of Public Service and Administration¹³, prepared in terms of the Department's mandate to investigate the hostage-taking of the Gauteng Provincial Commissioner at the time, Mr M.Z.I. Modise.¹⁴ Mr Govender set out the various concerns that union members put to him on behalf of Popcru. Amongst others, he noted the following:

"9. Both Mr Modipane and Mr Chaba highlighted their (POPCRU's) concerns – these were:

- (a) their inability to see the Provincial Commissioner (PC);*
- (b) no platform to air their grievances;*
- (c) agreements not implemented after joint meetings;*
- (d) members of POPCRU are charged, harassed, suspended and dismissed;*
- (e) it was through POPCRU's efforts that a number of the current managers were promoted; therefore POPCRU can remove them;*
- (f) the PC allows other unions to recruit their members and this only happens in Gauteng." (Own emphasis)*

¹³ Hereinafter referred to as "the DPSA".

¹⁴ See Leeuwkop Exhibit 'B7'.

The other issues that have been raised will be dealt with elsewhere in the report. However, the main issue of concern is paragraph (e) where it is stated that a number of managers were promoted through Popcru's efforts and that the members said Popcru could, as a result, also remove them from these positions.

It is apparent from reading (e) above that it is Popcru's view that it appoints people to various positions. This should obviously be looked at in the context of:

- (a) Operation Quiet Storm; and
- (b) Amagqugula, in which the selection process of personnel, was manipulated to achieve the union's end.

This on its own is a concession by Popcru to the fact that the selection process is not fair, objective or free of any influence by outside forces, and in particular, the union.

This Commission is of the view that the evidence relating to Operation Quiet Storm and the other union operations, does confirm that there was manipulation of the Department¹⁵ to the advantage of the members of Popcru and with the intention of realising Popcru's strategic objectives, whatever these may be. It is interesting to note that the National Commissioner, Mr Mti, does not fear such influence and is of the view that the Department had managed to establish clear roles for management and the unions.¹⁶

¹⁵ While Operation Quiet Storm played out mainly in KwaZulu-Natal, the Commission heard detailed testimony by Mr Thembile Goodman Matshoko in Port Elizabeth of the manipulation of the Department by the union in the Eastern Cape. (See Exhibit 'U' of St Albans proceedings.) The evidence of Provincial Commissioner Z.A.K. Modise was to the effect that Operation Quiet Storm was a national programme (Leeuwkop Transcript Vol. 10 at page 868).

¹⁶ See Correctional Services Portfolio Committee meeting dated 25 June 2002, where the National Commissioner, Mr Mti, informed the Portfolio Committee of this view at <http://www.pmg.org.za/docs/2002/view-minute>, accessed 17.1.2005.

3. CONSEQUENCES OF UNION INFLUENCE

It is the Commission's view that Mr Ntuli, in testifying about Operation Quiet Storm, gave the most plausible explanation of what caused the state of lawlessness in KwaZulu-Natal. The KwaZulu-Natal prisons were plagued by problems and, prior to this Commission, several inquiries bore no results. Instead, the various inquiries and investigators were sent around in circles without finding any root causes because the lawlessness in KwaZulu-Natal was so pervasive.

It was apparent that even though Quiet Storm was conceived and driven from the Pietermaritzburg Management Area, it resulted in forced removals and strike actions all over the province. As a result, the Department had to embark on litigation to try to stop this spate of unlawful actions. Quiet Storm also spread to other provinces, thus impacting on the entire Department. Mr M.Z.I. Modise's evidence regarding the national character of Operation Quiet Storm also gave a plausible explanation as to why the unlawful behaviour was copied by other provinces.¹⁷

The main feature of the Operation was that there was extensive violence, or threats of violence, against employees of the Department in all the Management Areas.

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 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

¹⁷ See the Chapter on Historical Background for more details.

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.¹⁸

The union influence within the Department of Correctional Services has had such a profound effect that even the appointment of senior, critical and technical staff has been affected. Some of those appointed do not qualify to be in their positions, while those who might assist in the effective management of the Department are sidelined or, if appointed, made to carry out menial duties that have nothing to do with their specific qualifications. The strategic and influential positions are left to those people loyal to the union.¹⁹

It should be noted that there has been a slight change in this trend at head office, where a number of new recruits have been appointed from the outside since the new Commissioner of Correctional Services was appointed.

However, there is still a problem in that at the middle and lower management level of the Department appointments are not aimed at employing the best person for the job. This is apparent if one looks into the specialist posts and the manner in which so-called specialists are treated. For example, warders end up playing the role of various specialists and technical people, such as medical doctors, psychologists, dieticians, human resources specialists, lawyers, accountants, strategic planners etc.

¹⁸ See the evidence of Mr Matshoko – St Albans transcript, Volume 14, page 1 439 and Mr Ntuli in the Chapter on Historical Background.

¹⁹ See Mr Ntuli’s evidence in the Chapter on Historical Background.

This demotivated professional staff in the Department. Even court orders²⁰ and directives of the Office of the Inspecting Judge of Prisons are sometimes ignored.²¹

Because of this union influence the strategic direction taken by the Department, or the lack thereof, is because of union influence. Moreover, if one considers that the majority of senior managers²² belong to Popcru, then one should be concerned as to which officials are protecting the interests of the Department when these are not the same as those of Popcru.

This indicates that the Department was, at one stage, generally under the control of the union. The Ministry and the Commissioner's office had lost total control of the Department. The current Minister and Commissioner are, under difficult conditions, endeavouring to reverse the situation.²³

From the evidence led before the Commission, it has become clear that the issue of trade unionism is one of the most divisive issues within the Department. There were even employees who said "trade unionism" was non-existent in some of the Management Areas and that it had been replaced by "gangsterism".²⁴

The reference to trade unionism as gangsterism has everything to do with the role the union has played in the various violent and illegal activities in the Department. This, unfortunately, has been the trend to date where there has

²⁰ See the disregard of court orders set out in Chapter One of this report. In particular, see also the Chapter on Conversion of Sentences for the manner in which the Marimuthu matter was discussed and other matters.

²¹ See also the Chapter dealing with the Office of the Inspecting Judge where the frustrations experienced by some of the Independent Prison Visitors are set out.

²² See statistics *infra*.

²³ For example, warders who were involved in unlawful activities at Pollsmoor and disrupted a visit by the Minister were suspended and charged. (See *The Cape Argus*, Friday 4 June 2004). A similar approach was adopted at Barberton Prison when there was unlawfulness.

²⁴ See the evidence of Mr B.B. Mchunu at Pietermaritzburg. (Pietermaritzburg transcript Vol. 8 page 810).

been a clear disregard for the law and the union carries on trying to influence the manner in which the Department is run through, sometimes, unlawful means.²⁵

The Commission will now consider in more detail the other issues, referred to above, that have a bearing on the issue of trade unionism.

4. AGENCY SHOP AGREEMENT

Section 25 of the Labour Relations Act gives a union the right to enter into a collective agreement with non-union members, which is referred to as an Agency Shop Agreement. This agreement requires the employer to deduct an agreed agency fee from the wages of employees who are not members of a trade union, but who are eligible to be members of a trade union.

The mischief, which this section seeks to address, is, briefly, the fact that non-unionised employees should not benefit from the achievements of union negotiations if they do not belong to a union. Thus, even though they do not belong to a union, they are obliged to pay an agency fee as the union acts as their agent in negotiations.

The effect of the Agency Shop Agreement is profound in that it influences the manner in which members approach trade unionism or trade union membership. The effect of the agreement is that even if officials have no desire to join a trade union, they might as well join because membership costs less in subscriptions, if the allegation is true that the agency fees are higher. Even if the allegation is not

²⁵ The issue of overtime payment and the issue of the 131 employees who were disciplined by the Department is relevant here, especially the manner in which the union has dealt with these matters. While it is clear that if they have any complaint they could either raise it in the Bargaining Council or they could appeal the dismissals within the structure set out in terms of the Labour Relations Act, they instead chose to embark on industrial action.

true, a person might as well join the union not only to get representation within the Bargaining Council but also to get other benefits, which might be derived from being a member of a union.²⁶ It is clear then that the agreement does have a bearing on how union membership has swelled.

Evidence has been presented that agency fees are higher than the normal subscription to the union in some instances. It is the Commission's view that the Department needs to investigate this.

Section 25(3) of the Labour Relations Act provides that:

- “(3) An agency shop agreement is binding only if it provides that-*
- (a) employees who are not members of the representative trade union are not compelled to become members of that trade union;*
 - (b) the agreed agency fee must be equivalent to, or less than-*
 - (i) the amount of the subscription payable by the members of the representative trade union;*
 - (ii) if the subscription of the representative trade union is calculated as a percentage of an employee's salary, that percentage; or*
 - (iii) if there are two or more registered trade unions party to the agreement, the highest amount of the subscription that would apply to an employee.” (Own emphasis)*

²⁶ On the evidence before the Commission, the benefits may include promotion, merit awards etc.

To avoid a situation where non-union members are paying an agency fee higher than the normal union subscriptions, the Commission will recommend that under no circumstances should non-union members be required to pay an agency fee, which is higher than the normal union subscriptions in contravention of section 25(3)(b)(i) of the Labour Relations Act.

5. SENIOR MANAGERS JOINING TRADE UNIONS

The Constitution of the Republic and the Labour Relations Act recognise that all employees, as defined in the Labour Relations Act, can join a trade union of their choice.

The right of employees to freedom of association as provided for in section 4 of the Labour Relations Act, draws no distinction between managerial and non-managerial employees.²⁷ The definition of “employee” in section 213 of the Act also does not distinguish between managerial and non-managerial employees. It is standard practice in the Department that senior managers belong to the same trade unions as other employees. The information the Commission received is that as at 31 January 2005, the union membership at senior management positions was as follows:

²⁷ Except that such a distinction is drawn in section 78(1) of the Labour Relations Act.

UNION	SALARY LEVEL					TOTAL	%
	11	12	13	14	15		
POPCRU	78	78	51	12	1	220	62.678
PUBLIC SERVANTS ASSOCIATION OF SA	30	32	25	1	1	89	25.356
HOSPERSA/ INDEMNITY	1	2	0	1	0	4	1.1396
NEHAWU	3	1	7	0	0	11	3.1339
NUPSAW	2	6	0	0	0	8	2.2792
SAPU	0	2	0	0	0	2	0.5698
DENOSA	0	1	1	0	0	2	0.5698
NON UNION MEMBERS							
PSCBC (AGENCY SHOP AGREEMENT)	6	9	0	0	0	15	4.2735
TOTAL	120	131	84	14	2	351	99.999

The above statistics illustrate that more than 95% of the senior management in the Department belongs to trade unions. The same trade unions organise in the lower echelons of the workforce. This is a very abnormal situation. It can clearly lead to a situation where the trade union positions or tensions amongst them are

reflected in the manner in which the Department is being run. This in turn can lead to a dysfunctional management team.

The only way in which the management team could be cohesive and manage the Department with a single objective, which is to pursue the Department's strategic direction, would be for the senior managers not to belong to the same union as the workforce. Otherwise, at all times there could be a "secret trade union agenda" in the management of the Department. Even if management is not acting in accordance with the union's objective, it will be perceived from the outside that they do. Justice must not only be done but be seen to be done.

At common law, every employee owes the employer a duty of good faith, a duty to advance the interests of the employer, an obligation not to compete with the employer and a duty to maintain as private and confidential those matters of the employer that are private and confidential. If an employee breaches any of these duties, such an employee can be charged with misconduct.

It is apparent that there is some tension between employees' rights to freedom of association and their right to engage in collective bargaining on the one hand and the common law duties of employees on the other. Under the Labour Relations Act, senior managerial employees cannot be precluded from joining a trade union. As long as the employees fall within the bargaining unit, they can join trade unions. However, there can be different bargaining units based on the different interest of the employees.

While the Commission cannot challenge the right of managers to join trade unions since it is a right enshrined in the Constitution, the Commission is, however, of the view that it would be advisable and appropriate if managers were to join a separate union from that which organises within the lower ranks of the Department. As early as February 2000, it was recommended to the Department that there should be a separate Prison Heads Association. It was recommended:

“There should be a separate Prison Heads Association. This simple and inexpensive step could at a stroke reduce the unhealthy influence of POPCRU (or the perception of such influence) among prison heads and senior managers. It would also provide a much needed professional Association for senior managers. We believe those for whom it is intended would welcome the step.”²⁸

The current situation creates a conflict of interest. Management has to decide on a number of issues that affect the rights of workers in the lower ranks, and, accordingly, it is imperative that they act with impartiality if they are to further the interests of the Department.

Managerial employees, by virtue of their managerial position, are privy to information that is private and confidential to the employer, which, if disclosed to the union, would cause prejudice or even harm. Such employees are required, in the observation of their duties to their employer, to keep such information secret and confidential. This puts managerial employees who are members of a trade union in a very difficult position indeed.

In other organisations, senior management does not belong to trade unions but instead to staff associations, which negotiate and look after the interests of senior management. This approach should be given serious consideration within the Department. Some form of staff association should be formed to provide organised representation to senior members from the rank of director upwards to negotiate their terms and conditions of employment and rights within the Bargaining Council. The Bargaining Council could be the same as that of junior members, or it could be a separate one, to try and facilitate issues.

²⁸ See Management Audit of the Department of Correctional Services Final Report dated 18 February 2000, at page 2.

This is the trend in most organisations in the corporate or business world. It has also been found to be the trend within the democratic world in respect of certain categories of civil servants and supervisory and managerial employees.²⁹

In its aim to assist the Department to find a workable solution, the Commission considered it necessary to look at the practice in other countries.

5.1 The United Kingdom (Great Britain)

The Industrial Relations Act of 1971 introduced a statutory right for employees to belong to trade unions of their choice. This Act was subsequently repealed. Following its repeal, "individual legal rights were introduced to protect trade union membership and activity at the workplace".³⁰ There are four (4) ILO Conventions dealing with freedom of association.³¹

The government of the United Kingdom did, in 1984, impose a ban on membership of trade unions by employees who worked at the Government Communications Headquarters (GCHQ). The government justified this ban on the grounds of "national security". The courts in the United Kingdom decided that considerations of "national security" did indeed outweigh other considerations. However, the Labour Government had lifted the ban by 1997.

²⁹ Refer to Labour Law Regimes in Canada and the United States of America.

³⁰ Sweet & Maxwell, Employment Law, 7A – 102.

³¹ The ILO Conventions are the following:

- “(a) No. 87 on Freedom of Association and Protection of the Right to Organise 1948);*
- (b) No. 98 on the Right to Organise and Bargain Collectively (1949);*
- (c) No. 135 concerning Protection and Facilities to be Afforded to Workers’ Representatives in the Undertaking (1972); and*
- (d) No. 151 on Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (1978).”*

5.2 Canada

In Canada, categories of “public employees” do not enjoy protection under collective bargaining statutes. This is the result of a peculiarly Canadian legal framework in which the:

*"Crown by operation of rules of interpretation is not bound by legislation unless there is an express provision to the contrary in the statute. Legislative silence has by implication excluded public servants from the general scheme of collective bargaining in many jurisdictions. Express restrictions, however, have been necessary in order to exclude such groups of public employees as policemen, firemen and teachers from collective bargaining legislation. As a general rule, Municipal employees (other than firemen and policemen) are not excluded from the general collective bargaining legislation, nor are the faculties and staffs of universities. Even where public employees are not excluded (either expressly or implicitly) from general collective bargaining legislation, restrictions may be placed on the exercise of general collective bargaining rights (such as recourse to strike action) by separate and more specific legislation. The general pattern, however, has been to establish special collective bargaining regimes for public employees, reflecting a reluctance to extend fully the private sector collective bargaining model to the public sector. While public employee collective bargaining statutes vary from jurisdiction to jurisdiction, the dominant pattern has been some restriction of the right to strike and a significant limitation upon a range of bargainable issues".*³²

³² International Encyclopedia for Labour Law and Industrial Relations-ELL-Suppl.150 (July 1993) paragraph 490 at pages 214-215 in *Kluwer International* (2002) Blainpain, R. Ed.

It seems that the manner in which Canadian public employees are excluded from collective bargaining legislation or, alternatively, if they are included, then the manner in which the range of bargainable issues applicable to them is limited, is the result of the peculiar rule of interpretation in Canada as to the application of collective bargaining legislation to the Crown.

5.3 The United States of America (USA)

The National Labor Relations Act (NLRA) regulates collective labour relations and provides that employees have “the right to form, join, and assist in labor organisations of their own choosing, free of employer interference”³³. The NLRA statutorily excludes “supervisory” employees from its reach and therefore from the full enjoyment of all of these rights.³⁴ The US Supreme Court has upheld these rights, which include freedom of association, as constitutional.³⁵

The National Labor Relations Board (NLRB) is established under the NLRA as a dispute resolution body. Its powers include determining which employees fall within the bargaining unit that the trade union seeks to represent, recruit and organise. The NLRB, in exercising its right to make decisions on the proper construction of bargaining units, “narrowed the Act's coverage even further ... in addition to an explicit exclusion of supervisory employees, managerial employees have been implicitly excluded from the Act's coverage.”³⁶ This managerial exclusion, compared to the statutory supervisory exclusion, developed strictly as a result of the decisions of both the Supreme Court and the NLRB.³⁷ As a consequence of this implied exclusion, managerial employees are denied “the

³³ National Labor Relations (Wagner) Act, ch.372, 2(3), 49 Stat. at 450 (1935) (codified as amended at 29 U.S.C. 152(3) (1994)) as quoted in 48 *Catholic University Law Review* at page 557.

³⁴ *Ibid* note 43.

³⁵ 48 *Catholic University Law Review* 557 at page 2. See also 91 *Columbia Law Review*, 405 (1991), Ben M. Germana, 'Protecting Managerial Employees Under the National Labour Relations Act'.

³⁶ See Footnote 8 of the abovementioned *Catholic University Law Review*.

³⁷ See Footnote 9 of the abovementioned *Catholic University Law Review*.

right to self-organization ... [and] to bargain collectively through representatives of their own choosing".³⁸

The express exclusion of supervisory employees and the implied exclusion of managerial employees from the reach of the NLRA have not resulted in the NLRA, or in the decisions of the NLRB that prevent managerial employees from being in the same bargaining unit as more junior employees, being declared unconstitutional by the US Supreme Court.³⁹

In the matter of *National Labor Relations Board v. Bell Aerospace Co.*,⁴⁰ the Supreme Court defined managerial employees as employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."⁴¹ This test is similar to the approach adopted by the South African Labour Relations Act, No. 66 of 1995 in section 78(1) when dealing with "senior managerial employees".

The test adopted by the NLRB is important as employees who do not in fact "formulate and effectuate management policies by expressing and making operative the decisions of their employer", but are otherwise considered to be managerial employees, are not excluded from the full reach of the NLRA. Such employees cannot lawfully be prevented from joining a trade union of their choice, including one that has more junior employees as its members.

³⁸ *Ibid* note3

³⁹ *Ibid* note 5

⁴⁰ See 416 US at 289. (414 US 816, 94 S.Ct. 47 (Mem) 1973).

⁴¹ Bell Aerospace, 416 U.S. at page 289 as quoted in 48 *Catholic University Law Review* 557.

5.4 The South African Legal Framework

South Africa's legal framework is very different indeed. If a framework were to be developed to restrict or limit the right of senior managerial employees, as defined in section 78(1)(a) of the Act and on a test formulated by the US NLRB, then it would have to pass constitutional muster.

The Constitution of the Republic of South Africa in section 23 provides that every worker and every employer has the right to engage in collective bargaining. Section 23 of the Constitution further provides that every worker and every employer has the right to freedom of association. This right of freedom of association extends not only to joining a trade union but involves also forming a trade union, as well as participating in the lawful activities of the trade union. These rights in section 23 of the Constitution are echoed in sections 4 to 7 of the Labour Relations Act, No. 66 of 1995 (the Labour Relations Act). The Act itself provides some guidance on matters that would properly fall within the phrase "the lawful activities of a trade union", as defined in section 213 of the Labour Relations Act.

The lawful activities of a trade union include the principal purpose of regulating relations between employees and employers, as well as other purposes that are related to this principal purpose. Employees cannot, under the guise of being engaged in trade union activities, do that which is unlawful and wholly unrelated to the principal purpose of regulating relations between them and their employer.

When attempting to craft a framework to protect the interests of the employer during collective bargaining and, for this purpose, to limit the rights of senior managerial employees to join trade unions or to restrict their right to join trade unions to particular trade unions, at issue is the meaning of freedom of association in the Constitution and in sections 4 to 7 of the Act. Freedom of association is part of our common law, is regulated in legislation, and is also an

important part of the conventions of the International Labour Organisation (ILO) which have been adopted by the Republic of South Africa.

Our labour law is familiar with developing concepts for the construction of a bargaining unit from which a trade union may draw its members. The identification of a bargaining unit is largely driven by determining whether the employees have a shared “community of interests”. Such a shared “community of interests” does not ordinarily exist between “managerial” employees and more junior employees. Factors relevant to the identification of a shared “community of interests” include: functional integration in the enterprise, the correspondence of qualifications, skills and training, similarity of terms and conditions of employment, the supervisory and organisational structure of the enterprise.⁴²

The “national security” justification may not be so convincing to the Constitutional Court to pass constitutional muster. The Court has been confronted with that argument albeit in a different context. However, the Department could more defensibly propose that (senior) “managerial” employees do not have a shared “community of interests”⁴³ with more junior employees. The effect of this is that such (senior) “managerial” employees should not be in the same bargaining unit and therefore trade union as more junior employees. In the matter of *Mutual & Federal Insurance Co. Ltd v Banking, Insurance, Finance & Assurance Workers Union*⁴⁴, the employer formulated a bargaining structure that excluded managerial employees from the bargaining unit and put non-managerial employees into three separate bargaining units. The Court held that the evidence of the employer that its proposed bargaining structure was “rational and fair [and]

⁴² *Labour Relations Law: A Comprehensive Guide, 4th Edition*, du Toit et al at page 232.

⁴³ *SA Municipal Workers Union v Rand Water Board* (2001) 22 ILJ 1724 (ARB). On rationality in the construction of the bargaining unit see also *Mutual & Federal Insurance Co. Ltd v Banking, Insurance, Finance & Assurance Workers Union* (1996) 17 ILJ 241 (A) at pages 249 to 251.

⁴⁴ (1996) 17 ILJ 241 (A).

that it was formulated for sound commercial and administrative reasons and that it was designed to promote industrial peace" was not contested by the union.⁴⁵

Section 36 of the Constitution does allow the limitation of fundamental rights to the extent that the limitation is "reasonable and justifiable" on certain conditions. The issue of limitation or restriction of some of the Constitutional rights of employees for work discipline is not a foreign concept in South Africa. For example, in section 50 of The Defence Act No. 42 of 2002, some rights of the members of the South African National Defence Force have been limited. However, the Courts have found a total ban on union membership to be unconstitutional⁴⁶ and also contrary to the provisions of the International Labour Organisation Convention.⁴⁷

However, the Commission is of the view that the recommendation contained herein is distinguishable because it is not a total ban on union membership but merely a separation of membership. It should be properly negotiated in the Bargaining Council and then enforced.

5.5 The Rationale

The issue of trade unionism also has a major bearing on the manner in which negotiations on terms and conditions of employment are done, including the Disciplinary Code, which has been found by this Commission to have a number of weaknesses. The manner in which Disciplinary Inquiries are conducted within the Department leads to inquiries being compromised because all the people who are appearing before the Chairperson of a Disciplinary Inquiry, including the

⁴⁵ *Mutual & Federal Insurance Co. Ltd v Banking, Insurance, Finance & Assurance Workers Union* (1996) 17 ILJ 241 (A) at pages 249 to 251.

⁴⁶ See *SA National Defence Union and Another v Minister of Defence and Another* (1999) 20 ILJ 2265 (CC), and also *SA National Defence Union and Another v Minister of Defence and Another* (1999) 20 ILJ 229 (T).

⁴⁷ See Article 2 and 9(1) of the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 of the International Labour Organisation.

Chairperson, the Investigator and sometimes even the Initiator, belong to the same trade union. The will of the union, which might be strongly expressed through the employee's trade union representative, can be intimidating in one way or the other to the Chairperson and other people who are supposed to be acting impartially.⁴⁸

The issues of appointments and merit awards are also affected by this particular aspect as eventually those sitting on selection panels and moderating committees and deciding who should be appointed or be given a merit award are people who belong to the union.⁴⁹

The Commission is of the opinion that if all parties negotiating terms of employment and conditions are from the same union there is a conflict of interest. Nevertheless, the Commission is mindful of the fact that a conflict of interest in itself does not necessarily imply a resolution in favour of, or a personal advantage to one, but merely that a conflict exists, which could be resolved in one of several ways.⁵⁰ It is therefore important that the Department bear in mind that some view corruption as a particular method of resolving conflict whereby personal financial interests overcome or distort the exercise of an employee's public duties and responsibilities. This distortion, according to some legal scholars, may be seen as an incidental benefit that is gained. To put it differently, corruption is not an end in itself but simply an illegal way of achieving a particular outcome or effect.

It is therefore quite possible that the general public may perceive that the outcomes of bargaining certain rights and duties between the Department and employees would necessarily advantage one party, if both parties belong to the

⁴⁸ This aspect will be dealt in more detail in the Chapter dealing with Disciplinary Inquiries.

⁴⁹ This aspect will be dealt with in more detail in the Chapter dealing with Recruitment.

⁵⁰ See "Conflict of Interest: Ethical Dilemma in politics and administration" by Dr M.J.Mafunisa *South African Journal of Labour Relations* (Winter 2003) at page 12.

same group, and that the advantage would be at the cost of the Department and the general public.

Furthermore, where management belongs to a particular organisation, like a specific union, and promotion and merit awards are discussed, there is the likelihood that those managers will benefit their fellow union members. So even if they act with honesty and integrity, it will always be perceived as a conflict of interest by those belonging to another organization, and that the manager favoured his union members.

The Commission's views on this perception of a conflict of interest are informed by evidence, *inter alia*, that even though Mr Russell Ngubo had been on suspension at the Pietermaritzburg Management Area, he still received a merit award.⁵¹ In some quarters, it was regarded as a merit award given to him because the people who decided on merit awards belong to the same union as he. It could also be argued that this was done because of senior officials' fear of Mr Ngubo. However, the bottom line, in the Commission's view, is that he received an award under very suspicious circumstances and the issue of belonging to the same trade union, as a member of management, has a bearing on this issue.⁵²

Ultimately, such behaviour translates into corruption because the conduct is perceived as the gaining of an illegal advantage.⁵³

⁵¹ See Pietermaritzburg Exhibits 'L4' and 'L5' as discussed in the Recruitment Chapter.

⁵² It might even have a bearing on the issue of belonging to the same political party. That particular aspect cannot be excluded.

⁵³ See section 3 of the Prevention and Combating of Corrupt Activities Act No. 12 of 2004 that reads as follows:

"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

To act in the interest of the Department should be of paramount importance to every employee. The Commission is of the view that if managers and junior staff belong to the same union, it inhibits the eradication of corruption because it hampers the freedom with which members can report wrongdoing.

During the hearings, it became clear that members showed reluctance to report corruption because they feared reprisals. It is therefore important to create an environment that will nurture a culture of whistle-blowing. Members should then be made aware of the consequences should they not blow the whistle on corrupt colleagues. While it is accepted that the fear of reprisal is complex, it is not insurmountable. One way of addressing such fear is to create impartial managers, who are perceived to be impartial, and who would act against corrupt members. Another way, however, is to grant protection to those who blow the whistle by making use of the Protected Disclosures Act,⁵⁴ and to combat any intimidation through the use of the Act.

If the Department fails to create an environment in which members feel free to report to their seniors, then it will fail to combat and eradicate corruption.

-
- (b) *gives or agrees or offers to give 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 functions 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 unauthorized or improper inducement to do or not to do anything, is guilty of the offence of corruption.”*

⁵⁴

See Act 26 of 2000.

Having separate bodies to represent all will therefore mean that the interest of the Department and the Government will be protected at all levels. The adoption of the recommendations will depend largely on the manner in which the Department introduces the proposals to the members of the Bargaining Chamber.

5.6 Implementation

The issue of managers and staff belonging to the same union is one, which needs to be addressed by the Department. However, the main challenge for the Department is how to deal with this issue so that the Department does not contravene the provisions of the Labour Relations Act and the Constitution. Should the Department decide to follow the direction of separating the bargaining units of junior and senior members, it is imperative that it act in a constitutional manner.

The separation of managers from the bargaining unit of the more junior employees can be achieved through:

- (a) Agreement at the level of the relevant bargaining council in the public service;
- (b) Seeking such a determination from arbitration proceedings in the bargaining council;
- (c) Other means to achieve the result, including a legislative or regulatory intervention.

However, the last suggestion would be politically contentious and time consuming. The second proposal may not be conducive to good labour relations between the Department and the Unions. Thus, the first proposal is the recommended route.

In the interim, while negotiations are being undertaken in the Bargaining Chamber, the Department can expressly require that senior managerial employees keep secret certain categories of information such as, for example, information that would form the subject matter of negotiation between the parties over terms and conditions of employment. Such a senior employee can lawfully be required to recuse himself from discussions in which the secrecy of the employer's information will be compromised. If the employees do not give such an undertaking, alternatively if they breach the undertaking, then they can be disciplined for misconduct.

The Department should, through the contract of employment, regulate the relationship between it and senior managerial employees who are privy to or exposed to or receive, as a result of their work, secret and confidential financial information about the Department that would affect and inform the stance of the Department or the approach of the Department in collective bargaining and operational requirements matters. The Department should, in the contracts of employment of senior employees, provide for the following:

- a) A specific obligation to keep secret and confidential information that they are privy to or receive as a result of their senior managerial position;
- b) The manner in which this information is to be communicated to them or received by them;
- c) The manner in which such information is to be stored by them and communicated to others who might lawfully receive it;
- d) A closed list of persons to whom they can disclose such information;
- e) That employees who also hold executive positions in their trade unions will remain bound not to disclose such information to the trade union for any purpose.

6. CONCLUDING REMARKS

The issue of trade unionism is a serious matter, which needs to be approached by the Department with the urgency and sensitivity it deserves. Unless there is a clear division between those who purport to be managing the Department and those they are supposed to be managing, there will be ongoing unhappiness and discontent among the members of the workforce.

This view is supported by some senior managers, who feel they are hamstrung by the fact that some senior managers belong to trade unions.⁵⁵

In the light of the above, the only solution to this complex problem would be to consider a recommendation that will create a clear division between management and staff.

7. RECOMMENDATIONS

7.1 The Department needs to address the issue of union influence urgently. This matter can be regulated immediately at the level of the Bargaining Council. In this regard, the Department should table a draft resolution for adoption by the PSCBC and the General Public Service Sector Bargaining Council (GPSSBC) dealing specifically with senior managerial employees on the terms as set out hereinafter:

- a) Serious consideration should be given to encouraging senior managerial appointments to undertake that they will not join any trade union that organises for junior members of staff.

⁵⁵ See the evidence of Mr Modise in Randburg Transcript Volume 2 pages 159, 205 and 211 and Leeuwkop Exhibit 'A' and also the affidavit of Mr D.K.M. Baloyi (Head Office Exhibit 'T').

- b) The people who are currently employed in management positions should give an undertaking that in making management decisions, they are not being influenced or trying to drive the agenda of a trade union or any secret organisation. The interests of the Department should be paramount at all times.

- c) Resolution 8 of 1998 should be amended to specifically provide for the regulation of the fiduciary duty that senior managerial employees owe their employer, including the following matters:
 - (i) a very cautious or careful handling of confidential information that such an employee receives or is exposed to by virtue of his or her senior managerial position;
 - (ii) a positive obligation to keep such information secret;
 - (iii) a positive obligation to recuse himself or herself from discussions with the union to which such information might be relevant, either directly or indirectly.

7.2 The Department should seriously consider encouraging senior members of staff and the union to agree with the parties introducing a resolution to be debated in the PSCBC and the GPSSBC that:

- a) Members of staff who are in senior management positions have a different “community of interests” to the one shared by junior members of staff who are in non-management positions;
- b) Managerial employees from the position of Director upwards should be encouraged to belong to an association or union, which is different from the union which junior staff members join;

- c) To protect their constitutional right to collective bargaining, managerial employees should be encouraged to form a staff association or union, which junior members of staff may not join;
 - d) A separate bargaining unit should be formed for managerial employees.
- 7.3 The Department should propose that senior managerial employees who want to be union members and hold office in their trade unions be appointed by their trade unions as their negotiators, and that they, from time to time, go on special secondment for the specific purpose of conducting negotiations on behalf of their trade unions in the bargaining council.
- 7.4 In the event of an agreement not being reached on the abovementioned matters within thirty six (36) months of the commencement of negotiations, the Department should consider referring these issues to arbitration for determination and later to Labour Courts for adjudication.
- 7.5 The Department needs to investigate the issue of agency fees as against union subscription fees that employees must pay to ensure that they comply with the provisions of section 25(3)(b)(i) and (d) of the Labour Relations Act.

CHAPTER 4

GANGS

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CHAPTER 4

GANGS

1. INTRODUCTION

It became evident during the Commission's hearings that gangs are a very powerful force in the prisons that were investigated. Furthermore, it is apparent that corruption will never be eradicated in these institutions unless a better way is found to break the power gangs exert inside prisons and to control them.¹ It also became clear during the hearings that these gangs are responsible for continuous instability in the prisons. Not only do they make the lives of many inmates a living hell but they also play a significant part in the corruption of some Correctional Services officers. As one of the witnesses stated, gangs alleviate the "pains of imprisonment" for some and increase the "pains" for others.² Gangs thus present a complex challenge to the Department of Correctional Services and it is clear that their eradication should be a priority in order for the Department to restore stability and order in South African prisons. Clearly, success in dealing with this problem demands a creative and well thought-out intervention strategy on the part of the Department. The fact that prison gangs pose a threat to the orderly functioning of our prisons can no longer be ignored.³

¹ Also see Amanda Dissel, 'Tracking Transformation in South African Prisons, Track Two' (2002) Vol. 11 at http://ccrweb.uct.ac.za/archive/two/11_2/transformation.html accessed on 23 November 2004.

² Dr Willem Schurink. See Exhibit 'V' Expert Opinion on Prison Gangs presented to the Commission in Cape Town, 3 February 2003 at page 18.

³ The phenomenon of prison gangs operating through force, intimidation, secrecy and extreme loyalty to fellow gang members and dedication to their gang laws is worldwide. See P Kassel ("Gang crackdown in Massachusetts" prisons: Arbitrary and harsh treatment can only make matters worse – *New England Journal on Criminal and Civil Confinement Winter*, 1998 at page 37.)

In order to gain an understanding of the different gangs and their power structure, it is necessary to examine the culture of gangs, their history and development. An evaluation of South African gangs, however, has its own difficulties due to the somewhat mythical origin of gangs. Questions regarding how and when gangs emerged in our prisons elicit varying answers.⁴

In some of the prisons the Commission investigated, it was suggested that gangs are in fact running the prisons. It has also been argued that, as conditions in prisons deteriorate because of overcrowding, gangs get stronger, which makes the penal system less effective. Questions have been raised regarding the adequacy of rehabilitation in correctional facilities and the fact that the presence of gangs impacts on the penal system, making it more costly to run⁵ and tying up resources that could be made available for rehabilitation programmes.

One witness who testified before the Commission said the following regarding rehabilitation:

*“The court sent me to rehabilitation but I never received any form of rehabilitation in prison. Just because of the existence of gangsters and where gangsters exist, there is a corrupt official and the two combine, there is no form of any rehabilitation.”*⁶

With the new dispensation in South Africa, the government has attempted to incorporate human rights values and international principles in the provision of

⁴ Jonny Steinberg, *Nongoloza’s Children: Western Cape prison gangs during and after apartheid* (2004) at page 4.

⁵ Jonny Steinberg cited in the ‘The Prison Catch-22’, editorial *Cape Argus*, 22 November 2004 at page 17.

⁶ See the evidence of Marius Engelbrecht, Commission Proceedings at Bloemfontein High Court, dated 28 June 2002, at page 736 of the record.

correctional services⁷ and one of the initiatives that set out to accomplish this goal was the drafting and implementation of the new Correctional Services Act⁸ in 1998.

The Act is committed to three goals:

- Enforcing the sentence of the court in a manner prescribed by the Correctional Services Act;
- Detaining all people in safe custody whilst ensuring their safety;
- Promoting the social responsibility and human development of all prisoners.

The safety of prisoners has been defined widely to include all aspects of the authorities' general duty to do everything required to preserve the physical and mental integrity of prisoners in their charge.⁹ The balance between the safety of prisoners and their rehabilitation is, however, almost non-existent in the state-run correctional facilities.

Our courts have also remarked on the state of the Department of Correctional Services and, in particular, the influence of gangs in our prisons. In *S v Mark and Another*,¹⁰ where a prisoner was killed while being transported with thirteen (13) other prisoners in a Department vehicle en route from Pollsmoor to three (3) other prisons, Davis J said:

"... it was an inescapable fact that had a warder been positioned in the separate observation compartment of the truck during the journey, the

⁷ Amanda Dissel & Stephen Ellis, 'Reform and Stasis: Transformation in South African Prisons' published in 'Ambitions reformatrices et inertie du social dans les prisons sud-africaines', *Critique Internationale* No 16 July 2002.

⁸ Correctional Services Act, No. 111 of 1998.

⁹ Dirk van Zyl Smit, *South African Prison Law and Practice* (1992) Butterworths, at page 187.

¹⁰ *S v Mark and Another* 2001 (1) SACR 572 (C).

murder could have been prevented. There was tremendous pressure on the Department of Correctional Services because of the escalation of crime and the evidence confirmed that gangs effectively ran prisons. They made a mockery of any objective of rehabilitation and perpetrated an even greater crime wave. Without addressing and solving the problems of prison gangs, prisons would remain the best guarantee of continued crime at the level and intensity, which is currently experienced. The Department of Correctional Services needed to develop and publicise a coherent strategy as to how it proposed to deal with these problems.”

One senior gang member informed the Commission that the day-to-day life of prisoners is currently one of drugs, gangsterism and corruption.¹¹ He stated that regardless of the time and the offence, an accused:

“... gets thrown into prison with hardened criminals, with drugs and corruption, he takes it as part of life. When he is released he is hardened because he has been raped, influenced by gang members and by corrupt officials.”¹²

The evidence above describing the experiences of life in South African prisons indicates that the existence and the continued functioning of prison gangs hampers the effective implementation of the goals of the Department in adhering to human rights principles enshrined in the Constitution.

Other commissions that have conducted investigations into the Department have come to the same conclusion. The South African Human Rights Commission, for example, in its investigation on the state of South African prisons, stated that they had become places where people are at risk of contracting HIV/Aids due to

¹¹ See evidence of Marius Engelbrecht, Commission proceedings, at Bloemfontein High Court, dated 28 June 2002 at page 735.

¹² See evidence of Marius Engelbrecht, Commission proceedings, at Bloemfontein High Court, dated 28 June 2002 at page 741.

prison rapes and sexual abuse.¹³ It recommended that the Department develop a clear policy to deal with these prison conditions and the safety and security of inmates.¹⁴ In fact, one of the recommendations is that the manner in which gangsterism flourishes in prisons should be investigated through targeted research and active intervention.¹⁵

As pointed out earlier in this Chapter, no meaningful recommendation can be made by this Commission to combat gangsterism unless the culture of gangs is critically analysed and reviewed. All the information – documentary or otherwise – that was presented to the Commission must be reviewed and considered, along with scholarly opinions on the topic, in order to make informed recommendations regarding this challenge facing the Department.

2. THE CULTURE OF PRISON GANGS

Dr Willem Johannes Schurink, who has done research into prisons, stated in his evidence before the Commission that there are two basic theoretical perspectives on patterns of response to imprisonment.¹⁶ According to him, these perspectives can be classified as the diffusionist/importation theory and functional/deprivation theory.¹⁷

The diffusionist theory, according to Dr Schurink, considers prisoner culture as consisting of three sub-cultures: a prisoner sub-culture; a criminal or thief sub-

¹³ South Africa Human Rights Commission, The National Prisons Project 1998, http://www.sahrc.org.za/prisons_reportPDF accessed on 22 November 2004.

¹⁴ South African Human Rights Commission, 'Prisoners Rights' at www.sahrc.org.za/chapter_10.PDF accessed on 26 November 2004. Also see Chapter on sexual violence for a more detailed discussion of abuses at the hands of gangs.

¹⁵ *Op cit* at 37.

¹⁶ See Evidence of Dr Schurink, Exhibit 'V' Cape Town hearings, 3 February 2003 at page 27.

¹⁷ See Dr Schurink *ibid*.

culture and a legitimate or conventional system. In short, these theorists see prison culture as a “latent culture” with outside roots.¹⁸

The deprivation theorists, on the other hand, argue that the inherent degradation of life in security institutions ensures the spread or the continued survival of gangs in prisons.¹⁹ These theorists argue that when in prison, one is robbed of the meaningful exercise of one’s agency such as the normal life of raising children, forging a career or being in control of the simple things humans do by themselves such as washing, using the telephone and deciding when to eat and rest.²⁰

Thus, within the prison walls, the concepts of individual dignity and self-worth do not apply as incarceration restricts the existence of the inmate to the institutional environment.²¹ It is argued that the very nature of institutions leads to the stripping or the “mortification” of the inmates, leading the inmate to either “bind himself to fellow captives with ties of mutual aid, loyalty, affection and respect, or enter into a war of all against all in which he seeks his own advantage without reference to the claims or needs of other prisoners”.²²

American studies have held that prison is an institution where inmates evolve through the prisonisation process that is more about defining behaviour

¹⁸ For a more detailed discussion of all the theories presented to the Commission, see proceedings at Cape Town Exhibit ‘V’ at pages 27-29.

¹⁹ These theorists include Erving Goffman and Gresham Sykes as cited in Steinberg *Nongoloza’s Children* at pages 18-19.

²⁰ Goffman cited in Steinberg at page 18. Theorists such as Sykes (1970), Irwin (1980) and Clemmer (1958) also share this perspective and believe that prisoner subculture is largely a response to conditions within prison. They also argue that since the environment to which prisoners have to adapt is unique, the resulting functionally integrated social system is also unique. This school (save for Goffman, who acknowledges that inmates bring in a culture) has been criticised for ignoring the cultural and behavioural patterns outside prisons that may influence prisoner subculture.

²¹ Fox V: ‘The politics of prison management’ *Prison Journal* 1984 cited in S. Fortune ‘Inmate and Prison Gang Leadership’ at page 33 accessed at <http://etd-submit.etsu.edu/etd/theses/available/etd-1103103-220112/unrestricted/FortuneS112503f.pdf> on 26 November 2004.

²² *Ibid.*

acceptable to fellow inmates than behaviour to please the staff.²³ However, it cannot be ignored that, in general, the socialisation process into prison culture depends upon the time served by prisoners. One theorist, for example, found that the prisoners either entering the penal system or getting ready to leave the penal system conformed more to the staff role expectations than did the inmates serving longer sentences who had been incarcerated for several years and were not leaving the correctional system.²⁴ As individuality and autonomy are stripped away by imprisonment, the prisoner begins to achieve status from his peers in another way. In gang culture, this status is determined and obtained mostly through competence and knowledge of the gang and also through acts of violence in the fighting line.²⁵

Gang codes provide individual gang members with a well-defined set of norms. Thus, the number gangs must, if the need arises, resist the authorities and work towards better conditions in prison. The gangs provide the individual gang members with goals and the military structure of the gangs ensures that each has his role to play and furthers the cause of the gang. The gangs also provide a form of welfare over and above protection from victimisation. Those who retire continue to be entitled to the privileges and respect of the gang. Thus, gangs alleviate some of the pains of imprisonment such as idleness, boredom, institutionalisation, powerlessness, the deprivation of goods and services and even sexual frustration.²⁶ Added to this, gangs also offer status, recognition and respect in a place where men are often belittled.²⁷

²³ Gaines L. K., Kaune M. & Miller R. L. *Criminal Justice: In Action* (2000) cited in S Fortune, 'Inmate and prison gang leadership' at page 29.

²⁴ S.Wheeler, *Socialization in Correctional Communities* (1961) cited in S Fortune *supra* n 21 at page 30.

²⁵ Nicholas Haysom, 'Towards an understanding of Prison gangs', (1981), Institute of Criminology:
Social Justice Resource Project, University of Cape Town paragraph 10 at <http://web.uct.ac.za/depts/sjrp/publicat/prisgang.htm> accessed on 22 November 2004.

²⁶ J.M. Lotter, 'Prison gangs in South Africa: A description', *South African Journal of Sociology* (1988) 19 (2) at page 71.

²⁷ Both members and fellow prisoners belittle them. Thus, there is a need for a system in treating prisoners with humanity.

Given that inmates, in general, become gang members for some of the reasons outlined above, it is essential to look at the South African experience and the factors that make our prisons breeding grounds for continued criminality rather than places of rehabilitation. In order to do this, it is essential to explore the origins and the nature of South African gang activity.

Right at the outset it has to be stated and accepted that the phenomenon of prison gangs is not unique to South Africa. What is unique are the differences in context and history of our prison gangs, requiring that one take particular notice of the context in order to find practical solutions in stripping the gangs of their power. The ease with which gangsterism survives and flourishes in prison should be investigated through proper research before a strategy in combating gangsterism is decided upon.

3. THE HISTORICAL ORIGINS OF SOUTH AFRICAN PRISON GANGS

Analysing all the evidence and the scholarly writings on prison gangs, it can be said that, on the whole, there seems to be consensus that prison gangs did not originate in prisons but rather developed from a gang culture that already existed on the outside, namely from a gang of thieves who operated in the early days of the developing Transvaal mining towns.²⁸ The details of the origins of the various gangs remain suspended between fact and myth, with historians differing on how exactly gang culture developed. Common to all the various theories and studies, however, is the name of one man known as Nongoloza (born Mzuzephi Mathebula).²⁹

²⁸ Nicholas Haysom, 'Towards an understanding of prison gangs', (1981) Institute of Criminology: Social Justice Resource Project, University of Cape Town at paragraph 12.

²⁹ Jonny Steinberg, *Nongoloza's Children* at page 8.

Jonny Steinberg states that oral legend has it that the origins of gangs can be traced to a number of black bandits known as “the Ninevites” who left their ancestral land to go to Johannesburg. They roamed the growing city, robbing mine owners and workers after refusing to take up wage employment for white bosses.³⁰ However, some gangs, especially the 26s, argue that it all started with a man called Paul Mombasa, who robbed people for a living as early as 1830 and who was later joined by two men, Kilikijane and Nongoloza.³¹

According to the myth, Nongoloza and Kilikijane were leaders of different groups of bandits. Nongoloza operated at night while Kilikijane worked during the day. It is argued that at some point Nongoloza became the leader of this infamous gang and soon organised it into a paramilitary hierarchy, making it one of the largest and most memorable gangs. Some gang members allege that, as other men joined the original members, their aim became both political and economic as they only robbed from white men who oppressed their people.³² However, from the reports of black victims, it became apparent that these men were robbing both black and white men, especially in the budding migrant towns.³³

With Nongoloza becoming leader of the band and organising it along paramilitary lines, the Ninevites became a formidable organisation that perfected the art of trickery, stealing and robbery.³⁴ Many of the Ninevites were incarcerated, including Nongoloza, who made it his mission to command the loyalty of the Ninevites in prison and in the compounds in the Witwatersrand and in the adjacent Transvaal towns.

Nongoloza was known to have sexual relations with other men, of which the Kilikijane band did not approve, and this led to the splitting of the Ninevites into

³⁰ Jonny Steinberg, *ibid.*

³¹ See Evidence Exhibit ‘U’ Commission Hearings at Cape Town at paragraph 20.

³² See Evidence Exhibit ‘U’ at paragraph 20.

³³ See Exhibit ‘V’, Cape Town hearings at 10.

³⁴ Jonny Steinberg *Nongoloza’s Children* at 10.

the 27s and the 28s.³⁵ It is said that unlike these two gangs, the 26s originated from inside prison when Kilikijane was in isolation and a group of smugglers slipped salt and bread into his cell via a crack beneath his door.³⁶

Tracing the origins of the different gangs helps us understand the type of crimes they are often associated with and their rules or codes of conduct. Thus, in the early 1900s, three (3) camps were formed: the 26s to accumulate wealth, the 27s to be the creators of gang law, keeping the peace, exacting revenge and spilling blood while the 28s were to fight for better living conditions for the inmates.³⁷

4. PRISON GANGS AND THEIR IDENTITY

Although the origins of gangs may be clouded in a combination of myth and reality, the current functioning of gangs is very real in South African prisons. The Commission has explored the functioning of some of the most prominent and dangerous of prison gangs through scholarly writings, through the testimony of the gang members who appeared before us and through evidence that was tendered before the Commission. This analysis will consider the infamous “number gangs” and some of the other smaller, yet forceful, gang associations in South African prisons.

From the outset it must be understood that gang culture is complex and does not exist in a vacuum. It is an inescapable fact that various socio-political and economic occurrences outside prison have had an influence on the situation inside prison. Prisoners become gang members for various reasons and understanding these reasons may be helpful in the search for effective solutions to the prison gang problem.

³⁵ See Commission Proceedings, evidence of Dr Shurink, Cape Town, dated 4 February 2003 at 1497 of the record.

³⁶ Jonny Steinberg *Nongoloza's Children* at page 14.

³⁷ Jonny Steinberg *Nongoloza's Children* at page 15.

Before analysing the different gangs, it should be pointed out, however, that although non-members often have to co-operate with gangs in various ways for their own survival, this does not mean that all prisoners are gang members.³⁸ In theory, however, there can be no denying that the confinement of inmates in overcrowded cells not only represents fertile ground for gangs to flourish but places enormous power in the hands of gang hierarchies in the way that they are then at liberty to use their various means to recruit intimidated non-members.

4.1 The “Number” Gangs³⁹

The so-called “number” gangs consist of three (3) tightly organised gang networks known as the 26s, 27s and 28s, who by far pose the most formidable challenge to the Department in its quest to eradicate gangsterism from our prisons.

Most of the witnesses who testified regarding the role of gangs and their violence referred to the number gangs. There is, therefore, no doubt that they are mostly responsible for the disruption, corruption and violence inside our prisons. To understand the gravity of the problem, it is important to understand the groupings that exist, their functions and their *modus operandi* in prison. What follows is a brief summary of some of the important facts about each gang and its status in prison:

³⁸ Human Rights Watch, South Africa Report (1994): Gangs and Violence at www.hrw.org/reports/1994/southafrica/8.htm accessed on 23 November 2004. Inmates testified as to how gangs may deprive non-members of all their personal belongings or deny them access to privileges and one told of how he had to ‘buy’ the right to a bed from gang leaders in the cell.

³⁹ See Amon Hlongwane, ‘Gang Conflict in Prison’ in ‘Excerpts from Research Documents on Prison Gangs, Community Gangs and Prison Violence’.

The 28s:

This gang is the direct descendant from the Ninevites and is said to be the strongest of all the number gangs. The main objectives of this gang are centred on food, boy-wives and correcting the wrongs of the institution.⁴⁰ Like all prison gangs, the 28s claim that membership is voluntary and that they will not recruit inmates already belonging to other gangs. Young gang members are classified as probations [boy-wives] and the older gang members are the soldiers.⁴¹ The senior officers of the gang are allocated their own boy-wives while the other gang members can have sexual relations with the probations of the gang. Promotion is based on knowledge of the codes of the gang and brave deeds.

When the 28s gang members are not satisfied with the quality and quantity of food served to them, they assault the cooks of the prisons. On the day that 28s are to assault cooks, they inform all the other gangs except the Big 5, a non-number gang whose members operate as informers in prisons. The Big 5 are obviously excluded because they can expose the secrets to the members of the Correctional Services.

The 27s:

Prison legend states that the 27s were established by a group of seven (7) defectors because of abhorrence at Nongoloza's practice of taking "wyfies" in his gang.⁴² Although this gang had considerable force in the early days, they have

⁴⁰ It is also argued that rape is the prerogative of the 28s because they subscribe to mutual sodomy and rape of those unprotected by a gang member. See "Collect your Blood", *The Witness*, 4 February 2005.

⁴¹ *Ibid.*

⁴² J.M. Lotter 'Prison gangs in South Africa: A description'; *South African Journal of Sociology*, 1988 at page 69. The author, however, argues that despite legend it is probable

become almost non-existent in most prisons.⁴³ Their objective was to keep peace between the three camps. They would learn and retain the laws of all three (3) gangs, as well as the laws of the relationships between the gangs. They would right wrongs by exacting revenge and when blood was spilt, they would spill blood in return.

The 26s:

Since its formation, this gang has been represented by the Kroon (crown), which is meant to bring wealth. Members live luxurious lives, maintained by robbing other prisoners of money and dagga and by smuggling items of value into prison.⁴⁴ Conversations with Correctional Services staff, save for complaints and requests, are prohibited unless permission is requested. Members cannot resign from this gang, and when they retire they cannot join another gang. Sexual relations with gang members are prohibited.⁴⁵

The number gangs are thus primarily distinguished from each other by specified goals, which must be respected by the others. For two of the gangs, their different functions are also determined by their traditional hours of operation: the 28s are men of the night symbolised by the sunset, while the 26s work by day and are not allowed to take blood after sunset, except in self-defence. Their symbol is the sunrise.⁴⁶ Despite these differences, the number gangs perform certain common functions for their members. The most important of these are the following:

that the 27s formed inside prison and might have been the 'Scotland' gang of the early 20th century spoken of in the Department of Prisons 1912 report.

⁴³ However, in the Western Cape where the gangs have continued to operate effectively, the 27s continue to thrive in prison culture.

⁴⁴ See "Collect your Blood", *Witness* 4 February 2005, where it is suggested that thieving could well be the motto of the 26s".

⁴⁵ See Steinberg *Nongoloza's Children* at 15 and J.M. Lotter, 'Prison gangs in South Africa: A description' at page 71.

⁴⁶ See Exhibit 'V' Expert Opinion, Dr Willem Schurink at Cape Town dated 3 February 2003 at page 14.

- Training: This consists of acquiring knowledge, skills and equipment in order for members to adapt to their prescribed roles and to move upward in the gang.
- Security: Gangs see to it that members are protected against any external danger. Members are prepared to defend their territories with their lives and die if necessary for the gang/brotherhood. Many of the inmates will join the first group that promises security.
- Fulfilment of physical, psychological and social needs: Number gangs strive to attain favourable positions in prison in order to acquire and store sought-after articles such as food, tobacco, drugs and liquor. The gangs also provide camaraderie, status and protection and, in the case of 28s, sexual outlets are also provided.⁴⁷
- Recruitment: Although prison authorities discourage gang formation, gangs still succeed in recruiting newcomers through entrapment or other forms of coercion to enrol inmates with sought-after qualities.⁴⁸ In an interview with the SABC, a prisoner from the Eastern Cape Middledrift Maximum Security Prison stated, “not belonging to a gang makes a prisoner an easy target for beatings and stabbings...but there are those who have found another way...”⁴⁹

⁴⁷ *Ibid* at page 15.

⁴⁸ Haysom (1981) at page 30 notes that although membership is voluntary in theory, the circumstances of prison life play a role in participation where inmates may join gangs either because they are raped and reduced to wives or because they join to escape this fate.

⁴⁹ Special Assignment ‘Art of Survival’ broadcast script, SABC 3, November 2004.

4.2 Non-Number Gangs

The Big 5:

This gang originated from the Torch Commando of the 1940s in Cinderella Prison. In the 1950s, their main objective was to aid escapes but when their leader, Masondo, was killed in an escape attempt, the gang decided to work with members of the Correctional Services. Members of this gang break down solidarity, which can be regarded as the cornerstone of the prison code.⁵⁰ The Big 5s also wear good-quality shoes called ganders with which they can sometimes deliver a lethal blow.

Airforce:

The main objective of this gang is to escape from prison.⁵¹ Members of this gang hold that, unlike some of the other gangs, membership is voluntary. Although they claim that they attempt escapes mostly due to ill treatment, they seem simply to make use of available opportunities.⁵² The Commission was made aware of the fact that one of their *modus operandi* is to start a fight between two gangs when they are plotting an escape in order to distract the warders.⁵³

Homosexual relationships within this gang are prohibited. The only communication with Correctional Services members is restricted to complaints or requests, as they fear that discussion may lead to exposure of gang secrets.

⁵⁰ See the evidence of Dr W. Schurink, also Exhibit V at page 17.

⁵¹ See the evidence of Mr Mohale, Gauteng hearings dated 25 October 2003.

⁵² In the words of another prisoner, “The RAF chaps are dedicated to escape. All else is subservient to getting out and rank is accorded to those who have tried once or more to do so. I know a bloke here who has tried and, because he is still here, failed nine times”. That would make him a RAF4, which is the highest ranking in the “Air Force”. (See “Collect your Blood”, *The Witness* 4 February 2005).

⁵³ See Gauteng hearings dated 25 October 2003. Mr Mohale, a Big 5 gang member, stated the role and workings of the Airforce gang when he testified before the Commission.

Promotion within the gang depends on seniority and the number of times an inmate has escaped from prison.⁵⁴

It is the view of some that a common factor among the gangs is that their codes are followed strictly and that membership is for life.⁵⁵ In one incident, a cleaner in Pollsmoor, who had been a gang leader of the 28s and was now working with the unit manager informing him of potentially dangerous situations, was stabbed by inmates who viewed him as a “sell-out who needed to be silenced”.⁵⁶ However, if one closely considers the current operation of prison gangs, especially the number gangs, it is apparent that aspects of previously differentiated members of each gang are increasingly being practised by all the gangs. For example, trickery and sexual relations among inmates are no longer the preserve of either the 26s or the 28s.

4.3 Street Gangs and Prison Gangs

It has been noted that in certain provinces, such as the Western Cape, where gang activity is rife both on the streets and in prison, there seems to be a relationship between the street gangs and the prison gangs. In one investigation, researchers found that a majority of the inmates in Pollsmoor prison between the ages of twenty one (21) and forty (40) belonged to a gang before they were imprisoned.⁵⁷ Based on this research, it can be said that these street-gang and prison-gang affiliations could be responsible for the continued existence of gangs in prison. Prison gangs, like street gangs, have developed a culture that glorifies

⁵⁴ Amon Hlongwane, ‘Gang Conflict in Prisons’.

⁵⁵ Zeldia Venter, ‘Just get it over with and give me my life’ *Independent Online*, 19 November 2002 at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw103770702145B216 accessed on 26 November 2004.

⁵⁶ Correctional Services Portfolio Committee, Department of Regional Commissioners; Briefings 27 August 2004 at <http://www.png.org.za/docs/2004/viewminute.php?id=4372> accessed on 22 November 2004.

⁵⁷ Joanna Flanders Thomas, ‘Gangsterism in Prisons: Correctional Services Portfolio Committee Briefing by Centre For Conflict Resolution’ 12 June 2001 at www.pmg.org.za/docs/2001/viewminute.php?id=684 accessed on 26 November 2004.

the ideal of belonging to a gang and being respected on the merit of violence and disregard for the law.⁵⁸

Research has also shown that an unusual phenomenon began to evolve, especially in the Western Cape, where street gangs such as the “Scorpions” and the “Born Free Kids” began to take on the metaphors, nomenclature and logic of the prison gangs. In the 1990s, the “Americans” and “The Firm” – both gangs operating outside prison – had in a wholesale manner adopted the number gang rituals. This was as a result of many of the prison gang members recruiting others after they were released from prison. This development did not find favour amongst the gang members inside prison because those recruiting on the outside did not hold senior rank in prison gangs, and thus did not have the authority to initiate people on the outside. At first, all such outside recruits were beaten and ostracised when they came to prison. Later, however, when outsiders like Jackie Lonti became wealthy, the situation changed.⁵⁹

This collaboration between prison gangs and street gangs is more prevalent and apparent in the Western Cape, where both prison and street gangs pose a great challenge to the police services of the country. This collaboration also creates an extremely difficult environment for prison warders to work under and impacts on the Department’s rehabilitation programmes and the intentions of those inmates who are ready to change their lives.⁶⁰

The existence of this undesirable collaboration is further reinforced by a recent study that found that members of the powerful 28s gang were running a street gang called “The Firm”, while members of the “Americans” gang began to

⁵⁸ Department of Community Safety, Provincial Gang Strategy, April 2003 at page 3. The report notes that group identity, self-protection, pride and boredom play a role in luring young men into gangs.

⁵⁹ Steinberg, *Nongoloza’s Children* at page 58.

⁶⁰ See Briefings 27 August 2004 of the Correctional Services Portfolio Committee and the submissions of the Department Regional Commissioners; at <http://www.pmg.org.za/docs/2004/viewminute.php?id=4372> accessed on 22 November 2004.

introduce mandrax into prisons.⁶¹ This gang was linked to the 26s, along with a number of other Western Cape street gangs, such as “The Naughty Boys”.⁶²

Given the continuous movement of prisoners into and out of prison, it is clear that there will always be a continuous revolving door of gang influence entering and leaving our prisons. Gang associations formed outside prison will continue inside and *vice versa*. With gangs exerting such a level of influence, it is unlikely that rehabilitation will take place in prison. The reality is that most prisoners will have become more hardened criminals by the time they are released and that the skills that they acquired during their imprisonment will return them to a life of crime on the outside.

The relationship between prison gangs and street gangs also appears to be important when it comes to meting out punishment on gang members and non-gang members who either breach codes or are a threat to the proper functioning of the gangs.

In his testimony regarding the safety of the Grootvlei informers, one inmate told the Commission the following:

*“... they will be relatively safe obviously outside as inside (alluding to the fact that the ‘number gangs’ could get them even if they were released from prison.)”*⁶³

⁶¹ Kinnes-Steinberg (2000) cited in Schurink ‘The world of Wetslaners: an analysis of some organisational features in South African Prisons’ at page 20. See also Joseph Aranes and Yunus Kemp, ‘Gangsters will fall and they will fall hard’ *The Cape Argus* 22 October 2003 at page 1 - the article gives a list of street gang members and their prison gang affiliations.

⁶² Norman Joseph, ‘Gang Boss gets triple life for Naughty murders’, *The Cape Argus*, 25 March 2003 at page 7, discussing the Cape High Court trial of Calvin ‘Gong’ Louw, a well-known 28s gang leader.

⁶³ Marius Engelbrecht, record of proceedings Jali Commission of Inquiry, Bloemfontein High Court 28 June 2002 at page 743.

5. CORRECTIONAL SERVICES MEMBERS

The Commission has found that members often took bribes to turn a blind eye to sexual abuse, gang violence and thefts taking place in prison. In some cases, members of the Department acted as the “pimps” of the awaiting trial prisoners, who were sold to the older prisoners.

There was also ample evidence of correctional services officials assaulting inmates and depriving them of their most basic liberties.⁶⁴ One of the prisoners told the Commission how he was repeatedly sexually abused in prison, by not only the gang members but also by correctional services officials, the very custodians entrusted to ensure his safety.⁶⁵ One twenty (20) year old told the Commission how both inmates and warders repeatedly sodomised him.⁶⁶ The same inmate testified that warders gave him over to other inmates and that one of the warders, who abused him and wanted him to be his ‘baby’, gave him dagga and toiletries.⁶⁷

The involvement of some correctional officials in supporting and/or neglecting the occurrence and furtherance of criminal activity inside prisons relating to gangs therefore has to be explored. The Commission has heard evidence that some members are known gang members and have tattoos that prove their membership.⁶⁸ According to a former inmate, prison warders are also involved in gang activities, and gang members actively recruit prison warders as a way of increasing their power. For example, if a member of the 28s wishes to obtain a

⁶⁴ See the evidence of Marius Engelbrecht, Commission proceedings, Bloemfontein High Court, dated 28 June 2002 at page 744. An earlier account that supports this submission is where a group of warders formed a vigilante group in 1999 called the Bavarians, who went on a spree of killing gangsters in the Western Cape – ‘Warders in Dock for Killing Gangsters’ *The Cape Argus* 27 March 2003.

⁶⁵ See the evidence of Louisa Karp, Pretoria Exhibit ‘TT1’. For a more detailed account of the incidents see the Chapter on Sexual Violence.

⁶⁶ See the evidence of Wilson Mohodi – Commission’s Fifth Interim Report.

⁶⁷ *Ibid.*

⁶⁸ See hearings of Leeuwkop Prison, Transcript at page 2605.

specific prisoner as a “wife”, he may succeed in having the targeted prisoner transferred to his cell by gaining the complicity of a recruited warder. It has also been reported that warders not only facilitate but also engage in sexual activities as part of their membership of a gang.⁶⁹

Warders’ involvement with either the 26s or 28s can also extend to the smuggling of food, weapons, cigarettes, drugs, and other items as well as prostitution of juveniles to other prisoners.⁷⁰ Warder involvement is especially rife where the Big 5 gang is involved. The Big 5 gang, like the 28s, participates in sodomy and is heavily responsible for much of the pimping that occurs in prisons.⁷¹

Prison officials also play an important role in most of the escape attempts by prisoners. One former inmate told the Commission about how warders got involved in such escape schemes because of the potential financial gain that could result from the escapes.

The Commission is alive to the fact that gangs will continue to operate even in instances where there are no corrupt prison officials, yet prisoners have acknowledged that the absence of corrupt officials would be a positive step towards dealing with prison gangs.⁷² One should therefore not lose sight of the fact that honest members of the Department who do not collude with the prisoners are extremely vulnerable to actions of prison gangs. In many cases, these custodians of the safety and wellbeing of inmates are themselves often the targets of initiation ceremonies, attacks to secure promotion and random assaults from gang members. The Department will fail its members if they are not made aware of their vulnerability in being targeted by gang members.

⁶⁹ See the evidence of Louisa Karp, Pretoria hearings Exhibit ‘TT1’.

⁷⁰ ‘Prison gang sentences video makers to death’ at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1025281801279B216 28 June 2002 accessed on 23 November 2004. Relating the testimony of Engelbrecht.

⁷¹ Sasha Gear and Kindiza Ngubeni *Daai Ding* at page 13.

⁷² See Evidence of Marius Engelbrecht *ibid* at 744. Also see Fana Peete, ‘Prison Boss encouraged culture of abuse’ *Pretoria News*, 21 April 2004, at page 4.

The Commission has also heard evidence that clearly demonstrates that even if prison officials are not knowingly co-operating with the gangs, they are most certainly, through their conduct, unknowingly improving the image of the gangs and the fact that they are in charge of prisons.

The Commission will use the example that Mr David Nkuna gave during the Leeuwkop hearings. Mr Nkuna said he was asked about gangsterism in Leeuwkop and that he thought the issue of gangsterism in Leeuwkop Maximum Prison was severe in that the “26” gang members were humiliating other prisoners attempting to rehabilitate themselves. He then complained about this humiliation to the officials at Leeuwkop. Shortly after his complaint, gang members threatened him saying he had “*de-characterised*” them in public by talking about them and by disclosing their sodomy activities to the authorities.

In Mr Nkuna’s own words, “*Nkuna you must be very, very careful. Tomorrow morning is the end of your life, you’ll die. Members of the ‘26’ gang are planning to come to stab you inside your cell.*”⁷³ Mr Nkuna testified that after this threat, he went to the Head of the Section where he indeed informed him of the threats and the way that the Head of the Section dealt with it was to remove Mr Nkuna from the cell and to put him and another prisoner, who was also threatened, in isolation. This conduct by Departmental officials clearly shows that they do not understand the power struggle of gangs in the prison. They also do not know how to handle gangs who make such threats or how to show the rest of the prisoners that they are in control of the prison and that they will deal with those offending gang members severely.

The case of Mr David Nkuna and Mr Kubheka shows that the officials lack insight into the dynamics of gangsterism and perpetuate gangsterism through their ignorance.

⁷³ See the Transcript of Leeuwkop proceedings, page 2 718.

6. GANGS AND SEXUAL ABUSE

Gangs, and in particular the so-called “number” gangs, are an important factor in the analysis of sex in prison because the practice of prison marriages is institutionalised in gang structures.⁷⁴ Thus, the reality, despite the earlier denial by prison authorities, is that sexual activity in South African prisons is intertwined with gang activity.⁷⁵

The nature of this institutionalisation and the gangs’ related attempts to regulate sex in prison will be given specific attention here. Central to gang membership and participation, especially among the 28s and the Big 5s, is the concept of “manhood”.⁷⁶ The dominant relationships through which sex takes place in prison are partnerships known as marriages. These relationships are sanctioned and institutionalised by inmate power structures, which often play out through the gang system.⁷⁷ Men are the superior partners and they own their wives. Central to being a man is the expectation that he provides materially for his wife. Thus men procure food, cigarettes, dagga and other goods while the ‘wyfies’ are required to keep the home-space in order and to serve their men. Thus the ‘wyfie’ does the washing and all the things associated with the social role of a woman. To be a wife is not a prized position within inmate culture and is usually associated with inferiority, stigma and loss of status. New arrivals or first-time offenders are especially vulnerable. The new inmates are not only vulnerable for sex purposes but also constitute an easy source of material goods such as clothing, money, jewellery and toiletries.

⁷⁴ This is not to assume that the non-number gangs do not engage in forced sex in prisons since it has been highlighted that the other gangs are also beginning to use gang sodomy as a form of punishment within prisons and also coerced relationships with other inmates.

⁷⁵ Sasha Gear, ‘Sex, Sexual Violence and Coercion in Men’s Prisons’ paper presented at *AIDS in Context* International Conference, April 2001, University of Witwatersrand, South Africa.

⁷⁶ What occurs outside these two gangs and, to some extent, consensual sex among inmates is elaborated later in the section.

⁷⁷ Sasha Gear and Kindiza Ngubeni *Daai Ding* at page 11.

The 28s gang fights on behalf of the three gangs for better conditions for the inmates. In turn, they are permitted to have sex, in their own ritualised manner, among themselves although they may never touch a 26.⁷⁸ In the 26s and the 27s, on the other hand, sex between gang members is formally outlawed and subject to severe punishment. The 28s, in contrast, are divided into two parallel hierarchies, the gold consisting of soldiers who fight the gang battles and the silver, which are female providing sex and other services to the gold line.

However, despite the official code of the 26s and the 27s, they too have more recently begun to take 'wyfies'.⁷⁹ Although the 26s and 27s claim to eschew homosexual activity and are reportedly forbidden by the gang's official code from taking a wife, staff at some prisons noted that homosexual activity has become common amongst all gangsters. Although the practice of *uchincha ipondo* (literally meaning change or exchange a pound), a form of consensual sex between prisoners, may take place within a single gang, the practice is likely to invite punishment from the gang, especially among the 27s, 26s and the other gangs such as the Big-5s. If one is caught, physical punishment or assault ensues.

The punishment meted out varies among the different gangs. Among the 26s, those caught may have to make a payment to keep the contravention quiet. The one who catches them may threaten them by saying 'I've seen you doing this, now its either you pay me R26 or R126 and if you don't I will tell the other 26 guys.'⁸⁰ On the other hand, if the parties belong to the 28 gang, the guy will tell them 'Now I want to have sex with both of you'.⁸¹ Given that most of the gangs now take 'wyfies', the distinction among them is that the 28s will fight or go to war with another gang if a relationship is threatened from outside its ranks.

⁷⁸ Steinberg *Nongoloza's Children* at page 15.

⁷⁹ Goyer KC, 'HIV/AIDS in Prison: Problems, Policies and Potential' (2003) 79 *ISS Monograph Series* at page 36 account of incidents in Westville Medium B.

⁸⁰ Gear, S and Ngubeni K, '*Daai Ding; Sex Sexual Violence and Coercion in Men's Prisons*', (2002) Center for the Study of Violence and Reconciliation at page 52.

⁸¹ *Ibid* at page 53.

Sex is also a commodity in prison and manipulation and trickery are often used. New prisoners may not be attuned to the workings of prison economies. One inmate relates:

“if you do not have a cigarette, you do not have it, so do not bother prisoners because obviously a prisoner’s things speak. If I give you a cigarette at night I will remind you...Give me sex. You start refusing and I say ‘I want my cigarette... I want it now ‘. And he does not have it. He has to pay me in some other way, he has to make a plan for me.”

Certain studies have shown the truth of the above statement. In a Malawian study it was noted that:

“Juveniles agreed to have sex with these men because they had no clothes and no blanket and they were hungry. One day these boys started to cry and refused to have sex. The men took away their blankets and after spending a night in the cold they agreed to allow the men to have sex with them again.”⁸²

Although there are many examples that surfaced before the Commission of a similar vein, the Commission will only quote the evidence of one juvenile at Bloemfontein to highlight the vulnerability of young inmates:

“The head cook first enticed me with food and then sodomised me in the storeroom of the kitchen.”⁸³

⁸² Jolofani and DeGabriel cited in Sasha Gear, ‘Sex, Sexual Violence and Coercion in Men’s Prisons’, paper presented at AIDS in Context, International Conference, April 2001, University of Witwatersrand, South Africa, accessed at www.csvr.org.za/papres/papgear1.htm on 26 November 2004.

⁸³ See Fifth Interim Report at page 59.

Outside of the material commodity nature of sex in return for material goods, it has been well accepted that sex is often the accepted payment for gang-related protection where an inmate has no access to money or drugs.⁸⁴ This is not to allege that all rapes or sexual violations that occur in prisons are gang related; indeed, studies have shown that some men rape others out of anger at their own circumstances. One inmate stated that:

“if you are frustrated with your situation, perhaps the magistrate remanded you for four months. Just to release my anger at being locked up, I end up sodomizing people.”⁸⁵

It has been argued that, by raping another man, the attacker seeks to validate his manliness and physical superiority through destroying the victim’s own claim to masculinity.⁸⁶ While this may be true of inmate culture, it is difficult to understand the abuse that occurs from the members of the Correctional Services. At some of the hearings, the Commission has heard how some warders get drunk on duty and demand sexual favours from inmates in return for allowing the inmates to use telephones, see visitors or leave their cells for routine exercise sessions.⁸⁷

Many factors, including overcrowding, the participation of warders and the fear of reprisals contribute to the culture of silence of males who are raped in prison.⁸⁸ There were many incidents that surfaced before the Commission of prison rape but no awaiting trial prisoner testified during pre-trial detention. However, this does not mean that it does not happen to awaiting trial prisoners as the evidence of Karp and others demonstrated.⁸⁹ Recently, an incident was reported in the

⁸⁴ Goyer and Gow cited in Sasha Gear note 77.

⁸⁵ Kola et al 1997, the case study cited in Sasha Gear ‘Sex, Sexual Violence and Coercion in Men’s Prisons’ at page 6.

⁸⁶ *Daai Ding* at 2.

⁸⁷ See Fifth Interim Report pages 54-65.

⁸⁸ See Chapter on ‘Sexual Violence’.

⁸⁹ See Chapter on ‘Sexual Violence’.

media of a man who was sexually assaulted by other prisoners⁹⁰ after he had been arrested for fraud and was awaiting trial at Westville Prison. Reports have shown that while rapes are rampant in South African prisons, the situation is especially difficult to control in the awaiting trial sections of prisons since supervision is limited compared to the sentenced sections.⁹¹

6.1 Gangs and Violence

Much high-risk behaviour is directly related to gang practices and activities. Membership in both the 26s and 28s gangs includes tattooing and it is not uncommon for more than one inmate to be tattooed at a time using the same needle.⁹² Prisoners may also be required to attack another prisoner and draw blood in order to be initiated into a gang. While the 26s engage in stabbings, the primary activity of the 28s is sex and prostitution. It has been said that almost half of deaths in prisons are unnatural and the result of gang violence.⁹³ As with the sex in prisons, the number gangs are also mainly responsible for the use of violence in prisons. Practices are, however, rapidly changing and all gangs are taking on the indiscriminate use of violence against each other and against non-members. In an affidavit where the inmate requests anonymity, the inmate stated the role of the gangs with regard to violence as follows:

“The 27 gang’s whole structure is based on the issue of blood. The 27s are the ones that do the ‘cleaning up’, for example if we as the 26s have a problem with someone, including the authorities, we will ask the 27s to

⁹⁰ Tania Broughton and Zukile Majova ‘We need to break the silence over jail rape’; *The Independent*; 17 July 2004 at page 2.

⁹¹ Tania Broughton and Zukile Majova ‘We need to break the silence over jail rape’; *The Independent* 17 July 2004 at page 2. The article notes that almost 50 000 prisoners languish in the awaiting trial sections and may be there for months on end; thus the rampant gang activity.

⁹² See Goyer *Op cit* at page 37.

⁹³ See Amanda Dissel, ‘Tracking Transformation in South African Prisons, *Track Two* (2002) Vol. 11 no 2 at http://ccrweb.uct.ac.za/archive/two/11_2/transformation.html accessed on 23 November 2004.

assist in getting rid of the people who create problems for us. The 28s are the ones who will also assist the 27s in the cleaning up process.”⁹⁴

Many of the initiation ceremonies involve violence especially into the 27s and 28s gangs. One inmate recounted how he was recruited into the 28s:

“I answered the question correctly, and I was told that to join the gang I must stab a white warder. I was told when the knife would arrive and how I must do it and what I must do afterwards.”⁹⁵

In another incident, a Cape Town man, who was in training to become a 28 member, shot his family members who had become state witnesses in a trial involving five 28s members who had been accused of stabbing a member of the 26s gang.⁹⁶ It became obvious to the Commission that both innocent warders and other inmates, gang and non-gang members, are often vulnerable to the brutal operation of prison gangs. Another practice that the Commission has heard of is the calling of a number; this is when an individual is marked for stabbing by one of the inmates, either because he poses a risk to the operations of the gang or as part of a test of courage.⁹⁷

In some of the more recent turns, prison gangs have started to resort to unconventional forms of violence such as the intentional transmission of HIV/Aids.⁹⁸ This form of punishment is common to errant members or inmates

⁹⁴ See Commission Exhibit ‘U’ at paragraph 19.

⁹⁵ Steinberg *op cit* at page 28.

⁹⁶ Karyn Maughan, ‘Gang Initiation drove man to edge of reason’ *The Cape Argus* 26 March 2004. This story must be contrasted with the assertion that relations are good between the 26s and the 28s. See Dr Schurink, Exhibit ‘V’, at page 17, Cape Town hearings dated 3 February 2003.

⁹⁷ See the evidence of Mr Engelbrecht, proceedings of Commission in Bloemfontein, giving details regarding the ‘calling of the number’ at page 735 *et seq.*

⁹⁸ See the evidence of Mr Morris from of the Inspecting Judges Office during the Commission’s Cape Town proceedings.

who refuse to join gangs and is applied by using those gang members who are HIV positive to rape those who fall foul of the gang.⁹⁹

Violence between gang members and “franse”¹⁰⁰ is common, yet violence within a gang takes place rarely and only in special circumstances where the member has broken the gang code.¹⁰¹ For example, although the 28s and the 26s often oppose each other, a certain degree of respect for each other’s work remains. They will not allow an inmate, who has committed a wrong against any of the numbers, to become a member until the wrong is corrected.¹⁰²

In the gang context, your ability to fight and the nature of the crime you committed also gives you a qualified status in prisons. According to Steinberg violence serves three purposes in prisons: firstly, it makes inmates into men rather than boys, secondly, it is used to patrol the boundaries of gang space against warders and thirdly, it divides inmates into men and women. In 1997, the situation of gang activity had become so rampant that many institutions were rendered ungovernable because members feared for their lives and were staying away from work.¹⁰³ Although the situation has improved, gangs still render many prisons unmanageable.

⁹⁹ Ben Maclennan, ‘Slow puncture; death sentence for prisoners.’ November 20 2002 at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw103779360175R131 accessed on 22 November 2004.

¹⁰⁰ A word commonly used to refer to non gang members

¹⁰¹ In some of the most bizarre cases, inmates will attack warders, not as part of any initiation ceremony, but to remain in prison. These incidences are often unrelated to gang activity but reflect the poverty-stricken circumstances in which some inmates live when outside prison. To such prisoners, prison, despite its harsh conditions and the abuses they face, is seen as the better of the two evils. See Norman Joseph, “Inmates attack warders “to stay in prison”, 14 May 2004 *The Cape Argus* at page 8.

¹⁰² See the evidence of Dr Schurink, Exhibit ‘V’, at page 17.

¹⁰³ Steve Pete, ‘The good, the bad and the warehoused’ *SACJ* (2000) 13 at page 41.

6.2 Smuggling

Member participation helps to facilitate gang activity. This is often apparent when gang members bribe warders to smuggle in goods and people.¹⁰⁴ It has been noted that without warder participation in smuggling networks, the availability of food, drugs and money in prison would be severely limited. One prisoner relates an inmate's interaction with prison officials:

*"If there is money you can buy anything and if the warder likes you, you can send them to buy cartons of cigarettes and sometimes, if you have already made them happy, they can bring you Nandos or what-what. For you to look after [small boys] you need to have lots of money... You have to sell [in order to support them]. There are lots of boys who sell drugs or dagga, all those things, and the police smuggle everything."*¹⁰⁵

Besides abundant evidence showing the gravity of smuggling in prisons, a United Nations research team focusing on corruption found that, amongst the types of corruption that South African warders engaged in, smuggling ranked as the third highest making up 13% of the cases they investigated.¹⁰⁶

In one of the most disturbing discoveries, the Commission, at the Grootvlei Prison hearings, was told how one member of the prison not only sold dagga and mandrax to prisoners but also sometimes allowed them to go to his home to buy

¹⁰⁴ "I was paid to help inmates flee, says warder' *The Cape Times*, 1 April 2004 at page 4. A former prison warder for Johannesburg Prison [Kgukutli Louis Pobe] informed the Commission of how he and other warders had worked together in planning the escape of prisoners and how he received payment from the inmates for the escapes and to remain silent about theft complaints.

¹⁰⁵ See *Daai Ding* at page 68.

¹⁰⁶ Painter-Morland, M (2004); Final Consolidated report- Focused Assessment of Anti-Corruption capacity within the Department of Correctional Services, United Nations Office on Drugs and Crime, Pretoria. Accessed from http://www.unodc.org/pdf/southafrica/focussed_assessment_anti_corruption_2004.pdf on 26 November 2004

dagga.¹⁰⁷ A prisoner, Mr William Smith, informed the Commission on how he would earn about R450 a month selling Mandrax for one of the warders and how he was persuaded to do this because he had no parents or visitors.

Mr Jansen, in his testimony before the Commission regarding Pollsmoor Prison, stated that a decision was taken in 1999 to separate gangsters from non-gangsters in Pollsmoor. He said the gang members could be identified by their tattoos and that they could rely on the experience of members to identify gangs. Mr Jansen argued that there is a willingness on the side of gangsters to change and that they are eager to learn alternative ways of dealing with conflict.¹⁰⁸

Mr Jansen's view is also supported by the evidence of Mr X,¹⁰⁹ who emphasised the importance of splitting gangs and who also said that it was important to keep gang members busy with workshops, church meetings, sports and the like so that they do not have the time to engage themselves in gang activities.

Dr Willem Johannes Schurink, who has done research on gangs, stated that prisoners made numerous allegations about smuggling operations and schemes involving the warders and gang members. He said that prison policy does not allow gangs and that certain Heads of Department, who acknowledge that there is nevertheless a problem, try to curb it by speaking to gang members. However, he added that, despite the prescribed measures, both prisons and officials approached the gang problem inconsistently.

According to a report of the Portfolio Committee on Correctional Services on their visit to Pollsmoor Juvenile Detention Centre on the 15 October 2004,¹¹⁰ offenders stated that it is almost obligatory to belong to a gang in Pollsmoor in order to

¹⁰⁷ Fikile-Ntsikelelo Moya 'Warders find prisoners are not so nice', *The Star*; 26 June 2002.
¹⁰⁸ See Exhibit 'Q' and the evidence of Chris Gifford at Cape Town, who testified that the training was aimed at gang members and the initiative was called the "Change Begins with Me Programme".

¹⁰⁹ A gang member who requested not to be identified.

¹¹⁰ See <http://www.pmg.org.za/docs/2004viewminute.php> accessed 29 November 2004.

ensure one's safety and protection. Offenders also said that it was impossible to stop gangs within the prisons, as they have been in existence for a very long time and traditions are passed on from generation to generation. In addition, the gang culture is rife within the community outside prison, especially in the Western Cape as stated earlier, where there is a strong relationship between civilian and prison gangs. Some offenders stated that because they have little opportunity to be kept busy in prison by working or studying, they have little else to do than keep busy with gang business.

In the same report, it was stated that drugs are widely available within Pollsmoor:

“some are smuggled in by members, others by offenders, especially when they are escorted by police to court cells. This year nine (9) members have been arrested for drug smuggling within Pollsmoor. Sometimes contractors working on the RAMP projects are also responsible for providing drugs to offenders”.

7. DEPARTMENTAL RESPONSE TO GANGS

Although overcrowding and understaffing undoubtedly exacerbate an already bad situation, there is a view that the inefficiency, indifference and corruption on the part of prison officials has led to the high level of gang activity in prisons. There have been varied responses to the problems of gangs on an official level and it is necessary to examine briefly, and consider the success or practicability of, some of these responses. The Commission is naturally aware that these responses need to be considered against the backdrop of the size of the institution and gravity of the problems of gangs at such an institution.

7.1 Recognition and Separation

It has become a practice in some correctional facilities to place inmates belonging to the same gangs in the same cell in a bid to curb inter-gang prison violence. Pollsmoor Prison, which has experienced many serious incidents of gang violence, has attempted to follow this approach. However, overcrowding limits the extent to which this approach can effectively be followed.¹¹¹ This method, however, does at least attempt to serve two (2) important functions in the effective running of the prison. Firstly, it attempts to minimise the incidents of violence and secondly, it tries to limit the number of new inmates who are recruited into gangs.

In the Eastern Cape, two inmates died as a result of prison violence and one of the deaths was gang related. In a briefing to the Correctional Services Committee, Mr Tolo (ANC) asked whether members of the same gang were grouped together and whether this did not give the impression to the public that the Department was legitimising gangs as an institution in prisons.¹¹² Mr Gxilishe, the Provincial Commissioner of the Western Cape, replied that the Department did not recognise gangs and cellmates were mixed irrespective of gang affiliation.¹¹³ He also stated that the Department did not have a programme targeted at gangs *per se* since the Department did not recognise them. He went further to say that the Department's rehabilitation programme targeted all

¹¹¹ Helen Bamford, 'Life on a knife-edge at Pollsmoor', *The Cape Argus*; 24 July 2004. The article notes how, in the sentenced and the unsentenced section, the gang members were separated from non-gang members.

¹¹² Mr B. Gxilishe, Regional Commissioner of the Eastern and Western Cape presenting a report before the Correctional Services Portfolio Committee, Department Regional Commissioners; Briefings 27 August 2004 at <http://www.pmg.org.za/docs/2004/viewminute.php?id=4372> accessed on 25 November 2004.

¹¹³ *Ibid.*

inmates.¹¹⁴ Mr Gxilishe's statement seems rather short-sighted if one accepts the submission of Mr Mketshane to the Portfolio Committee that 90% of inmates at Pollsmoor are gang members and therefore they could not separate gang from non-gang members.

A social worker suggested that a system of classifying unsentenced inmates into different categories should be developed to deal with the problems of awaiting trial prisoners, who are amongst the most vulnerable to abuse and violence.¹¹⁵ However, despite contrary evidence, the prison's spokesperson, Mr Maupi Monyemangene, denied that rape was rife in South Africa and held rather that rape in prisons could not be attributed to a particular factor. He added that the Department encouraged victims to notify prison heads.¹¹⁶

It has been noted that the problem in South Africa is not the existence of gangs *per se* but rather the extent to which the activity of gangs has affected the orderly operation of correctional institutions.¹¹⁷ This scourge of gang activity in our prisons represents a daunting challenge to the Department of Correctional Services. The Department critically requires sound initiatives and a responsive attitude to show its commitment to creating an effective and efficient prison system that ensures the safety and security of all the prison inmates.

¹¹⁴ Mr B. Gxilishe, Regional Commissioner of the Eastern and Western Cape, presenting a report before the Correctional Services Portfolio Committee, Department Regional Commissioners presentations; minutes 27 August 2004.
<http://www.pmg.org.za/docs/2004/viewminute.php?id=4372> accessed on 25 November 2004.

¹¹⁵ Mariette le Roux, 'Untried prisoners are vulnerable to abuse' *The Independent Online* 6 February 2004 at www.iol.co.za/general/news/newsprint.php?art_id=qw1076937844689B240&sf accessed on 25 November 2004.

¹¹⁶ Tania Broughton and Zukile Majova 'Breaking Silence over jail rapes' *The Independent* July 17 2004 at page 2.

¹¹⁷ Report of The National Prisons Project of The South African Human Rights Commission at page 78.

7.2 The White Paper of the Department

Despite the complexities and dangers that gangs pose to proper correctional facilities, the subject received very little attention from the Department in its White Paper which provides as follows on the subject:¹¹⁸

“10.6 Prison Gangs and the Safety of Inmates

10.6.1 *The safety of inmates compels the Department to effectively deal with the issue of gangs in correctional centres. Gangs have been a feature of the South African correctional system over the past century. Along with the presence of gangs is a level of correctional centre violence that violates the safety of other inmates. It manifests in many ways such as:*

- *Gang supported fights;*
- *Assault and murder;*
- *Forced sexual activity or rape;*
- *Intimidation and coerced favours; and*
- *Complicity of or the turning of a blind eye by Correctional officials in relation to these activities.*

10.6.2 *The pervasive manner in which prison gangs assert control over the management of correctional centres requires an anti-prison gang strategy to be adopted by correctional management.”*

Regrettably, all that this important document does is confirm the existence of a century old problem and merely calls for an anti-gang strategy to be formulated.

¹¹⁸ See The White Paper at page 75.

The Department's Strategic Plan for the years 2005/6 to 2009/10 also takes the matter no further, as it makes no mention of any intended plan on the part of the Department to deal with gangs in our prisons over the next five (5) years.

A submission by the Centre for the Study of Violence and Reconciliation (CSV) to Parliament on the White Paper, states that while the draft paper emphasises the need to provide a safe environment for inmates, a proper strategy needs to be developed to create this environment, especially in cells at lock-up time when offenders are more vulnerable to threats, violence and coercive behaviour.¹¹⁹ It suggests that staff be adequately trained to deal with incidents and that prisoners who pose a risk to the safety or health of other inmates must be separated from the general prison population and those vulnerable should be protected.

The Civil Society Prison Reform Initiative (CSPRI), in their oral submission to the Portfolio Committee on Correctional Services, states that the attention given to prison gangs in the Draft White Paper is scant.¹²⁰ The submission states that the severe impact that prison gangs have on the daily lives of prisoners and the management of prisons begs the question why the Department of Correctional Services has not launched a thorough investigation into prison gangs since 1994. The CSPRI requests a far more rigorous approach in the White Paper to address the problem of gangs in our correctional facilities, a position fully endorsed by this Commission. Why a comprehensive strategy has not been implemented to address a problem which the Department itself acknowledges has been in existence for over a century is difficult to comprehend and seems to indicate that the problem of prison gangs has not been high on the list of priorities of management in the years gone by.

¹¹⁹ Centre for the Study of Violence and Reconciliation, Oral Submission to the Parliamentary Portfolio Committee on Correctional Services on the Draft White Paper on Corrections in South Africa, 3 February 2004.

¹²⁰ L. Muntingh and Julia Sloth-Nielsen, Oral Submission to the Portfolio Committee on Correctional Services regarding the Draft White Paper on Correctional Services 3 February 2004.

8. COMPARATIVE STUDIES

Prison gangs are not unique to South Africa and have been the subject of studies in North America for some decades before the phenomenon caught the attention of the authorities and academia elsewhere. Gangs in South Africa and America both have in common their fanciful accounts of their origins, laws, salutes and military organisational structures.¹²¹ While American gangs have mainly a racial-ethnic element, a close analysis of how the authorities have dealt with gang related incidents in US prisons might be helpful in understanding fundamental aspects and provide South Africa with some guidelines on how to deal with prison gangs.¹²²

Among the super gangs of America, the Aryan Brotherhood (AB) is white, the Black Guerilla Family, as its name suggests, is black and the Mexican Mafia and Latin Kings are Spanish American.¹²³ The only difference between the American and the South African prison gangs is that the centrality of race and ethnicity that dominates the composition of American gangs is minimal in the South African prison gangs, where racial and ethnic groups freely interact with no signs of animosity. Unlike South African prison gangs, which have a long history, American prison gangs have a relatively short history having originated in the 1940s. However, they had a considerable impact on prison life in the 1960s.¹²⁴

As in South Africa, American prison gangs are also responsible for much of the violence, distribution of drugs, manufacture and transport of weapons and loan sharking inside the prisons.

¹²¹ See evidence of Dr Schurink Exhibit “B” Cape Town hearings at page 25.

¹²² It is noted from this report that many of the American States have had to deal with prison gang activity. The State of California provides an interesting case study in its similarity to Cape Town with respect to prison gang activity.

¹²³ *Ibid.*

¹²⁴ Scott N. Tachiki, ‘Indeterminate Sentences in Super-max Prisons Based Upon Alleged Gang Affiliation: A reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements’, *California Law Review*, 83 (1995) 1115 at page 1 127.

American authorities have devised a number of ways to deal with prison gangs with the most popular and widely documented being the creation of the super-max prisons.¹²⁵ These super-max prisons/control units have been described as “a prison within a prison” because of the indeterminate state of isolation or confinement of the inmates housed in these facilities.¹²⁶ It has been argued that the rationale behind these super-max prisons is to ensure maximum protection for prison staff and inmates within the super-max prison and throughout the rest of the prison system.¹²⁷ These goals are achieved in two ways: Firstly, the super-max prisons isolate the most violent, predatory offenders within the system, allowing inmates at the other facilities within the system to serve their time with less chance and fear of being a victim of violence. Secondly, super-max prisons limit an inmate’s freedom, making the potential for violence inflicted upon fellow inmates or prison staff practically nonexistent.¹²⁸ In such super-max facilities, inmates are confined to tiny cells the size of a parking space, for twenty three (23) hours, often in what they describe as an “eerie silence”.¹²⁹

There is no doubt that there is at present, and will in the future, be great pressure on the Department to resort to the building of more super-max prisons like C Max in Pretoria and the super-max prison in Kokstad in order to break the

¹²⁵ For more details on South Africa’s super-max prisons, see the Chapters on Solitary Confinement and the section dealing with C-Max Prison.

¹²⁶ Rachel Kamel and Bonnie Kerness, ‘The Prison Inside Prison; Control Units, Super-max prisons and Devices of torture’ (2003) Americans Friends Service Committee Justice Visions Briefing Paper at <http://www.afsc.org/community/prison-inside-prison.pdf> page 1, accessed on 25 November 2004.

¹²⁷ Scott Tachiki, ‘Indeterminate Sentences in Super-max Prisons Based Upon Alleged Gang Affiliation: A reexamination of Procedural protection and a Proposal for Greater Procedural Requirements’, *California Law Review*, 83 (1995) 1 115 at page 1 116. Also see the Chapter on Solitary Confinement for a more in-depth discussion.

¹²⁸ Scott Tachiki *ibid* at 1128. The author also alleges that these facilities have two added benefits in that by removing prison gang leaders and the most violent inmates from the general prison population, officials at other prisons are able to reduce the amount of control they exert. Furthermore, because super-max facilities have a bad reputation among prisoners as a bad place to serve time, prisoners in other prisons are deterred from committing violent acts or joining prison gangs because they do not want to serve time in a super-max facility.

¹²⁹ Rachel Kamel and Bonnie Kerness, *op cit* at page 2.

stranglehold that gangs have on our prisons. It is the Commission's view, however, that given the provisions of the Constitution and the need to apply acceptable national and international norms for humane punishment, it is unlikely that this imprisonment policy in its current form will survive constitutional scrutiny for much longer under the new democratic order that seeks to protect basic human rights.¹³⁰

9. THE PROBLEMS IN DEALING WITH GANGS

The Commission is of the opinion that the Department of Correctional Services needs to address the following prevailing circumstances in our correctional facilities before it can succeed in its quest to eradicate gangs from our prisons:

- The already overcrowded prisons that make it extremely difficult to implement policies that will separate the troublemakers from those inmates who are vulnerable. Without some kind of separation policy, non-gang members will continue to be vulnerable. Overcrowding also severely hampers the Department's efforts at implementing its rehabilitation programmes.
- The harsh conditions inherent in prison life that, to a large extent, make prisons conducive to the creation and advancement of prison gangs. Although there are some benefits to inmates in belonging to gangs, the overwhelming evidence suggests that the existence of prison gangs is detrimental to an effective correctional service.

¹³⁰

Although super-max facilities continue to exist in the USA, they have been found to contravene international human rights conventions and to deny inmates' rights. See chapter on the Treatment of Prisoners wherein the Commission recommends that such prisons are infringing on the rights of prisoners.

- Understaffing in the Department of Correctional Services that results in the members being unable to monitor incidents of gang activity, particularly sexual abuse, that occur during lock-up, particularly in the awaiting trial section of the prisons.
- The lure of money and safety from attack that leads to the corruption of some of the Correctional Services staff members who choose to associate and align themselves with gangsters instead of protecting those in their custody.

Although numerous factors aid the functioning of gangs in South African Prisons, overcrowding remains the greatest challenge, a view that the Minister of Correctional Services supports, as can be seen by the following statement:

*“Overcrowding remains our greatest challenge. It is threatening to undermine our efforts to comply with international laws and standards regarding the separation of categories of prisoners, humane detention, provision of basic needs, provision of comprehensive primary health care, rehabilitation of offenders, safe custody and raising and maintaining staff morale.”*¹³¹

It was found that the ten (10) most overcrowded prisons in South Africa were overcrowded by 285% to 386%. It was also noted that overcrowding results in the inability of the Department to provide effective security to prisoners and exacerbates the spread of gangsterism within prisons, which has a ripple effect on staff morale and stress levels leading to high absenteeism.¹³²

¹³¹ Minister of Correctional Services, Mr B. Skosana, speech to Parliament dated 12 May 2000.

¹³² Portfolio Committee on Correctional Services Report, ‘Solutions and Recommendations to prison Overcrowding’, 7 October 2004 at paragraph 4.

Furthermore, in responding to a question about the overcrowding in prisons and whether fewer arrests would increase the crime rate, the Inspecting Judge answered:

*“No, they learn about crime in jail and that creates more crime. They cannot be rehabilitated in jail because it is completely overcrowded.”*¹³³

The issue of overcrowding and the negative impact thereof on correctional facilities is dealt with more comprehensively elsewhere in this report. The Commission is mindful that success in the fight against gangsterism will not be achieved overnight but is convinced that if overcrowding and the other circumstances referred to can be addressed, then the turning point in the battle against gangsterism would have been reached.

It is the view of the Commission that the Department’s current approach to combating gangsterism is largely defeatist with the existence of gangsters being accepted as part and parcel of prison life. The Department clearly needs a new strategy and vision to disempower the gangs and retake control of the prisons.

10. RECOMMENDATIONS

To address the problem of gangs in our prisons, the Commission makes the following recommendations:

1. To restrict the influence that gangs are able to exert over newly arriving prisoners, the Commission recommends that the Department undertake the classification and separation of awaiting trial prisoners into:

¹³³ Nazma Dreyer. ‘We need fewer inmates, says inspecting judge’ quoting the words of Inspecting Judge of prisons Hannes Fagan, *The Cape Times*, 17 June 2004.

- 1.1 First offenders;
- 1.2 Repeat Offenders, and
- 1.3 Gang members

Depending on the outcome of the research and the comprehensive strategy to be developed on gangs referred to hereunder, this separation policy could even ultimately be extended to sentenced prisoners. Considerations could also be given to dedicated correctional facilities or even portions thereof, being used to house members of a particular gang. The Commission is mindful, however, that the implementation of such a policy will be dependent on a whole host of practical and logistical considerations and that the implementation of such a policy may only be possible in certain prisons.

2. Proper and detailed research should be carried out by the Department on gangs and their culture with the aim of developing and ultimately implementing a comprehensive gang strategy with such strategy being incorporated into the Department's Strategic Plans.
3. To achieve this, the Department should create better networking and working relations with the many NGO's who have the skills and knowledge needed for the development and implementation of a comprehensive anti-gang strategy. It is, accordingly, recommended that the Department liaise with these organisations before it compiles its anti-gang strategy, as envisaged in its White Paper. The anti-gang strategy should be compiled after due consultation with non-government organisations such as:
 - 3.1 Centre for Study of Violence and Reconciliation;
 - 3.2 Centre for Conflict Resolution;
 - 3.3 Institute for Security Studies.

4. Linked to the above, the Department should develop a comprehensive database on prison gangs and gangsters and collect and update such information on an ongoing basis. With the high rate of recidivism in our society, this database will easily identify repeat offenders who are gang members when they return to prison. Prisoners who are being transferred from one prison to another will also be identified if they are gang members. Procedures will naturally have to be incorporated to ensure that the names of those inmates who have clearly proven that they have given up their gang membership, can be reclassified on the system.
5. The Department should make use of the expertise and skills of the National Intelligence Agency in building a database of known gang members and follow a multi-disciplinary approach with the Agency in order to successfully clamp down on gangsters in prison.
6. More contact should also be made by the Department with those selected NGO's who have valuable experience and skills to offer the Department in its rehabilitation programme by assisting gang leaders to change and become law-abiding citizens.
7. The Department can also learn and draw upon the experience of the South African Police Service, which has achieved significant success by not working in isolation but rather in closer contact with communities and non-governmental organisations.
8. As a short-term safety measure, the Department should develop strategies as suggested by the CSV¹³⁴ and the Commission¹³⁵ to ensure that inmates are safe in their cells especially at lock-up time when gang activities are at their most prevalent and dangerous.

¹³⁴ See Footnote 119 above.

¹³⁵ See recommendations in Chapter on Sexual Violence where the installation of cameras connected to closed circuit television is recommended.

9. The Disciplinary Code of Conduct should be amended to make any involvement and association with a gang by correctional services members a dismissible offence. Clearly no gang can exist in prison without the active or passive assistance of warders. If these members who co-operate in any way with gangsters are not dismissed, the image and the integrity of the Department and their fellow colleagues will be tarnished. An amendment of the Code would also impact on the gang's ability to recruit new correctional service members who will now fear the severe penalty of associating with gangs.
10. Heads of Prisons and Unit Managers should be trained in basic labour law in order to fulfil their tasks as managers and to equip them to discipline transgressing members decisively, confidently and without fear of coming to incorrect decisions or following incorrect procedures. The presence of such better trained and skilled Heads of Prison and Unit Managers will have a positive impact in improving general discipline at correctional facilities. Members under their command will be less inclined to consider improper behaviour, such as colluding with and being corrupted by gang members.
11. In the short-term, it is recommended that the Department make use of the Prevention of Organised Crime Act No. 121 of 1998 (POCA). Section 9¹³⁶

¹³⁶

Section 9 of the Act provides as follows:

“Sub-section 1 – Any person who actively participates in or is a member of a criminal gang and who:

- (a) wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang,
- (b) threatens to commit, bring about or perform any act of violence or any criminal activity by a criminal gang or with the assistance of a criminal gang, or
- (c) threatens any specific person or persons in general with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence shall be guilty of an offence.

Sub-section 2 – Any person who:

of the Act can be used to charge those prisoners involved in gang activities and section 11¹³⁷ to identify prisoners as members of a gang.

-
- (a) performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity,
 - (b) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about, perform or participate in a pattern of criminal gang activity, or
 - (c) intentionally causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang, shall be guilty of an offence.”

¹³⁷

Section 11 of the Act provides as follows:

“In considering whether a person is a member of a criminal gang for purposes this chapter the Court may have regard to the following factors, namely that such person:

- (a) admits to criminal gang membership,
- (b) is identified as a member of a criminal gang by a parent or a guardian,
- (c) resides in or frequents a particular gang’s area and adopts their style of dress, their use of hand signs, language or their tattoos or associates with non-members of criminal gangs,
- (d) has been arrested more than once in the company of an identified member of a criminal gang for offences which are consistent with usual criminal gang activities,
- (e) is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.”

CHAPTER 5

RECRUITMENT

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RECRUITMENT

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CHAPTER 5

RECRUITMENT

1. INTRODUCTION

Any efficient and well-managed organisation is entirely dependent for its continued success on the calibre of its senior employees. The Department of Correctional Services is no different. The Commission has repeatedly made the point that unless members recruited or promoted by the Department to senior positions have the necessary integrity, skills, qualifications and expertise, problems of discipline will continue to beset the Department.

Furthermore all employees expect that diligence and loyalty will be compensated by merit awards being granted to deserving members in a regular manner according to clearly defined policies. The granting of merit awards in an irregular manner to members not entitled to such awards has a negative effect on staff morale, and especially on those who have strived to do their best in the workplace. To be overlooked when merit awards are granted when they are deserving of such an award is demoralising. Their disappointment is likely to be exacerbated when it appears that those who get merit awards belong to a particular work grouping.

It was therefore of serious concern to this Commission to find that in almost all Management Areas it has investigated, issues relating to the recruitment, merit awards and promotion of staff remain a major challenge facing the Department. Recruitment 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.

This Chapter will address the Department's policies and procedures relating to recruitment and merit awards and previous investigations conducted into recruitment processes of the Department. Specific instances of maladministration, mismanagement, corruption, nepotism and favouritism relating to recruitment and merit awards in some of the Management Areas the Commission investigated, will be highlighted in this Chapter.

2. RECRUITMENT MALPRACTICES

According to the evidence before the Commission, prior to 1998, the recruitment at entry level to the Department was by word of mouth. There were no advertisements for positions for which the general public could apply. Thus there was a lot of corruption and nepotism within the Department.¹

2.1 Recruitment Drives

With effect from 1998 the Department started to have formal recruitment drives. Evidence before the Commission indicated that the normal recruitment practice adopted by the Department is to conduct two recruitment drives by means of two rounds of advertising. However, during the recruitment drive of 2001/2002, the Department's management committee decided that one advertisement should cover both recruitment drives for the years 2001/2002.²

The process normally involves advertising the relevant posts nationally and applicants are invited to apply for particular posts as advertised. After all the application forms have been received by the cut-off date, the Department

¹ See Mrs Kgosidintsi's evidence in Pietermaritzburg Volume 13 pages 1118 and 1119.

² The decision was made that applicants would apply once and that they would be interviewed and fill positions during the first recruitment drive, and those applicants who were unsuccessful during the first recruitment drive, would be considered for the second recruitment drive. This procedure was followed nationally during the recruitment drive of 2001/2002.

commences with the selection process. Department officials within the Province then interview the short-listed candidates and thereafter recommend appointees to the Commissioner for the ultimate appointment.

The Commission has heard evidence that the bi-annual recruitment drives conducted in various Management Areas of the Department are riddled with malpractices, corruption, irregularities, favouritism and nepotism. The Commission also found that inexperienced and incompetent officials were appointed as Heads of Recruitment. The problem is further compounded by the fact that even after their appointment, these inexperienced and incompetent officials are not given any specific training in recruitment.

The Commission has established that in addition to the provisions of the Act, there are various policies and procedures in place regulating the recruitment, selection and appointment of members to the Department. However, evidence led before the Commission has shown that members of the Department in charge of the recruitment drives often do not follow these procedures and policies. A closer examination of the provisions of the Act, policies and procedures is therefore necessary.

2.2 The Correctional Services Act and Procedures

The determination of qualifications for appointment, promotion and transfer of members of the Department to a large extent rests with the Commissioner. Section 96(3) of the Correctional Services Act³ provides as follows:

“Subject to the provisions of this Act and the provisions of the Labour Relations Act and having regards to the operational requirements of the Department, the Commissioner shall determine the qualifications for

³ Correctional Services Act No. 111 of 1998.

appointment and promotion and decide on the appointment, promotion and transfer of correctional officers but –

- (a) The appointment or promotion of a correctional official to or above the post level of director takes place in consultation with the Minister;*
- (b) All persons who qualify for appointment, promotion or transfer must be considered;*
- (c) The assessment of persons shall be based on the level of training, the relevant skills, competence, and the need to redress the imbalances of the past in order to ensure the Department broadly represents our South African population, including representation according to race, gender and disabilities;*
- (d) Despite the provisions of paragraph (c), the Commissioner may, subject to the prescribed conditions, approve the appointment, transfer or promotion of persons to promote the basic values and principles referred to in section 195(1) of the Constitution; and*
- (e) For the purposes of promotion or transfer, the Commissioner may exempt a correctional official who is exceptionally skilled, has special training, renders exceptional service, or has successfully completed the prescribed departmental training, from the requirements of the code of remuneration.”*

The Regulations⁴ promulgated in terms of the 1959 Act, also deal with enrolment and appointment of staff. In particular, they deal with the enrolment and appointment of a member who is not a commissioned officer, and the waiver of qualifications by the Commissioner in certain circumstances.⁵

⁴ See Regulation 8(1) and (2).

⁵ The new Regulations gazetted on 30 July 2004 no longer deal with this aspect.

Insofar as the entry level is concerned, the Commission heard evidence that with effect from 2000, the educational requirement for entry level is now matric.⁶ Previously, the minimum requirement at entry level was Standard 8.⁷

2.3 Departmental Policies and Procedures

The Departmental Policy and Procedure Manual clearly states that the purpose of the Department's human resource employment policy is to ensure an integrated approach that facilitates maximum flexibility to attract, recruit, appoint and retain high calibre employees. The policy also directs the Department on the procedures governing the recruitment process which must be followed in order to ensure consistency, fairness and equity in various aspects of recruitment.⁸

A further document dealing with the Departmental policy on recruitment and employment is the Personnel Provisioning Manual. In terms of this document, the appointment function, on the one hand, forms an integral part of the Correctional Services' broader manpower management programme and, on the other hand, it is sensitive to the organisation's interest as employer.

It is expected of the Department to try and recruit the best candidates according to the post and human specifications. Transfer and recruitment must therefore always take place objectively and without nepotism, according to the 70/30 Affirmative Action Policy as approved by the Commissioner.

Recruitment is currently decentralised to the different Provincial Commissioners. The employment centres are responsible for supplying staff in all occupational classes in the Department. Due to the variable and technical nature of the recruitment/appointment function and the specialised knowledge that is required

⁶ Grade 12.

⁷ Grade 10.

⁸ See Departmental Policy and Procedure Manual dated 1 January 2001.

for this, it should be understood that staff qualified for this task will not be moved or transferred before suitably trained replacement staff are available.

In terms of section 7(3)(b) of the Public Service Act No. 103 of 1994, Heads of Department are responsible for the efficient management and administration of their respective departments. Therefore in each Department, the Head of that Department is responsible and accountable for the execution of the recruitment function according to the needs of the Department.

In the Department of Correctional Services such duties are delegated to the Provincial Commissioners who are responsible for implementing and activating recruitment in each Province. The final decision of all appointments up to the level of senior correctional officer is vested in each Provincial Commissioner.

Other documents, which deal with the recruitment practices of the Department insofar as those particular recruitment drives were concerned, are the following:

- a) Document S3/1 dated 8 June 1998; and
- b) Document S3/1-b dated 4 December 1998.⁹

The Department's A-Orders also deal with recruitment and employment of staff. It has been noted that this document makes reference to the Public Service Staff Code throughout.

The multiplicity of documents dealing with the Department's recruitment and employment practices adds to the problems experienced with recruitment. It is extremely difficult for the Department to properly manage its recruitment and employment function when it relies on a multiplicity policy documents, which contradict each other.

⁹ See Exhibits 'SS5' and 'TT' – Durban-Westville Management Area.

3. MERIT AWARD MALPRACTICES

3.1 Introduction

From the evidence heard, it is clear that Human Resources malpractices in the Department nationally were not confined to recruitment, but also extended to the merit award system. Evidence established that merit award malpractices were committed by senior Department officials, who commonly manipulated the processes.

3.2 Merit Award Policy

The policy of the Department requires that an officer be in a rank for at least one (1) year before he/she gets a merit award. As will be shown later in this Chapter when the Commission examines the recruitment and merit award malpractices in the Management Areas, certain officials in the Department were given merit awards before they even completed one (1) year's service in their rank.¹⁰

There was also evidence of favouritism in that the wives and girlfriends of certain senior members were given merit awards when they did not qualify for such awards.¹¹

Before dealing with specific recruitment and merit award malpractices, it is appropriate to first examine the previous investigations into recruitment and merit awards in the Department by other agencies.

¹⁰ Merit awards should only be awarded to a member for meritorious work done in a given twelve (12) month period.

¹¹ See St Albans Management Area as well as Pietermaritzburg Management Area, hearings. See St Albans transcripts, Volume 16 at pages 1655 *et seq.*

4. PUBLIC SERVICE COMMISSION REPORT¹²

The recruitment challenges faced by the Department have been identified in an earlier investigation by the Public Service Commission¹³ (PSC), which completed its report on 31 August 2000.

The PSC Report deals with various irregularities in human resource management practices in the Department. However, the Commission will only deal with the following areas, where the PSC has made findings and recommendations:

- Recruitment
- Verification of qualifications
- Filling of advertised posts
- General management of human resources.
- Performance agreements.

The PSC Report reads as follows :

4.1 Recruitment

The PSC received a number of allegations in respect of the appointment of senior managers, family members and friends to positions within the Department. The PSC found, however, that although the allegations received contained too little detail to enable its investigators to conduct inquiries within the limited time available, they nevertheless point to the

¹² See Public Service Commission: Inquiry into allegations of irregularities in HRM practices in the Department of Correctional Services, August 2000. Hereinafter referred to as the “PSC”.

¹³ The Public Service Commission is chaired by Professor Sangweni, who, with his colleagues, has been of invaluable assistance to this Commission.

existence of problems in human resources and the need for pro-active intervention by the Department.

In this regard, the PSC proposed that the Departmental policy regulating recruitment, selection, appointment and promotion make it obligatory for officials to:

- *Declare being related to an applicant;*
- *Declare being a close friend of an applicant;*
- *Recuse themselves from all actions related to the processing of their family member's/close friend's applications and, in particular, from general management decisions affecting close associates.¹⁴*

4.2 Verification of Qualifications

The PSC had four hundred and twenty seven (427) cases to investigate in this regard. Four allegations were made regarding officials either not having certain qualifications or having suspect qualifications.

The PSC found that the Department neglected to follow up on the submission of qualifications by new appointees. The Department also does not authenticate school and tertiary qualifications pro-actively in cases where there is reason to doubt their authenticity. Although the Department endeavours to obtain certified copies of qualifications, this by no means guarantees that certificates submitted are indeed authentic.

Although the PSC was to conduct an investigation into the verification of qualifications throughout the public service, it proposed that the Department of Correctional Services adopt the following measures:

¹⁴ Public Service Commission Report: 1 August 2000 at pages 19 and 79.

4.2.1 *In the short term, implement a procedure whereby the relevant staff ensure that the submission of original certificates is always followed up and that all certificates are authenticated with the issuing educational bodies.*

4.2.2 *In the long term, the PSC proposed that the Department:*

- (a) *Adopt the policy of making a candidate's assumption of duty subject to submission of original certificates; and*
- (b) *Ratify all qualifications and appointments.¹⁵*

4.3 Filling of Advertised Posts

After the investigation of the malpractices regarding the filling of advertised posts, the PSC made the following proposals regarding the filling of advertised posts:

4.3.1 *In the short term, the Department should release a circular to make it obligatory that:*

- (a) *The advertisement specify the qualifications and other requirements for occupational classes, posts and person's qualification;*
- (b) *Posts' and persons' specifications should correlate with the job content;*
- (c) *Short-listing is based on advertised requirements;*
- (d) *Reasons for late applications are fully recorded;*

¹⁵

At pages 20 and 79 of the Public Service Commission Report, August 2000.

- (e) *Interview questionnaires are based on advertised requirements and posts' and persons' specifications;*
- (f) *Where potential is measured, this is done with regard to advertised requirements;*
- (g) *The candidature of all qualifying candidates is discussed in terms of advertised requirements;*
- (h) *Monitor the filling of posts, especially those done under delegated power authority;*
- (i) *Enter suitable oversight notes regarding the above in the performance agreements of those responsible for overseeing human resource management.*

4.3.2 *In the long term, the Department should:*

- (a) *Update applicable policy and procedures to incorporate the above;*
- (b) *Provide managers with training and a good practice guide;*
- (c) *Personnel officers should monitor adherence to policies, report on this to the Chief Deputy Commissioner; Human Resource Management at Head Office and provide advice locally;*
- (d) *Ensure that duties of human resource management posts conform to the scope of the core.¹⁶*

4.4 General Management of Human Resources

4.4.1 *The PSC made the following findings regarding the general management of human resources:*

¹⁶ Public Service Commission Report, August 2000, page 80.

- (a) *Human resource management staff at management level, i.e. Deputy Director and higher, are not always fully conversant with the human resource management policies of the Department. This group is responsible for handling the career incidents in the Department and for advising management on human resources management decisions. Maladministration in the Department can also be understood against this background;*
- (b) *Submissions on policy divisions are scanty and poorly reasoned, making both informed decision making and review of cases difficult;*
- (c) *Senior managers take decisions in a “rubber-stamping” fashion. They do not query crucial omissions and information on wrongly quoted prescripts. This demonstrates either incompetence in human resource management or outright negligence;*
- (d) *Managers deviate from policies and procedures without authorisation or full motivation for their decisions;*
- (e) *The Department interprets the application of national norms and standards and, in some cases, even its own policies, inconsistently, with a lack of pragmatism and without due regard for the purpose of such policies;*
- (f) *Human resource management policies are not sufficiently detailed and do not show consistency, fairness and objectivity;*
- (g) *Policy application is totally open to abuse, manipulation and the furthering of sectarian objectives;*

(h) *Apart from affirmative action objectives, there is not always a central set of other equally important human resource management objectives to inform decisions in a strategic and integrated manner, such as ensuring adequate skills levels in areas of management or organisational competence. Each action and decision is approached in an ad hoc manner.*

4.4.2 *The PSC then proposed that the performance agreements of certain officials include additional clauses. The proposals in this regard were:*

(a) *Chief Deputy Commissioner: Human Resource Management*

(i) *Development of human resources plan, taking into account skills levels and distribution in the Department, human resource forecasting, training of managers and personnel officers/practitioners, career management, and other issues linked to service delivery objectives;*

(ii) *Formulation of criteria on which decision-making of all human resource management practices must be based;*

(iii) *Formulation of specifications with regard to record keeping and the documentation of decisions on human resource matters;*

(iv) *Formulation of a pro-active, obligatory personnel advisory service, the contents of*

which must form part of each and every memorandum and/or submission (as a standard item) that is intended to obtain a profile for human resource management actions;

- (v) Formulation of an internal monitoring programme to ensure compliance with both national and Departmental human resource management policies and procedures and the criteria and specifications mentioned above.*

(b) All Managers from level 13 upwards

- (i) Compliance with the Department's specifications regarding record keeping and the documentation of decisions on human resource matters;*
- (ii) Compliance with human resource management advice provided by the Department's personnel advisory staff;*
- (iii) Assistance and support to the human resource management monitoring programme;*
- (iv) Compliance with Departmental criteria on which human resource management decisions must be based.*

4.5 Discussion of PSC Report

The PSC completed its investigations and submitted its final report on 1 August 2000. In this report, long and short-term proposals were made in order to address

the existing problems of maladministration and malpractices in the human resource section of the Department.

As will be shown the present Commission also received a number of complaints during its investigations from members in the various management areas relating to corruption, abuse of power by senior officials, nepotism, favouritism and maladministration in the area of the human resources, and in particular recruiting personnel.

A large number of the allegations relating to recruitment were investigated by the PSC, which made certain recommendations.¹⁷ The irregularities persisted and still complaints were brought to the attention of this Commission. It was clear that the Department failed to implement the recommendations of the PSC.

In his report on the implementation of previous investigations into the Department of Correctional Services,¹⁸ the National Commissioner answered that the report of the PSC had led to the President appointing this Commission. The National Commissioner, however, failed to give reasons why the recommendations of the PSC have not been implemented. Several reports have been submitted to date which, could have enabled the Department to deal decisively with the human resource issues identified by this Commission. The PSC as early as 2000 recommended that the Department take pro-active action in the verification of qualifications when recruiting employees. They also recommended that any relation to an applicant should be declared. Both recommendations were aimed at combating corruption, yet the Department chose to be passive and ignored such recommendations.

The Department has preferred to manage the process of restructuring in terms of its project called “Gearing DCS for Rehabilitation” in accordance with the PSCBC

¹⁷ See the recommendations as cited from the Report.

¹⁸ See the Chapter dealing with the Implementation of Previous Investigations into the Department for more details.

Resolution 7 and 8 of 2002.¹⁹ This project's report does not, however, address the issue why the recommendations of the PSC relating to recruitment malpractices were not implemented.

5. DIAGNOSTIC ASSESSMENT

During 1998, an organisational diagnostic assessment of the Department was carried out by the Brite Future Executive Recruitment and Consulting Psychological Service Division. Brite Future's report on the status of the mental health of personnel of the Department stationed in Pietermaritzburg was presented to the Department in October 1998.²⁰

Although the report relates to Pietermaritzburg, it is clear that the important aspects of the findings relating to recruitment apply to all Management Areas investigated by the Department. Its recommendations also provide the Department with vital assistance as to how to address the problems of recruitment in the Department and offer solutions to address such challenges.

The consultants' findings applicable to this chapter can be broadly categorised as follows:

- Leadership and management;
- Human resources.

Extracts from the aforesaid report is annexed to this Chapter.²¹ The Commission will quote from it, insofar as it may be relevant to its current discussion.

¹⁹ Report on investigations previously conducted into the Department of Correctional Services dated 4 May 2002.

²⁰ See Pietermaritzburg Exhibit 'A' from page 72 onwards – Submission by the Area Manager of the Pietermaritzburg Prison.

²¹ See the extract from the said Report annexed hereto marked "A".

5.1 Comment

The report of the consultants was presented to the Department in October 1998. The Commission, however, found that the malpractices and irregularities relating to recruitment, which were identified by the consultants in their 1998 report, persisted at the time that the Commission conducted its investigations.

The Commission also noted that the Department did not implement the recommendations the consultants made, and there appears to be no reason why it did not. It seems that the Department does not consider the problems arising from recruitment and merit award malpractices as an issue that requires urgent attention and intervention.

The Commission will now deal with the recruitment and merit award malpractices found in some of the Management Areas investigated by the Commission.

6. POLLSMOOR MANAGEMENT AREA

Both recruitment drives in the 2001/2002 year were riddled with irregularities in the Pollsmoor Management Area.

Mr Hennie van Achterberg, an Assistant Director: Recruitment and Transfers, testified that the first step in the process of a recruitment drive is the input of the Area Managers. At entry level, the Head of Recruitment chairs the panel. When it is time to open the application forms, Area Managers normally assign this to representatives from their respective areas. The geographic location of the applicants is not a criterion to be used in the selection process. The Department has an equity policy that a person may be re-interviewed during the second

process but if they are interviewed within the same recruitment drive, then there should be a very good reason for the second interview.

6.1 First Recruitment Drive

During the first recruitment drive for the year 2001, irregularities occurred in that applicants already interviewed were being re-interviewed and people who were not short-listed were interviewed and recommended for appointments. Candidates were being picked by Area Managers, short-listed and interviewed. Mr Nxele, the Acting Provincial Commissioner, interfered with the process and removed the names of certain people who had been recommended from the final recommended list because nepotism was suspected. It was during this recruitment drive that Mr Nxele appointed Mr Samuel Joseph Theron to act as Head of Recruitment, despite him lacking the necessary qualifications, experience or training in recruitment procedures.

Mr Theron was in charge of both the recruitment drives. According to Mr Theron, he was part of the interview panel and sat in on the interviews, which were finalised on 22 May 2001. A final list of recommended candidates was drawn up on 28 May 2001 and then distributed to the relevant Area Managers. Mr Nxele confronted Mr Theron and asked him why they had excluded the Area Managers from the interview process.²²

Mr Nxele convened a meeting where he suggested that re-interviews and further interviews should be held. Both Mr Steenkamp and Mr Lategan, being psychometrists, objected to this suggestion and told Mr Nxele that they had followed the correct procedure in conducting the interviews and selecting the

²² It needs to be stated that the Area Managers have always been involved in the interview process but during this recruitment drive a decision was taken to exclude the Area Managers from the process.

candidates. They also stated that the process had been finalised and pointed out that it would be irregular to conduct further interviews.

The Area Managers, at that stage, voiced their displeasure at being excluded and supported Mr Nxele that further interviews should be held. The main concern raised by the Area Managers was that they would not be able to provide accommodation in the Management Area for the candidates initially recommended, which by implication meant they preferred to appoint local candidates.

Mr Steenkamp informed the meeting that the recommended candidates met the criteria and performed better than others during the interviews. He further pointed out that accommodation was not part of the criteria for appointment. He also informed the meeting that if these candidates took the matter to court, they would have a case against the Department.

Mr Nxele's reaction was that Mr Lategan and Mr Steenkamp were negative and asked them to leave the meeting. The meeting then proceeded in their absence. It was resolved that the Area Managers would select the candidates who were to be interviewed. Although the Area Managers participated in the interview process, they did not normally participate in the short-listing of the candidates.

The Area Managers commenced with the selection of the candidates and compiled a list of candidates to be interviewed. This list contained the names of candidates who had already been interviewed, as well as candidates who were not. Some of the candidates had not even been short-listed in the first interviews.

The interviews and re-interviews of the candidates selected by Area Managers were held on 20 June 2001. The re-interviewing panel consisted of Area

Managers and Mr Theron. According to Mr Theron, about forty (40) people were interviewed during this process.²³

Mr Theron in his testimony referred to candidates who had already been interviewed but not recommended after the first interview process, but who were subsequently recommended by the Area Managers for appointment at the Worcester Management Area. He testified that Area Managers had removed some of the candidates recommended during the first interviews from the final list compiled by them. He also testified that people who were not even on the Area Managers' preferred list were interviewed and added to the final list.²⁴

Mr Theron referred to the removal of four people from the final list after Mr Nxele's complaint that the Department was not a family business. Mr Nxele had complained that certain candidates, who were members' relatives, had been recommended for appointment. Some candidates, who had the same surnames as some of the members, were randomly picked and removed from the list. Four other candidates, on Mr Nxele's instruction, replaced four candidates who had been recommended for appointment.

Mrs Elsa Melinda Jones, the Acting Provincial Control Officer: Corporate Services, who was also responsible for this recruitment drive, confirmed Mr Theron's evidence that four names were removed from the final list of recommended candidates and replaced by others on the instructions of Mr Nxele, who complained of nepotism. Evidence also established that there was no attempt to verify whether these candidates were indeed related to officials in the Department before their names were removed.

²³ See Pollsmoor hearings, Exhibit "O".

²⁴ See Pollsmoor transcript Volume 9, pages 801-858, for Mr Theron's testimony regarding the recruitment process followed.

Mr van Achterberg testified that if certain candidates were re-interviewed, then all the candidates should have been re-interviewed and stated that there must be a good reason why people should be re-interviewed.²⁵

Evidence also established that only five Area Managers were involved in the selection and re-interviewing of the candidates after the instructions from Mr Nxele. No reason was advanced as to why, out of 28 Area Managers, only five participated in the process.

After the completion of this process, concerned members of the community and applicants lodged complaints of alleged irregularities.

Mr van Achterberg said these complaints were forwarded to the office of the Provincial Commissioner, Western Cape, for investigation and finalisation. No progress report was received from the office on the investigation of these complaints. Head Office thereafter recommended that recruitment investigations into the irregularities should be conducted and an independent investigation was approved. Mr Z. Sikiti, a Human Resource Manager of the Department of Justice and Constitutional Development, was appointed to conduct these investigations.

Mr Sikiti, however, stated the stated that the state vehicle had been broken into and the original short-list given to him had been stolen.²⁶ In his report dated 18 October 2002, he concluded that, amongst other things, the original short-list that he obtained from Mr Stalcor was sufficient evidence that names had been unlawfully added to the short-list. Mr Sikiti testified that only the files and a key, belonging to the Department, were stolen from his vehicles.²⁷

²⁵ See Pollsmoor transcript Volume 9 at pages 870 *et seq* also see Exhibit “P” for further comments of Mr H van Achterberg.

²⁶ See Pollsmoor transcript Volume 38 at pages 2978 to 2981.

²⁷ Mr Sikiti conceded at the hearings that valuable items, like a radio, were in the car but no attempt was made to take anything else from the car.

6.1.1 Findings on First Recruitment Drive

In the course of these recruitment drives, Mr Nxele was at the middle point of all the irregularities. Evidence established that all the irregularities during these recruitment drives were carried out on his instructions. Mr Nxele was afforded ample opportunity to refute the allegations against him, but he opted not to and walked out of the proceedings.²⁸ At the conclusion of the proceedings dealing with this recruitment drive, the evidence against Mr Nxele remained unchallenged.

As the Acting Provincial Commissioner for the Western Cape, Mr Nxele had an obligation to assist this Commission in its investigations regarding the allegations of corruption during these recruitment drives. Mr Nxele was the highest-ranking official of the Department in the Western Cape at the time.²⁹ His conduct, particularly his walking out of the proceedings and his absence during the rest of the proceedings, shows great disrespect for a judicial Commission and certainly sets the wrong example for junior members.

It has been pointed out in the interim reports of the Commission that for as long as senior officials regard themselves above the law, the Department will never be able to get to the root of corruption that is so endemic.

Save for the exclusion of the Area Managers from the interview process, it would appear that a normal procedure was followed during the first recruitment drive until the interviews and recommendations were made. The Area Managers were usually involved in the interview process but during this recruitment drive, a decision was taken by certain officials to have them excluded.

²⁸ This was the same strategy which had been adopted by the other senior members at St Albans and Johannesburg. For a discussion see Chapter one and Chapters on the applicable Management Areas.

²⁹ He still holds a very senior position in the Western Cape, as Provincial Control Officer: Corporate Services, with the rank of a Deputy Director.

Although it is common cause that they were never involved in the short-listing process, they were, however, involved at the interview stage.

The decision to exclude Area Managers from the interview process when they had previously been involved, appears to have been an arbitrary decision taken by Mrs Jones and other officers, who were fairly junior to the Area Managers. The Area Managers thus had good reason to complain that they were unfairly excluded from the interview process.

However, the management board's decision to conduct further interviews and re-interviews tainted the whole process. This decision, or rather instruction, from Mr Nxele, that people should be re-interviewed, remained in force despite the objections raised by Mr Lategan and Mr Steenkamp, the psychometrists.³⁰ This decision culminated in a situation where Area Managers became involved in the short-listing process, picking candidates that they wanted and interviewing them. Some of the candidates who had already been interviewed were then re-interviewed.

It appears from the evidence that several candidates, who were not even short-listed, were interviewed during the process, including candidates not initially recommended.

Another strange feature of this process was that the interview panel was made up of only five Area Managers from the 28 Management Areas. The invitation to these five Area Managers to participate in this process is a clear indication that there was an ulterior motive, and the process provided an unfair advantage to certain candidates. When Mr Lategan and Mr Steenkamp raised a valid objection to the process and informed the meeting that the Department could be taken to

³⁰ See Chapter one for a discussion on how professional people, like psychometrists, are ignored by “disciplinary members.”

court, Mr Nxele accused them of being negative and they were eventually excluded from the meeting.

If some candidates were re-interviewed, then all the candidates should have been re-interviewed and it is clear from the evidence of Mr van Achterberg that there must be a good reason why people should be re-interviewed.

Evidence established that names were removed and replaced in the final short-listing process on the instructions of Mr Nxele, who told Mr Theron to carry out his instructions and Mr Theron, in turn, told Mr Lategan to carry out those instructions. This evidence remained unchallenged at the conclusion of the Commission proceedings.

The evidence also showed that Mr Nxele removed four names from the final list and replaced them with four other names as he suspected nepotism. It was shown that no proper investigations were done to determine whether those candidates were indeed related to officials in the Department.

The overall effect of these irregularities is that all the candidates who were lawfully recommended and later excluded on the instructions of Mr Nxele, would have a valid claim for damages against the Department.³¹

6.2 Second Recruitment Drive 2001/2002

The second recruitment drive in the Pollsmoor Management Area took place during the second part of 2001 and was concluded in February 2002. Mr Theron, who was then the Acting Head of Personnel Provisioning, was also in charge of this recruitment drive.

³¹ If all the affected persons should decide to bring the matter before a Court of law, it is highly likely that the Department would be compelled to employ those who were unlawfully excluded.

If all the affected persons brought the matter before a court of law, it is highly probable that the Department would be compelled to employ all those who were unlawfully excluded and pay them.

The Commission heard evidence of a number of malpractices and irregularities relating to the second recruitment drive, and Mr Nxele was also at the center of these irregularities.

Evidence led before the Commission regarding this recruitment drive shows that after the completion of the process and after the interviews had been finalised, Mr Theron received two additional lists from Mr Nxele of people to be interviewed. Mr Theron was instructed to conduct further interviews of all people whose names were on those two lists. Mr Theron convened a further interviewing panel and those people were subsequently interviewed. Mr Theron testified that the first list Mr Nxele gave to him came from a member of Parliament, Mrs Bathabile Dlamini. The second list, containing the names of six people to be interviewed, came from Mr Joseph Jansen, the Head of Maximum Prison at Pollsmoor Prison.³² In an affidavit, Mr Jansen confirmed that he only handed these application forms to Mr Nxele and did not say anything to him.

Regarding the further interviews, Mr Theron argued that even though this practice was irregular, it was acceptable because it was sanctioned by a more senior member. He was of the view that if the Provincial Commissioner told him to interview additional people, irrespective of what form they filled in, then he had no choice but to interview them. He further stated that he found it impossible to work in accordance with the procedures as set out in the Recruitment Manual when there is such influence from senior officials to do differently.

³² See paragraph 23 of Exhibit “O” of the Pollsmoor hearings.

According to Mr van Achterberg, the Head of Recruitment and Transfers at Head Office, Pretoria, the policy regarding recruitment requires that posts must be advertised and people apply by filling in a Z83 form, which all people applying for a post in a government department post must complete, supported with a CV. After the cut-off date has passed, these application forms are sorted and those who comply with the requirements are put on a gross list.

The selection panel compiles the gross list from which the short-list is compiled and eventually the short-listed candidates are called for interviews. After the interviews have been conducted, the recommended candidates go for further final screening, which involves medical testing and a criminal records clearance. The final recommended list is then submitted to the Head Office and presented to the National Commissioner for final consideration and approval.

The list is then submitted to the National Commissioner, who would approve the list on the basis that everything has been done in accordance with the Department's policy. The Department would keep a person's application form, the Z83, together with the annexures, namely, a certified copy of his identity document, as well as certified copies of qualifications. All these documents contain the personal details of that person and how much experience he/she has in various fields. These documents are an essential part of the Department's records. Copies are kept at the provincial office and also forwarded to the Management Areas where candidates have been appointed. The original documents are forwarded to Head Office.

According to Mr Theron, the interviews in this particular recruitment drive were completed on 12 December 2001. Further interviews for the additional candidates, submitted by Mr Nxele to Mr Theron, were completed on 20 December 2001. During this recruitment drive, 30 000 applications were received for 100 posts to be filled in the Western Cape.

Mr Theron testified that Mr Nxele subsequently told him that an additional four posts had been arranged and he gave him the names of the people who had to be appointed to fill these posts. Two of these people were on neither the parliamentarian's list nor on Mr Jansen's list. Two of the candidates had done well in the interviews but were eliminated because of their age. In querying the additional posts with Head Office, Mr Theron was told that no other arrangements had been made for four extra posts.

According to Mr van Achterberg, the two recommended name lists were sent to Head Office.³³ The list that was received first was not in the correct format and the Acting Provincial Commissioner did not confirm and sign it. Only Mr Theron signed it. Head Office then received the final list from the Western Cape. Mr Theron phoned to ask if the list had been increased to 104 candidates and he was informed that the Department had approved only 100 candidates.

According to Mr van Achterberg, the list that contained the names of 104 people was not the list that was originally presented to Head Office. No list containing more than 100 people arrived at the Head Office or was presented to the National Commissioner. The National Commissioner never approved the appointment of the four additional people.

Mr van Achterberg further testified that it was pointed out to Mr Theron that the procedure followed in the Western Cape could result in trouble. Firstly, only one Area Manager should list persons. Secondly, the purpose of the entire recruitment drive is to ensure that in a time of unprecedented unemployment, every person has a fair chance of obtaining a job. If Mr Theron was saying that people were interviewed in a normal interviewing process and thereafter lists were circulated of candidates to be interviewed, then irrespective of who compiled such list, that process could be fair.

³³ See Exhibit "P" of the Pollsmoor hearings.

Every process that is followed in a recruitment drive must be justified and each candidate should be exposed to the same process. If there is a deadline, then forms must be completed by a particular date and submitted in accordance with that deadline.

If interviews are scheduled for a particular period, then all candidates must be interviewed during that period. There are nine Provinces in this country and Head Office must rely on these Provinces and the Provincial Commissioners to protect the integrity of the process. If the Provincial Commissioner fails to adhere to the procedures, then the whole process in the Department gets tainted.

According to Mr van Achterberg, the integrity of the process was called into question when it was realised that six identified appointees had given as their address 112 Arcadia Park, Goodwood, which belongs to a Member of Parliament, Mrs Bathabile Dlamini. When this was discovered, Head Office requested that the matter be investigated. By the date of the hearing of this matter, Head Office had not received any feedback on this investigation.

The six candidates involved were:

- (a) Ms F.B. Mabizela
- (b) Mr S.B. Mkhize
- (c) Mr S.J. Dlamini
- (d) Ms B.M. Hlongwane
- (e) Mr M.H. Majola
- (f) Mr N.P. Shange.

At the request of the Commission, Mr van Achterberg was asked to examine the personal files (SP files) of these six members. The examination revealed that:

- (i) None of the six files had a checklist containing qualifications and other relevant information, which should have been signed by the Head of Recruitment;
- (ii) Documentation was missing from each file;
- (iii) In some instances, there were no Z83 application forms;
- (iv) Date stamps for certification were, in some cases, dated after the closing date of the advertisement;
- (v) A Z83 form was, in one case, dated after the closing date of the advertisement; and
- (vi) No stations were indicated on some of the application forms. One Z83 form was not dated at all.

According to Mr van Achterberg, a close examination of all these SP files indicated that all these applicants should have been rejected at the screening stage. The applicants all came from Pietermaritzburg.³⁴

All the applicants involved were afforded a chance to present their version before the Commission but they simply denied the allegations without providing any satisfactory explanations.

The Area Manager of Paardeberg, Mr Michael Sibusiso Nhlangothi, told the Commission that one of the abovementioned persons, Ms Mabizela, was appointed to his area. From the time of her appointment until about a month before he testified before the Commission, she had been on the Paardeberg

³⁴ The Member of Parliament, Mrs Dlamini, is also from Pietermaritzburg. She was also the Chairperson of the Portfolio Committee on Correctional Services at the time.

payroll but had never worked at the prison. He testified that none of the five people who were short-listed for his area was qualified. As a result, he unsuccessfully approached different Area Managers looking for candidates who might be suitable. He subsequently received a fax from Mr Theron indicating that one candidate had been appointed to his Management Area even though she was in college at the time. Although he had indicated that it was essential that the candidate reside in the Boland area because of the accommodation problem at Paardeberg, Mr Nhlangothi received a fax from Ms Mabizela requesting accommodation. Mr Nhlangothi told the Commission that he had asked how she got the job at Paardeberg when she did not reside in the area and received a vague answer.

On the day that Ms Mabizela would have been required to commence work, Mr Nhlangothi received information that she had applied for leave from the Department whilst at the college at Paardeberg and would only start five days later. He was subsequently informed that she had extended her leave again.

Mr Nhlangothi met Ms Mabizela, who was accompanied by Popcru officials, in August. He reported to the Commission that the result of the meeting was that Ms Mabizela had to go to the Provincial Office to seek assistance with her accommodation problem because Mr Nhlangothi was not in a position to assist her at the time. He then heard that she was working at the Provincial Office temporarily, although she was still on the payroll of the Paardeberg Management Area.

Mrs Dlamini, who was a member of the Portfolio Committee of Correctional Services at the time that the interviews took place, was no longer a Member of Parliament at the time of the hearings. She responded by way of an affidavit stating that the only allegation against her was that she used her Parliamentary residence as a temporary home for those who applied for jobs in the Department

of Correctional Services. She denied playing any role in the employment of anyone at the Department, saying that she had no intention nor power to do so.

6.2.1 Findings on Second Recruitment Drive

The evidence before the Commission established that during this recruitment drive:

- (a) The Acting Provincial Commissioner was at the center of all the malpractices and corruption;
- (b) The initial interviews were concluded on 12 December 2001 but further interviews were conducted on 20 December 2001 to accommodate the persons contained in the two lists, which came from the Parliamentarian and from Mr Jansen, as set out above. Evidence given by Mr van Achterberg, who is Head of Recruitment at the Pretoria Head Office, established that the policy does not provide for further interviews or re-interviews after the process had been completed;
- (c) Mr Theron, as Acting Head of Recruitment at the time, knew that the policy did not make provision for further interviews but, despite that, he proceeded to conduct further interviews on 20 December 2001, alleging that he was acting on the instructions of his senior, the Acting Provincial Commissioner, Mr Nxele;
- (d) Some of the candidates who were interviewed on 20 December 2001 had already been interviewed. These candidates were re-interviewed because they did not perform well at the first interview. It is no defence for Mr Theron to state that he was carrying out an instruction from a senior official, Mr Nxele. For this defence to succeed, the instruction had to be lawful and reasonable. Mr Theron knew that it was contrary to the

Department's policy to hold further interviews especially when the interviews had already been completed;

- (e) Both Mr Dlamini and Mrs Hlongwane were interviewed twice, as they did not do well during the first interviews;
- (f) The personal files of the six candidates appointed did not contain all the documentation that was required. Evidence also established that none of the six applicants should have been short-listed in terms of Departmental policy;
- (g) It is likely that Mrs Dlamini played a role in the appointment of the six candidates by providing a list to the Acting Provincial Commissioner, Mr Nxele. Mr Jansen, who was Acting Head of the Pollsmoor Maximum Prison, gave a similar list to Mr Nxele and admitted this in his affidavit.

According to the evidence given by Mr van Achterberg, as a result of the defects in the application forms, all six applicants would have been eliminated during the screening process. These defects make their applications for appointment irregular;

- (h) All the applicants during this recruitment drive should have been given a fair and equal opportunity of employment. If candidates are interviewed twice with the purpose of improving their scores, the whole process then becomes irregular;
- (i) The four additional candidates, who Mr Theron included in the final list, were appointed, without being sanctioned by the Head Office, on the instructions of Mr Nxele.

The actions of both Mr Nxele and Mr Theron during this recruitment drive amount to an abuse of power. It has been noted that this abuse of power by senior officials of the Department of Correctional Services remains a major problem within the Department.³⁵ The Department should not hesitate to act against officials who abuse the system since such abuses creates a breeding ground for corruption.

The process for recruiting new members has been marred by inefficiencies, corruption and the lack of transparency. There is no doubt a need to review the criteria for the type of people required to perform the functions of a correctional official.

The Department of Correctional Services has decided to outsource the processing of applicants due to the extremely high response rate to advertised posts. The Department of Correctional Services received 1 600 000 applicants for 2 200 entry level posts.³⁶

7. DURBAN-WESTVILLE MANAGEMENT AREA

7.1 Introduction

As in all the other Management Areas the Commission has investigated, the recruitment of staff in KwaZulu-Natal and, in particular, officials in managerial positions, has been affected by Operation Quiet Storm,³⁷ which was primarily aimed at replacing white managers with black managers. The issue of skill or potential to do the job was immaterial. Patronage was the only consideration.

³⁵ Also see the Chapter on Abuse of Power for an in depth discussion of seniors who manipulate and abuse their “offices”.

³⁶ See Report of the Ad Hoc Committee of the Correctional Services Portfolio Committee, dated 22 June 2004 at page 8.

³⁷ Operation Quiet Storm was the brainchild of Popcru. See the Chapter dealing with the Historical Background for more details on Operation Quiet Storm.

Officials appointed to occupy senior positions within the Province of KwaZulu-Natal were identified at secret meetings and this resulted in the appointment of unskilled and incompetent managers. This has contributed significantly to the demise of administration capacity in the Department in the Province. Furthermore, the Department neglected to have these unskilled, inexperienced and incompetent managers trained.

7.2 Lack of Managerial Skills

In the Durban-Westville Management Area, the Commission heard evidence of Ms Ntombodumo Laurette Delubom³⁸ who the Department employs as an Employee Assistance Practitioner in charge of a new programme. The programme is aimed at helping employees to cope with the pressures of life, which affect their performance. This is to enhance their social functioning and productivity in their jobs. Although this programme is directed at all employees in the Department, her evidence revealed that managers were not co-operating. She identified managers with no leadership skills who are unable to inspire their subordinates, untrained managers who do not know or understand their roles, supervisors who do not have managerial skills or skills in decision-making and conflict resolution.

She recommended in her evidence that the following proposals would need to be implemented to enable this programme to be successful:

- (a) Having identified the lack of managerial skills amongst the managers, there is a need for them to be trained in managerial skills so as to empower and equip them for a more effective and efficient service delivery;

³⁸ See Exhibit 'YY' of Durban-Westville Management Area hearings.

- (b) Participation in the Employee Assistance Programme (EAP) should be taken into account in determining managerial skills and the capacity of the managers and supervisors;
- (c) Managing employees holistically should form part of the performance agreement management signs in the Department;
- (d) The programme should be more formalised and managers should be sensitised to the fact that participation in the programme forms part of their responsibilities and duties;
- (e) There is also a need to employ more practitioners so as to be in line with the International Employees Assistance Association's ratio of 1:200, which is currently 1:1 500 in the Department, to ensure a better EAP service.

In the Durban-Westville Management Area, the Commission heard evidence that senior officials of the Department employ their wives, relatives and friends in circumstances that amount to nepotism.

Evidence established that Mrs T.G Zulu, the wife of Mr I.S Zulu, the former Area Manager at Westville Prison, was appointed to Stanger Prison, but she never worked there and was instead transferred to the Westville Prison.³⁹ Her transfer from Stanger to Westville Prison was facilitated by her husband in circumstances that amount to an abuse of power.⁴⁰ Furthermore, Mrs T.G Zulu had a previous conviction. The Commission also found that by condoning Mrs Zulu's

³⁹ It was also established that at the time of her appointment she was 36 years of age, which was contrary to the age limit of 35 that is applicable in terms of Regulation 8 of the regulations promulgated in terms of the 1959 Act.

⁴⁰ See First Interim Report in respect of the Durban-Westville Management Area, pages 34-53 and 60 for more details.

appointment without regard to her previous conviction, Mr Zulu acted improperly and in circumstances that also amount to an abuse of power.

It transpired during the evidence, however, that each recruitment drive was governed by its own guidelines. The guideline applicable during this particular recruitment drive did not stipulate the maximum age but only the minimum age.⁴¹

The Commission did not find any evidence indicating that Regulation 8, prescribing the maximum age limit of 35 for members at entry level, had been amended. On the other hand, Exhibit 'TT', referred to above, does not set the maximum age limit at entry level for members.

This is another example of the multiplicity of policy documents, which contradict earlier directives that were issued by the Department regarding recruitment. It is evident to the Commission that there is a need for the Department to recall earlier directives issued on specific topics, like recruitment, if it does not want to create confusion and uncertainty in its Management Areas.⁴²

8. PIETERMARITZBURG MANAGEMENT AREA

8.1 Operation Quiet Storm

The Pietermaritzburg Management Area was the most problematic area in terms of the recruitment of staff, with many of the problems being a consequence of Operation Quiet Storm.⁴³

⁴¹ See Exhibit 'TT' – a Memorandum issued by the Department of Correctional Services dated 4 December 1997 – Durban-Westville Management Area.

⁴² See the PSC Report *supra* that recommended as early as 2000 that the Department should update its policies.

⁴³ For more details dealing with Operation Quiet Storm, see the chapter dealing with Historical Background and the Pietermaritzburg Management Area chapter.

Operation Quite Storm, coupled with the affirmative action policy, had a major impact on recruitment and promotion of staff at Pietermaritzburg.⁴⁴ The intimidation and violence which prevailed made the ground fertile for corruption and maladministration.

8.2 Political Appointments

The type of discussion which took place outside the formal recruitment process is best illustrated by the manner in which Mr I.S. Zulu was appointed. Mr Philemon Ntuli, a witness before the Commission, referred to what he described as the “political appointment” of Mr Zulu, which was agreed to at a meeting held in Newcastle, where the former Minister of Correctional Services, Mr Sipho Mzimela, and the Minister of Welfare and Social Services in KwaZulu-Natal, Prince Gideon Zulu, were present.⁴⁵

8.3 Alleged Nepotism

The Commission also heard evidence to the effect that the appointment of managers’ wives was the order of the day in the Pietermaritzburg Management Area. Out of 17 Area Managers, fewer than five did not have their wives working in prisons.⁴⁶

It was also noted by the Commission that a significant number of employees in the Department in the Pietermaritzburg Management Area were related to one another. Ms Kgosidintsi, who was employed by the Department as a Chief Deputy Commissioner: Human Resource Management, testified that in an assessment of staff conducted in 1998, she and other colleagues found that at least 78% of staff in Correctional Services at the time were related to each other.

⁴⁴ See Pietermaritzburg hearings Transcript Volume 3 pages 9 – 11.

⁴⁵ See Pietermaritzburg Management Area Transcript page 33.

⁴⁶ See Pietermaritzburg Management Area Transcript page 48.

She testified that she was told that it had been like that for years and that it was also necessary for security reasons, as most prisons were in rural areas.⁴⁷

8.4 Merit Awards

In the Pietermaritzburg Management Area, merit awards were also the subject of testimony at the hearings. The allegations in this Management Area concerned people who had received promotion whilst on probation, and people who received a notch within one (1) year.

The Commission also heard evidence that Mr Russell Ngubo received a merit award whilst on suspension. It also heard evidence that Mr Ngubo was promoted whilst he was in police custody facing a murder charge during the year 1997.

Mr D.J. Makhaye, who was the Area Manager of Pietermaritzburg, testified before the Commission that Mr Ngubo was on suspension from 17 February 1999 and was reinstated on 19 November 1999. After Mr Ngubo's return from suspension, until the end of the financial year, his performance was average. He was accordingly given a score of 110, which was made up as follows:

(a)	Management ability	55
(b)	Ability to adjust	55
		—
		<u>110</u>

According to Mr Makhaye, this information was brought to the attention of the chairperson of the Provincial Moderating Committee for assessment of the year 2000/2001.⁴⁸ Notwithstanding this assessment by Mr Makhaye, Mr Ngubo was

⁴⁷ See Pietermaritzburg Transcript Volume 13 at pages 1118 to 1119.

⁴⁸ See Pietermaritzburg hearings Exhibit 'L5'.

given an award of Forty Thousand Rand (R40 000,00) by the Provincial Moderating Committee.⁴⁹

8.5 Further Irregularities

Mrs Kgosidintsi also testified that she was instructed to transfer several people and the reason given for these transfers were usually because Popcru was unhappy with these people.

Allegations of irregularities and manipulation of the recruitment process were also referred to in the evidence of:

- (a) Mr Zeblon Mthethwa, the Deputy National Chairman of the Public Service Association, who was stationed at Newcastle Prison, who testified before the Commission about two members who were former prisoners and who had been appointed to the Department.⁵⁰
- (b) Mr Sibusiso Dumisani Mhlongo, a qualified psychometrist, who testified that personality and I.Q. tests were no longer done on short-listed candidates.⁵¹ However, this had been done previously. Even with his qualifications, he played no role in assisting⁵² in the recruitment procedure and, instead, took minutes of what candidates said in reply to the selection panel's questions.⁵³

⁴⁹ See Pietermaritzburg hearings Exhibit 'L4'.

⁵⁰ A report in the *Daily News* of 29 March 2001 states that 38 prison warders from Pietermaritzburg Prison are themselves convicted criminals. The National Minister of Correctional Services, Mr Ben Skosana, provided this information in response to a Parliamentary question.

⁵¹ The Commission found that this was also the practice in the rest of the Management Areas.

⁵² See Chapter one for a discussion of the role of psychometrists.

⁵³ An article in the *Echo* newspaper of 6 August 1998 states that recruiting officers in the KwaZulu-Natal Department of Correctional Services have asked for bribes or sexual

8.6 Fraudulent Qualifications

The Commission heard evidence of a number of members who submitted fraudulent matric certificates either to obtain employment, promotions and/or other related benefits within the Department. In the Pietermaritzburg Management Area a total of 14 members submitted fraudulent matric certificates to gain employment in the Department or to receive promotion and other related benefits.

One member, Mr Thamsanqa Memela, submitted two fraudulent matric certificates, one in 1997 and the other during the year 2000. The Commission has already made recommendations that these officials be charged accordingly.⁵⁴ This practice is not only confined to the Pietermaritzburg Management Area but is spread over all the Management Areas.⁵⁵

favours in return for jobs. “It is understood that at least five complaints have been received by the Commissioner’s Office in Pietermaritzburg. *Echo* is also in possession of the names of at least five officers who have allegedly resorted to malpractice. A source said that some applicants have been asked to pay between R1 500.00 and R3 500.00 for a job, while women who do not have financial resources “are invited to offer sexual favours”. One woman is quoted as saying that an official got her telephone number from her application form and kept on calling her.

The article continues:

“*Echo* has learned that an official based in the Commissioner’s Office is about to be transferred because of her involvement in corruption. 17 posts have since been frozen. However, allegations include:

- The presence of a recruiting officer on a panel which interviewed his wife;
- Intimidation of employees who question practices they believe are improper;
- Employment of friends and relatives;
- Employment of candidates who do not possess matric qualifications. The minimum requirement for a warder’s post is Std 8, preference given to candidates with matric.”

⁵⁴

See the Fourth Interim Report on the Pietermaritzburg Management Area.

⁵⁵

In the St Albans Management Area, for instance, two officials, namely Mrs Ditala and Mr Mvana, were also found to have submitted fraudulent matric certificates when they were employed by the Department.

Despite the Department's policy that the validity of matric certificates should be verified before a person is employed in the Department, the high number of fraudulent matric certificates found in this Management Area indicates that this policy has not been adhered to by the Department.

The Public Service Commission also recommended that certificates be verified and that appointments should be subject to the submission of an original certificate. The Department did not comply with this recommendation.

8.7 Concluding Remarks

The implementation of Operation Quiet Storm and incorrect application of the affirmative action principles have resulted in the appointment of unskilled, incompetent managers to run the Department in the Pietermaritzburg Management Area.

This has resulted in a dysfunctional Department. As indicated above, despite the appointment of unskilled and incompetent officials, the Department has not taken pro-active steps to train those officials in managerial positions that lacked the necessary expertise.

As in all other Management Areas the Commission has investigated, recruitment, the appointment of staff and the granting of merit awards were manipulated by senior officials in the Pietermaritzburg Management Area.

As can be seen from the Brite Future consultants report referred to above, the intimidating work environment at Pietermaritzburg had a severe effect on the morale and mental state of members.

9. BLOEMFONTEIN MANAGEMENT AREA

There were also allegations of corruption, nepotism and favouritism in recruitment and promotions in this Management Area. These allegations related to the 1998/99 recruitment drive in the Free State Province. The Commission heard evidence of interference and manipulation of the recruitment processes by a senior official of the Department, Mr M.S Kosana, who was in charge of the recruitment drives in 1998/99. At the time, he occupied the position of Head: Personnel Provisioning.

The allegations against Mr Kosana in this recruitment drive concerned nepotism and corruption. It was alleged that he had appointed his former spouse, a girlfriend, a niece and a brother in circumstances that amounted to nepotism. It was also alleged that he failed to recuse himself during the interview processes, which involved his relatives.

The Commission recommended that the Department should therefore always pro-actively ensure that whoever is in charge of recruitment processes is a person of integrity and, in addition, has undergone intensive training before the drive is executed. It turned out that Mr Kosana did not receive any appropriate training, and he did not have any skills relating to recruitment.⁵⁶

10. ST ALBANS MANAGEMENT AREA

As will be noted from the evidence and the findings below, the affairs of the Department in the Eastern Cape Province, at the time of the Commission's investigations, were effectively run by a group of people closely associated with Popcru. The Department appeared to have lost total control in this region. It is

⁵⁶ See the Fifth Interim Report for more details on recruitment in Bloemfontein.

even more disturbing that Head Office was aware of this group's activities in the Eastern Cape but did nothing to rectify the situation.

As in all other areas the Commission has investigated, recruitment is a huge problem in the Eastern Cape. The Commission heard evidence from various witnesses on how appointments and promotions were manipulated by certain members in the St Albans Management Area. Evidence will show that two senior officials, Mr Mpemva and Mr Nweba, played a major role in the manipulation of these processes. The manipulation took the form of:

- interference with the short-listing process;
- the removal from and inclusion of certain names on the short-list;
- the appointment of senior members' wives, relatives and girlfriends;
- the removal or transfer of members who were viewed as obstacles.

There is nothing wrong with transformation of any department, as long as it is done fairly and in accordance with the applicable laws and governmental policies. In fact transformation of the Public Service is a constitutional imperative.⁵⁷ The transformation programme, which was embarked upon in this case, was problematic in that it was not in accordance with the law and it was a product of an exclusionary and subjective process.

10.1 Amagqugula

The Commission heard evidence that Popcru embarked upon a programme of action, which was aimed at transforming the prisons in the Eastern Cape. In terms of this programme, the control of prisons was to be removed from white management and placed in the hands of black members. As a result of this programme, black members were placed in managerial positions. The Commission also heard evidence that most of the important decisions dealing

⁵⁷ See Section 195(1) of the Constitution.

with the transformation and appointment of staff were taken at these secret meetings called Amagqugula. This programme is similar to what in other provinces was known as Operation Quiet Storm (KwaZulu-Natal) or Operation Thula (Free State).

High-ranking members of the Department, as well as Popcru shop stewards, attended these secret meetings. It is understood that this strategy was adopted from Popcru's National office. Some of the secret meetings were held at the home of Mr K. Titus, who was a senior Popcru shop steward and employed as a warder at St Albans prison. These secret meetings were held to discuss sensitive matters pertaining to the Department in the Province.

10.2 Messrs Mpemva and Nweba

Mr Mpemva was appointed as the Provincial Head of Personnel in the Eastern Cape. His appointment is questionable. His appointment to this position was also discussed at the secret meetings. He was originally appointed in 1997, as Head of the Umtata Prison. He refused this post because he wanted to be appointed as a Provincial Head: Personnel, which is a Deputy Director's post. He was eventually appointed to this position, even though he was not qualified and even refused to submit himself to an interview by Mr Piet Steyn for this post. He demanded that the points allocated for him in the interview for the position of the Head of Umtata Prison be made binding for the more senior post. His demand was acceded to. He was then brought to the Provincial Commissioner's office in the Eastern Cape. He was thereafter appointed as Provincial Head of Personnel. Prior to his appointment to this position, he had been a grade one warder at East London Prison. Despite not being the best candidate for the position, he was nevertheless appointed. Two other candidates, Mrs Muller and Mr Gouws, had performed better than him during the interviews. They were, however, not appointed. Evidence before the Commission confirmed the notion that Mr Mpemva's appointment was as a direct result of his union affiliation.

Mr Nweba, who at the time was an ordinary grade one warder, and only had Standard 10, was also appointed to a senior position, the Deputy Director: Inspectorate. At the time of his appointment he was not the best candidate but he was nevertheless appointed.

After the appointment of Mr Mpemva as the Provincial Head: Personnel, it was felt within the Popcru ranks that they had control of the recruitment and appointment processes in the Eastern Cape. It was felt that he would be in a position to influence and give information regarding post establishments in the province. He would further be able to influence matters of recruitment, transfers and merit awards. The appointment of Messrs Mpemva and Nweba into what were perceived to be strategic positions enabled Popcru to manipulate and influence the recruitment processes within the province.⁵⁸

10.3 Other Irregular Appointments

After Mr Spelman's retirement, Mr Ntoni came to the Eastern Cape from KwaZulu-Natal as Provincial Commissioner. He stayed less than three months in the post and then mysteriously left the province. The reason for the brief sojourn was never explained. The Department then appointed Mr Baloyi as Acting Provincial Commissioner for the Eastern Cape.

The appointment of Mr Baloyi, a Popcru-aligned member, as a Provincial Commissioner for the Eastern Cape provided an opportunity for both Messrs Mpemva and Nweba to manipulate the recruitment processes. At the time Mr Baloyi had been forcibly removed from Grootvlei Prison so he was in a weak position and was in no position to resist the unions demands. Mr Mpemva was still the Head of Personnel and Mr Nweba was the Provincial Head: Inspectorate

⁵⁸ See also the Chapter on Historical Background.

Services, as well as Acting Provincial Commissioner during the 1999 recruitment drive, when controversial appointments were made and signed by Mr Baloyi.

The Commission heard evidence that the following controversial appointments were made during the 1999 recruitment drive:

- (a) Mr Baloyi's wife, who was approximately 47 years old and who was a former school principal, took a horizontal transfer from the Department of Education.
- (b) Mr Nweba's wife, Mrs J.N Nweba.
- (c) Mr Nweba's sister's child, Nomvuyisi Kaka.
- (d) Mr Molima's wife.
- (e) Mr Molima's alleged girlfriend, Ms Jackie Gumede, who came from KwaZulu-Natal.
- (f) Mr Mpemva's wife, who was working at the Provincial Commissioner's office.
- (g) Mr Mpemva's sister-in-law, Ms Ntsangani, who later withdrew because she was pregnant at the time of her appointment.
- (h) Mr Ditala's girlfriend, who is now his wife, was appointed as a typist and thereafter applied to be appointed as a warder but was found to have a false matric certificate and was not appointed. Mr Ditala was a senior shop steward in Popcru and a friend of Messrs Mpemva and Nweba.
- (i) During the 2002 intake, another sister-in-law of Mr Mpemva, Ms Mshingale, was appointed.
- (j) Family members of Mr Nweba, Mr George and Mr S.G Jinikwe.
- (k) Mr Jinikwe's wife.

Many other family members of people in the employ of the Department were appointed as well.

Mr Matshoko testified that he also benefited from the recruitment irregularities that Messrs Mpemva and Nweba committed during the 1999 recruitment drive, in that his ex-wife was appointed to the Department as an educationalist.

The circumstances under which Mr Matshoko's ex-wife was appointed were as follows:

"During the year 1999, Mr Matshoko applied for the post of senior correctional officer, Head Management Services, at Cradock. He was interviewed for this position and after the interview, Messrs Mpemva and Nweba called him to Mr Mpemva's house.

At this meeting they told him that he did well in the interviews but they would not give him the post because rumours were already circulating at St Albans that he was going to be given the post. They told him that this would confirm the reports in the Evening Post⁵⁹ of the previous week, which stated that managers had secured appointments for their wives and friends.

He voiced his concerns and displeasure at not being appointed, even though he was the best candidate. Mr Mpemva then came to his house to discuss the matter. Mr Nkebi, another shop steward of POPCRU, joined them five minutes later."⁶⁰

At this meeting, Messrs Mpemva and Nweba gave him the following three options:

- (a) He could be transferred to Cape Town where he came from.

⁵⁹ This was a newspaper which circulated in the Port Elizabeth Area at the time.

⁶⁰ See St. Albans Management Area, Exhibit 'U'.

- (b) He could be given the Senior Correctional Officer's post for which he had applied; or
- (c) His wife, who had applied for an educationalist post and had not succeeded, could be appointed.

He chose the third option, even though his wife had not been short-listed or interviewed. She was then called for an interview and appointed as an educationalist within the Department. She had resigned from the Department of Education and had received a package. Her employment with the Department of Correctional Services did not involve an inter-departmental transfer.

Messrs Mpemva and Nweba did not only interfere with recruitment processes but also with internal placement and promotion of members. Only people or members who Mr Mpemva and Mr Nweba favoured were appointed to posts. They would, after the interviews had been conducted, simply compile their own recommendations and memoranda and the people they recommended would then be appointed.

The following are examples of people who were appointed because Messrs Mpemva and Nweba favoured them:

- (a) Mr Mtanase, who is a friend of Mr Mpemva and who did not meet the criteria when he was appointed in 1999. One of the requirements for this post was a valid driver's licence. He was appointed, despite the fact that he did not have a driver's licence.
- (b) Mr Mabandla was appointed in 1999, as a Deputy Director, to a post on the Parole Board. One of the requirements for this post was that the candidate should have managerial experience. He did not have such experience and he was just an ordinary grade one warder at the time when he was appointed.

- (c) Mr Abersalie, a senior Popcru shop steward at St Albans who participated in the removal of Mrs Tseane, the former Provincial Commissioner of the Eastern Cape, was, in the year 2000/2001, rewarded with the post of Assistant Head of the Prison at Mdantsane. Before his appointment, he was a grade one warder and also a friend of Messrs Mpemva and Nweba.
- (d) Mr Jinikwe from Kirkwood was appointed as a senior correctional officer simply because he was a friend of Mr Mpemva and also a member of his church.
- (e) Mr Saki was appointed to the post of Senior Correctional Officer in Grahamstown. His wife was also appointed to the Department in the year 2000. Mr Saki had only two years' experience in the Department when he was promoted to SCO.

10.4 Mr R. Mataka

The arrival of Mr Mataka as the Provincial Commissioner did not help to curb corruption in appointments and recruitment.

Popcru members who were involved in corrupt activities were not charged. For example, even though a complaint was made to Mr Mataka that Mr Tshatshu gave "jobs for sex", no steps were taken against him.

The Commission investigated the aforesaid allegations but witnesses were not willing to testify and the matter could not be taken any further.

Another example of a member who benefited from the system is Mrs Ditala, who is the wife of a Popcru shop steward. It was discovered that her matric certificate was fraudulent. Instead of disciplining Mrs Ditala, it was arranged that she should resign voluntarily. She is now employed as a secretary at the Popcru office.

10.5 Recruitment Drives

Ms Maria Magrieta Fourie, a psychometrist, employed by the Department, gave a detailed account of the manipulation of recruitment drives during the years 1998/99 and 2001/02.

The Department has a bi-annual recruitment drive. Her role in these recruitment drives was merely to prepare the lists and participate in the interview panels. In all other Management Areas the Commission has investigated, including Pietermartizburg and Bloemfontein, the role of psychometrists has been reduced to that of clerks, who, in some cases, only take notes during the interviews. The Commission also noted that these psychometrists are highly qualified and the reduction of their roles as psychometrists amounts to an abuse of professionals.⁶¹

10.6 1998/99 Recruitment Drive

Of the 68 000 applications received during this recruitment drive, 1 000 candidates were short-listed. Interviews took place on 21 December 1999. Whilst the interviews were in progress, Mr Mfenqe called Ms Fourie and told her that he was lodging a complaint on behalf of Popcru because certain procedures had not been followed during the short-listing process. The panel were then instructed by Popcru members led by Mr Mfenqe⁶² to stop the interviews. The candidates were told that there was a problem and they should go home and they would be advised later.

A management meeting was thereafter convened and it was decided that a new panel should be constituted.

⁶¹ See Chapter one for a more detailed discussion.

⁶² See Exhibit 'Y' St Albans Management Area.

The new short-listing panel comprised Mr Zono, Ms Dumbela, Ms April and Mr Mfenqe. Although management wanted Ms Fourie to be part of the new panel, she declined.

The new panel then compiled a list of candidates to be interviewed. Ms Fourie observed that a number of people who were on the old list were not included on the new list. She also noticed that the new list included family members of the management, as well as the family members and friends of the panel that compiled the list. The wives of Messrs Nweba, Mpemva and Zono were on the new list, although they had not been included in the previous list. The list of the controversial appointments is fully set out on page 38 *supra* in this Chapter.

These people were then interviewed and after the completion of the interviews a list was compiled of people who had been successful. It was sent to Head Office for scrutiny and the National Commissioner's approval.

10.7 2001/2002 Recruitment Drive

The process in the 2001/2002 recruitment drive went smoothly until the compilation of the short-list. The candidates were arranged in their order of preference. A total of 60 people had to be appointed during this recruitment drive. After the interviewing panel had compiled the list, it was given to the Provincial Control Officer, Mr Mpolweni, in terms of the procedure. Whilst they were waiting for feedback from Mr Mpolweni, he informed Ms Fourie that he had instructed the network controller to retype the list on his computer. Three days later, Mr Mpolweni gave her a list, from which he said they should compile the final list of candidates.⁶³ The two lists, which were included in her affidavit, were not the same. The Head of Personnel thereafter compiled a list of the successful candidates to be appointed on the basis of Mr Mpolweni's list.

⁶³ See Exhibit "Y" of the St Albans hearings. The original list sent to Mr Mpolweni is marked Annexure 'B' and the list received from Mr Mpolweni is marked Annexure 'E'.

Ms Fourie observed that the name of Mr Sithole was not on the original list, nor on the short-list. She also observed that Mr Nqeketo's score, one of the applicants, had been changed from 12 to 17. She further noticed that the ranking of the officials had also been changed. When she questioned Mr Mpolweni on the ranking of the officials, he told her that he was giving preference to potential candidates from rural areas. She was not aware of any policy that people from rural areas should be given preference.

Mr N.L. Funani, who initially scored 17 points, was not appointed. Ms Fourie could not see any reason why they should screen the initial list if someone else could arbitrarily change a decision that was made by the panel.

Ms Fourie's testimony was that all the relevant information was kept on computer. At a particular time the network controller came to her office and told her he had to install a virus program on the computer. He did not tell her who had sent him to her office. Five minutes later when she was working on her computer, she found that the list of all the posts, transfers and vacancies had been deleted from her computer.

Mr Vuyani Kenneth Zono confirmed Ms Fourie's testimony that there were two sets of interviewing processes. On 21 December 1999, Mr Mfenqe, a Popcru shop steward, approached Mr Zono in his office. They had a discussion and spoke about things that were happening at the recruitment section, about some people who were being short-listed for reasons not related to the position and others who were excluded for silly reasons. Mr Mfenqe stated that candidates were being included because they were relatives of people employed by the Department. Mr Zono told Mr Mfenqe that he felt that it was wrong for people to be excluded simply because they were relatives of officials.

The following morning Mr Mfenqe came to his office and told him that Mr Baloyi wanted to see him. They then went to Mr Baloyi's office. Ms Dumbela joined them. Mr Baloyi told them that he knew what was happening in the recruitment office. Mr Baloyi then told them that Ms Dumbela and Mr Zono had been selected to sit on a new panel, which would interview candidates all over again. The new panel would comprise of Ms Dumbela, Mr Mfenqe, Ms Fourie, Ms April and Mr Zono. Mr Baloyi appointed Ms Dumbela as the chair of the committee.⁶⁴

After a short while Ms Dumbela came to his office and told him that Mr Mpemva had called him to the conference room. When they got to the conference room, Ms Fourie, Mr van den Berg and Ms April were already there. Mr Mpemva and Mr Mfenqe joined them later. Mr Mpemva told them that there was dissatisfaction with the short-listing of candidates. He wanted to know why some people had been excluded from the short-list. Mr van den Berg said that people could not expect to be appointed simply because they were relatives of Departmental officials. Ms Fourie added that this would especially be the case if they did not comply with the requirements of the advertisement. Mr Zono then said that people could not be excluded unless there was a valid reason.

Mr Zono, Ms Dumbela and Mr Mfenqe were then left to deal with the selection criteria and were later joined by Ms Fourie. Ms Fourie stated that it was pointless for her to be with them for the criteria as this had already been done. Mr Zono then asked Ms Fourie how they had determined the requirement of "experience". She was unco-operative and left them. At the time there were approximately 1 500 forms to process and each one of them had their own pile. All those who fulfilled the requirements were referred to Ms April.

During this process Ms Dumbela received a number of calls on her cellphone, which she went outside to receive. What surprised Mr Zono was that after each

⁶⁴ The appointment of Ms Dumbela as the Chairperson was thus irregular because she was not the Head of Human Resources (See the evidence of Mr Achterberg discussed under Pollsmoor Recruitment *supra*).

call, Ms Dumbela would go to the excluded pile of forms and look through it again. She did this on a number of occasions until Mr Zono commented on it. Several of these calls were received from Mr Mpemva's office phone and some were not from the Port Elizabeth area. Two of the calls Ms Dumbela received were traced to the Area Manager: East London, that is, Mr Gaqa.⁶⁵

Mr Zono indicated to Ms Dumbela that the forms she kept re-checking had already been done and that there were still many more to be done. He also said he would not work beyond 15h45 and subsequently left at this time. The others continued working. When he came back the following day, he observed that Ms Dumbela and Ms April had worked until late and had done a lot of work.

On 26 December 1999 Ms April contacted Mr Zono and told him that his brother had been short-listed. He was not aware of the fact that his brother had applied for a position. She further told him that his brother would be interviewed the following week. He could not tell whether Ms Dumbela took the rejected batch back to the other forms and whether she had selected his brother from the rejected batch.

10.8 Merit Awards

At the St Albans Management Area, the manipulation of the system by Messrs Mpemva and Nweba was not restricted to recruitment and appointments, it also extended to merit awards and performance appraisals. Evidence in this region established that wives and girlfriends of senior members were given merit awards and performance bonuses, when they were assessed, some of them, after only eight (8) months in the Department.

⁶⁵ See the Chapter on Abuse of Power for a discussion of this member's conduct and abuse of the discipline system.

This was a deviation from the policy, which requires that an officer be in the rank for at least one (1) year before he/she gets a merit award. One has only to look at the merit awards given to Mr Nweba, his wife and Miss Gaga, a relative of Mr Nweba, to find evidence of favouritism and manipulation of the merit and performance awards.

Mrs Nweba and Mrs Mpemva received three (3) merit awards and production bonuses even before they had completed one (1) year of service within the Department.

10.9 Findings

10.9.1 Appointment of Members to Senior Positions

Irregular appointments in the Eastern Cape were not confined to the appointment of junior members but also extended to the appointment of members to senior positions.

These irregular practices culminated in the appointment of four persons to very powerful positions in the province. These four persons were:

- (a) Mr Mpemva's appointment as the Provincial Head of Personnel was irregular, as established by evidence. His appointment was also discussed at the secret meetings referred to above.
- (b) Mr Nweba was appointed Deputy Director: Inspectorate. Evidence has also established that this appointment was irregular.
- (c) Mr Mpolweni was appointed Provincial Control Officer: Corporate Services (Human Resources), which was irregular. Prior to his appointment, a secret meeting was held to discuss his position.

- (d) Mr Mataka was appointed the Provincial Commissioner of the Eastern Cape. This appointment was also riddled with irregularities. He was appointed even though he should have been subjected to a disciplinary inquiry for a number of transgressions which had been uncovered by the PSC, the Department of Public Service, and Administration investigators.

After the appointment of these four individuals to their respective positions, they exerted control over the recruitment and appointment processes in the Eastern Cape. Evidence has established that they were effectively in control of the province and manipulated people in the Department. They became the final approving authority in the Department and placed people of their choice in various positions in violation of both the Constitution and fair labour practice.

10.9.2 1998/1999 Recruitment Drive

Evidence led before this Commission has established that the recruitment and selection process in the Eastern Cape Management Area during 1998/1999 was tainted with a number of irregularities. Members of Popcru interfered with this process, which led to the halting of the interviews. Names on the short-list were changed and new lists were drawn up, which included the names of members' relatives. The process also saw a new short-listing panel being constituted and the removal of Mr van den Berg as the Head of the Recruitment.

10.9.3 2001/2002 Recruitment Drive

There is clear evidence supported by documents that Mr Mpolweni, who is Head of Corporate Services, unlawfully interfered with the process during this recruitment drive.

The evidence has proved that the interviewing panel prepared a list of recommended candidates and sent it to Mr Mpolweni's office. When the list was

sent back to Ms Fourie, she observed that the name of Mr Sithole, which was not on the original list, had been included. He also changed the ranking of the candidates and the scores of two applicants, Mr Qekeza and Mr Mqeketo. He included the name of Mr Mbumbe, which was not on the original list. It also appeared that Mr N.L Funani, who scored 17 points, should have been appointed but was not recommended for appointment.

Mr Mpolweni's conduct by changing the recommendations of the panel, made a mockery of the whole recruitment process.

10.9.4 Manipulation of Merit Awards and Performance Appraisals

Evidence has established that Messrs Nweba and Mpemva also manipulated merit awards and performance appraisals. Contrary to the policy, which requires that an officer be in the rank for at least a year before receiving a merit award, the following members received merit awards:

- (a) Mrs Mpemva
- (b) Mrs Nweba
- (c) Ms Kaka.

10.9.5 Fraudulent Matric Certificates

(a) Mrs Ditala

After her appointment it was discovered that she had a fraudulent matric certificate. The Department took no disciplinary action against her but gave her the opportunity to resign. The conduct of the Departmental official who did not discipline her amounts to unsatisfactory work and neglect of duties.

(b) Mr Mvana

Evidence established that Mr Mvana, a Popcru shop steward, was in possession of a fraudulent matric certificate. At the disciplinary hearing he was found guilty and given a final written warning. No criminal charges were preferred against him.

11. GAUTENG (JOHANNESBURG, LEEUWKOP & PRETORIA)

11.1 Recruitment Malpractices

The April/May 2001 recruitment process was also characterised by a number of irregularities, malpractices, corruption, nepotism and non-adherence to the Department's policy in the Gauteng Province.

The then Provincial Commissioner, Mr M.Z.I. Modise, appointed a team of investigators to work together with the Scorpions Unit to investigate allegations of unsatisfactory recruitment practices, maladministration and possible corruption at the Provincial Commissioner's Recruitment Office.⁶⁶ The Scorpions' focus was the alleged criminal activities and the internal investigation focused on administration and procedures. The investigating team received their mandate to conduct the investigations on 16 May 2001 and to finalise their mandate by 27 June 2001.

The findings and the recommendations made by the investigating team are fully set out in Exhibit 'W1'.⁶⁷ The function of recruitment is centred at the Provincial

⁶⁶ See Exhibit 'W1' – Investigation, recruitment of personnel: Alleged unsatisfactory recruitment, administration and possible corruption PC Recruitment Office.

⁶⁷ See pages 41-51 of Exhibit "W1", Leeuwkop Management Area.

Office and the administration process of recruitment is explained.⁶⁸ The nine steps of the administration process on recruitment are fully set out in pages 2 – 6 of Annexure B to Exhibit ‘W1’ above. The recruitment administration process set out in this document is clear, understandable and simple and there appears to be no reason why officials in charge of recruitment should not follow this process.

The investigating team of the April/May 2001 recruitment process in the PC Recruitment Office made the findings set out below.⁶⁹ It is important to note that none of the officials mentioned in the investigations report was implicated during the Commission’s investigations. The report is, however, quoted verbatim to provide further insight into the challenges facing the Department in the area of human resources, not only in the Gauteng province but countrywide.⁷⁰

11.2 Merit Awards

Gauteng was also not free of merit award malpractices. In terms of the original Auditor-General’s query, seventeen (17) officials from the Leeuwkop Management Area were paid incorrect/invalid merit awards during the 1999/2000 financial year. As a result, the National Commissioner instructed the Provincial Commissioner to investigate the list of incorrect payments of merit awards as reported in the Auditor-General’s report and all other incorrect merit award payments.

An investigating team consisting of Messrs Zimba and de Bruin was appointed by the Provincial Commissioner’s Office: Operational Support to conduct the investigation. The investigation was conducted from 1 May to 11 June 2002.⁷¹

⁶⁸ See Exhibit ‘W’ Annexure ‘B’ of the Leeuwkop Management Area.

⁶⁹ The findings of the investigating team are fully set out on pages 41-48 of Exhibit ‘W1’.

⁷⁰ See Annexure ‘B’ to this Chapter.

⁷¹ See Exhibit ‘W2’ of the Leeuwkop Management Area.

The investigation reports into Gauteng clearly show that the incidents of recruitment malpractices, corruption, nepotism and non-adherence to Departmental policy in this province are no different from those found in other Management Areas. The administration processes on recruitment are clearly and in simple and understandable form set out in pages 2 – 6 of Annexure B to Exhibit ‘W1’ and there appears to be no reason why officials in charge of recruitment should not follow this process.

12. NCOME MANAGEMENT AREA

No direct evidence was heard relating to recruitment malpractices and corruption in this Management Area. However, Mr V.S Hlatshwayo, an Area Commissioner, and Mr G.G Smit, a Director of Human Resources Administration and Development of this Management Area, both identified the following problems relating to recruitment:⁷²

- (a) Recruitment has been at the centre of many serious problems in the Department and this is also the case at Ncome.

- (b) Ncome Prison is a farm prison, which is far from the nearest town and has limited housing available. Despite a request that people from the area be recruited, people are appointed from as far as the Western Cape. Most of these appointees found it difficult to adjust to the farm life at Ncome and, since they did not know the area, they experienced problems in acquiring accommodation, which led to continual problems with reporting to work on time.

⁷² See Exhibits ‘A’ and ‘D’ of the Ncome Management Area hearings.

- (c) Several of these members used Ncome as nothing more than a place of appointment and applied for transfers to their areas in other provinces within the first month of service.
- (d) There were also cases where persons were appointed who were clearly medically unfit to be in the Department, which indicates that the screening process is flawed.

During the hearing of evidence into Ncome Management Area it also became apparent that many officials appointed to senior positions at this prison do not have the necessary competency.⁷³ This suggests that the screening process is flawed as contended or that irregularities occurred at the time of the appointments.

13. CONCLUDING REMARKS

The contents of this report show clearly that recruitment, merit awards and promotions are amongst the most controversial activities undertaken by the Department.⁷⁴ In all the Management Areas the Commission investigated, there are ongoing allegations of corruption, nepotism and irregularities in recruitments, merit awards and promotions. These allegations are not confined to provincial or local level, but also surfaced at Head Office.

There is ample evidence that Popcru manipulated appointments and processes. There is also conclusive evidence that at the secret meetings that took place, Popcru members were put into strategic positions, and that the removal of individuals who were perceived by Popcru as being stumbling blocks to “transformation” was discussed at these secret meetings.

⁷³ See the Chapters dealing with the Ncome Management Area for more details.

⁷⁴ See the Fifth Interim Report, Bloemfontein Management Area.

A number of investigations have been conducted into the Department regarding malpractices, corruption, nepotism and related issues to recruitment. The findings and recommendations of these investigations have, however, not been heeded to by the Department.

This Commission's investigations reveal that similar problems are recurring in the Department, despite previous recommendations and guidance given by other Commissions to the Department, in how to solve some of the problems.

It is therefore clear that the Department is unable to manage the recruitment of staff. It will be the Commission's recommendation that the Department should rather focus on its core business, that of security and the welfare of prisoners, and that the recruitment of staff be outsourced to an independent body or any other competent institution.

14. FINDINGS

14.1 Recruitment

The Commission makes the following findings regarding recruitment in the Management Areas investigated:

- (a) The process for recruiting new members nationally has been marred by inefficiencies, corruption and lack of transparency. There is a need to review the criteria with regard to the type of people required to fulfill the function of a correctional official. The Department of Correctional Services has decided to outsource the processing of applicants, due to the extremely high response rate to advertised posts. The Department of Correctional Services received one point six million (1.6 000 000-00)

applicants nationally for two thousand two hundred (2 200) entry level posts.⁷⁵

- (b) In all the Management Areas the Commission investigated, recruitment processes are characterised by corruption, maladministration, nepotism, favouritism and non-adherence to departmental policy.
- (c) The common feature in these malpractices and irregular practices is the manipulation of the processes by senior officials in the Department.
- (d) Inexperienced, unqualified and incompetent officials are appointed as Heads of Recruitment.
- (e) Once these officials are appointed, they are not given any training in the recruitment process or in managerial skills so as to empower and equip them for more effective and efficient service delivery.
- (f) The appointment of staff is also influenced by trade union affiliations.
- (g) The Department has failed to implement recommendations, which were made in a number of investigations into recruitment processes in the Department.
- (h) The Department does not have the capability or capacity to handle recruitment.
- (i) The multiplicity of documents dealing with the Department's recruitment and employment practices also causes some problems relating to the recruitment processes.

⁷⁵ See Report of the Correctional Services Portfolio Committee dated 22 June 2004 at page 8.

- (j) The Department cannot properly manage its recruitment and employment function whilst it uses a number of different policy documents, which sometimes contradict each other, to effectively manage its functions.
- (k) It is the Commission's view that the outsourcing of recruitment exercises nationally would address all its problems and corruption in the Department recruitment processes.
- (l) The conduct of Mr Mpolweni in altering the final list of recommended candidates, changing the scores of the candidates, changing the ranking of officials on the list and leaving out certain names of the recommended candidates from the final list, amounts to fraud.
- (m) The Commission will be making recommendations that Mr Mpolweni be charged with fraud.
- (n) The conduct of Mr Nxele in instructing Mr Theron to conduct further interviews and re-interviews in respect of both recruitment drives, after the closing date, amounts to misconduct in terms of the Department's Disciplinary Code, as well as criminal conduct.
- (o) The conduct of Mr Nxele in authorising the appointment of four (4) additional candidates without the approval of the National Commissioner, also amounts to misconduct. The Commission will be making recommendations in this regard.
- (p) The conduct of Mr Theron to interview and re-interview certain candidates after the closing dates during both recruitment drives, purportedly on the instructions of Mr Nxele, amounts to gross negligence in terms of the Disciplinary Code.

- (q) Section 196(4) of the Constitution deals with the powers and functions of the Public Service Commission. Section 196(4) provides as follows:

“The powers and functions of the Commission are-

- (a)
- (b) *to investigate, monitor and evaluate the organization and administration and the personnel practices of the public service;*
- (c)
- (d) *to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;*
- (e)
- (f) *either of its own accord or on receipt of any complaint–*
 - (i)
 - (ii)
 - (iii)
 - (iv) *to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.”*

- (r) In the light of the provisions of the Constitution referred to above it is the Commission’s view that the Public Service Commission is empowered by

virtue of the said provisions to audit the recruitment practices in the Public Service.

- (s) Recruitment is a non-core function of the Department that lends itself to outsourcing to private or non-state service providers.
- (t) The outsourcing of recruitment to the private sector will allow the Department to focus on its core responsibilities.
- (u) The outsourcing of recruitment nationally would also address the problem of staff shortages experienced by the Department countrywide. The members who are trained regarding safe custody of prisoners can do what they are trained to do instead of trying to be HR Practitioners.

14.2 Merit Awards

The Commission has found that in almost all the Management Areas it has investigated, the awarding of merit awards is problematic in that:

- (a) Officials who do not qualify for these merit awards, are given the merit awards through corruption or maladministration.
- (b) Nepotism/favouritism played a major role in the awarding of merit awards.
- (c) There are no proper controls over the documentation/assessment questionnaires in the awarding of these merit awards. The chairpersons and secretaries of the moderation committees need to ensure that the minutes and all other relevant documentation are kept and properly signed.

- (d) The Department should keep proper assessment questionnaires for each assessment made.
- (e) The chairpersons and secretaries of the moderation committees responsible for merit awards, do not adhere to the policy of the Department, which requires that an officer be in the rank for a least one (1) year before he/she receives a merit award.
- (f) Recommendations made by previous investigations in this regard have not been implemented by the Department. The Commissioner's report on the implementation of the recommendations made in external investigations into the Department dated 4 May 2005, does not explain why recommendations relating to merit awards made by previous investigations, have not been implemented.⁷⁶

15. RECOMMENDATIONS

15.1 Recruitment

The Commission noted that the Department has not heeded or has failed to implement the recommendations with regard to the recruitment process made by various investigations conducted in the Department. The disturbing feature with these recruitment malpractices is that the processes are manipulated by very senior officials.

It has been pointed out that recruitment is one of the non-core functions of the Department, which can readily be outsourced to private non-state service providers.

⁷⁶ See in particular the PSC and DPSA reports and recommendations.

The Commission accordingly makes the following recommendations:

15.1.1 Short Term Recommendations:

- (a) The advertising of posts, setting out the criteria, short-listing and interviewing of candidates nationally should be outsourced to independent non-state service providers.

- (b) Mr Nxele be charged with:
 - (i) contravening clause 4.4. Column A of the Department's Disciplinary Code (fraud); alternatively

 - (ii) contravening clause 5.4. Column A of the Department's Disciplinary Code (sabotage).

 - (iii) he be charged criminally with the offence of fraud.

 - (iv) the record of the proceedings relating to Mr Nxele in this regard be handed over to the office of the Director of Public Prosecutions in the Western Cape for his perusal and consideration of the charge of fraud.

- (c) Mr Theron be charged with:
 - (i) contravening clause 2.1. Column A of the Department's Disciplinary Code (gross negligence) (First recruitment drive Pollsmoor).

- (d) Mr Mtanase's appointment to a senior position at St Albans Management Area be reviewed by the Department.

15.1.2 Second Recruitment Drive

The Commission recommends that:

- (a) Mr Nxele be charged with:
 - (i) contravening clause 2.1. Column A of the Department's Disciplinary Code (gross negligence); alternatively
 - (ii) contravening clause 5.4. column A of the Disciplinary Code (sabotage).
 - (iii) he be charged criminally with the offence of fraud.
 - (iv) the record of the proceedings with regard to Mr Nxele in this matter to be handed over to the office of the Director of Public Prosecutions in the Western Cape for his perusal and consideration.

- (b) Mr Theron be charged with:
 - (i) contravening clause 2.1. Column A of the Disciplinary Code (gross negligence).

- (c) Mr Mpolweni be charged with:
 - (i) contravening clause 4.4. Column A of the Disciplinary Code (fraud); alternatively
 - (ii) contravening clause 5.4. Column A of the Disciplinary Code (sabotage).

- (iii) he be charged criminally with the offence of fraud.
- (iv) the record of the proceedings relating to Mr Mpolweni be forwarded to the office of the Director of Public Prosecutions in the Eastern Cape for his perusal and consideration.

15.1.3 Long Term Recommendations

- (a) Recruitment in the Department of Correctional Services nationally, should be outsourced to independent non-state service providers.
- (b) Alternatively, recruitment in the Department of Correctional Services should be undertaken under the direct supervision of the Public Service Commission.

15.2 Merit Awards

The Commission makes the following recommendations:

- (a) No disciplinary action or any action relating to the recovery of merit awards incorrectly paid, is recommended by the Commission at this stage as this may present difficulties.
- (b) Proper systems must be put in place in the Department with regard to the granting of merit awards.
- (c) The chairpersons and secretaries of the moderation committees responsible for merit awards, should be senior officials in the Department.

- (d) The chairpersons and secretaries of the moderation committees must keep proper minutes in respect of each and every merit award granted.
- (e) The chairpersons and secretaries of the moderation committees must adhere to the policy relating to merit awards.

15.3 General Recommendations

- (a) The Department should consolidate all its recruitment policies into one Recruitment Policy document applicable in all Management Areas and disseminate it to all the Management Areas as soon as possible.
- (b) The Department should implement the recommendations made in the Public Service Commission's Report of August 2000.

ANNEXURE “A”

5.1 Leadership and Management

The consultants found that members generally perceive management as lacking the essential leadership qualities to steer the organisation in the right direction. To back up this belief, they cited the following examples:

- (a) Political allegiance, not professional competence, is the major criterion for appointing personnel to major positions.
- (b) Management does not develop the authority to allow people who carry out day to day duties of the Department to have a say in the decisions they have to carry out.
- (c) There are no training or development opportunities to acquaint staff with the rules and regulations of the transformed Department.
- (d) Leadership often fails to implement decisions.
- (e) The selection and recruitment procedures are not well publicised.
- (f) The recruitment procedures and advertisements are meant for all of those people who are targeted for particular jobs.
- (g) Information is not widely disseminated and members have to rely on hearsay.
- (h) Management has no flexibility when it comes to the implementation of policy, e.g. gender issues of female guards forced to work with dangerous criminals without assistance.

5.2 Human Resources

There is a general lack of personnel who have the knowledge and skills to motivate staff to attain superior performance. The predominant de-motivators are cited as:

- the reward system; and
- affirmative action.

Reward system:

- There is a general belief that the wrong people or non-performers are the most likely to get rewarded.
- The production bonus in Pietermaritzburg is a most contentious issue, which needs immediate attention.

Affirmative action:

- (a) Members contend that they are in favour of some of the principles of affirmative action. However, the way that it is being implemented promotes patronage.
- (b) There is a belief that those who were in the anti-apartheid leadership are now using their power to settle old scores, especially in appointments.
- (c) The gender issue is not addressed and women and other groups are grossly under-represented in the Department.
- (d) There is general lack of discipline on the part of management and staff. Some staff members who are known to be corrupt continue their activities with impunity.
- (e) Staff members view some of the disciplinary cases as being arbitrary e.g. the staff member who was accused of beating a prisoner to death was dismissed without due process.
- (f) There tend to be dictatorial ways of doing things e.g. members are told to report for work after suspension without proper briefing.⁷⁷

Members also complained that:

⁷⁷ See Exhibit 'A' pages 78-79, Pietermaritzburg Management Area.

- (a) There are no clear guidelines in terms of recruitment processes.
- (b) There are no clear indications as to what job requirements are.
- (c) Available posts are not listed in areas that are easy for members to reach.
- (d) Rumours abound that there are officials who will sell jobs for the right price. For this reason, some of the more capable people do not apply for these posts. This deprives the Department of some of the talent that could help it in its quest for transformation.

5.3 Recruitment Findings

The consultants' findings into the problem areas relating to recruitment in Pietermaritzburg can be summarised as follows:

- Lack of leadership skills
- Inability to assume leadership roles
- Corruption
- Nepotism
- Favouritism
- Prevalence of power abuse
- Intimidation
- Lack of regard to compromised evaluations and assessments
- Abuse of affirmative action process
- Selection and recruitment processes lack credibility
- Promotion/rewarding of non-performers
- Job dissatisfaction.

5.4 Merit Award Findings

Bright Future also looked at the reward system in the Department and in their report highlighted that:

- (a) There is a general belief that the wrong people or non-performers are most likely to get rewarded and
- (b) The production bonus in Pietermaritzburg is one of the most contentious issues, which requires immediate attention.

In their report, they made the following recommendations:

- (c) Once a member begins his permanent job, the next phase is that of promotion, whereby the chances of pay increases and merit grade increases are a move up the organisational ladder with new duties and responsibilities.
- (d) The merit system in the Department ought to be guided by seniority and performance.
- (e) In this Department, however, there is a belief that merit is not rewarded, but mediocrity is.

5.5 Recommendations

The following recommendations were made in the report regarding:

5.5.1 Personnel/Human Resources

In order to meet the organisational objectives, the Department should ensure that at all times it attracts people who are right for the kinds of jobs that are available. The widespread belief that the Department is corrupt in its recruitment and selection criteria makes it a worthwhile effort to put in place highly skilled people.

They will not be attracted to the Department and be retained if the perception that the Department needs only those with mediocre performance does not change.

5.5.2 Selection Criteria

Criteria for selection should be based on:

- (a) Those who are involved in selection should be trained in interviewing on selection methods.
- (b) Every applicant should have an equal opportunity of getting the job.
- (c) Selection should be based solely on merit and no other relevant consideration.
- (d) The selection panel should be familiar with the guidelines.
- (e) Candidates who have not been successful should be notified in writing within a reasonable time.
- (f) Successful candidates should also be informed about their new appointments in reasonable time.

5.5.3 Post-recruitment Phase/Placement and Induction

Once an applicant has been offered a post, an induction process must begin. This is where the newly appointed employees are introduced to procedures, policies and advice so that they can get acquainted with the organisation. At this stage, it would be important to find out if the employee would need any training or wishes to undergo a development programme in order to enhance his or her capabilities to perform.

5.5.4 Promotions/Remuneration

Once a member begins his or her permanent job, the next phase is that of promotion, whereby chances of pay increases and merit grade increases are a

move up the organisational ladder with new duties and responsibilities. The merit system in the Department ought to be based on seniority and performance.

In this Department, however, there is a belief that mediocrity and not merit is rewarded. There is an assertion that management has no managerial skills and thus no leadership qualities.

In summary, it was recommended that:

- (a) The Department reviews its recruitment and selection procedures.
- (b) Managers, supervisors, a representative from the Personnel department and an outside agency should conduct the interview sessions.
- (c) Those who are interviewing should have knowledge of the job requirements.
- (d) A standard questionnaire should be formulated based on those requirements that are necessary for the job performance.
- (e) Each candidate should be weighed against others using an attribute scale, which is accordingly marked.

The Commission noted that in all Management Areas it has investigated, many officials in leadership or managerial positions are incompetent and unskilled and require training in managerial skills to alleviate the enormous problems facing the Department of Correctional Services.

ANNEXURE “B”

The findings were as follows:

- (a) *“The advertisement for vacant posts was placed incorrectly in the newspapers, as it was for two cycles and not for one cycle only.*
- (b) *Mrs Makgato had to pay R1 000 to Mr Hlophe and Mrs Makhanya for her employment. This amount of money was paid to the members and the Scorpions arrested them.*
- (c) *Mr Mofokeng, the applicant, received the interview questions from Mr Hlophe on the night preceding the interview. Mr Hlophe acknowledged that he gave the questions to Mr Mofokeng but said that he refused to take the R1 000 cash. The Scorpions arrested Mr Hlophe and Mrs Makhanya when they were caught red-handed by Special Agent Ramogoshi and an amount of R1 000 was confiscated together with the interview questions. After they were arrested, Case No. 502/05/2001 was opened against them. They were detained in the Pretoria Central Prison and were released on bail of R3 000 each.*
- (d) *Mr Sekhaolelo acknowledged that he made inscriptions in his own handwriting on the application forms.*
- (e) *Applicants were interviewed without application forms, at the request of Mr Tshwale. Mr Sekhaolelo, Mr Mmethi and Mr Tshwale completed the applicants’ documents.*
- (f) *Applicants’ documents did not fulfill the requirements of the advertisement as certified by Mr Seseko.*
- (g) *Short-listing and gross listing and was not done. On the final day, Mr Tshwale handed over a short-list to panelists, which he had selected.*
- (h) *The applicant Mr Malefahlo apparently knew the exact answers to the questions for the interviews.*

- (i) *Application forms were kept in an unlocked storeroom until Mr Tshwale bought a lock and key, out of his own money. During the investigation, they told Mr Baloyi to open the storeroom and he asked Mr Tshwale to open it. Mr Tshwale left the storeroom open for more than a week.*
- (j) *Mr Tshwale drafted an action plan for equipment but it was never implemented.*
- (k) *The proper documents and guidelines were available for the recruitment process as Ms de Jager handed them over to Mr Mbatha on 14 June 2000.*
- (l) *The handwriting on certain application forms was the same but the signatures differed.*
- (m) *Applicants were allocated to management areas without consultation.*
- (n) *In most cases, short-listed applicants did not comply with the criteria as advertised. Only three out of 817 applications were correct.*
- (o) *Mr Mbatha stated that he had no knowledge of recruitment, although Ms de Jager stated that he had received all the documents and guidelines and he was sent on the National Recruitment work session.*
- (p) *Mr Masango of Leeuwkop Management Area was corrupt, in the sense that he completed an applicant's application form. Mr Masango also collected R350 to ensure proper feedback concerning her application by Mr Mesack at the PC Office. This was collaborated by both the applicant's father and mother. This matter was reported to the Anti-Corruption Unit.*
- (q) *Mr Ngobeni assisted Mr Masango who was corrupt in that he completed an applicant's application form and did not report the matter immediately to the Anti-Corruption Unit.*
- (r) *Mr Dlamini was corrupt because he gave questions and answers to an applicant. Mr Dlamini also committed corruption by transporting private persons in a government motor vehicle.*
- (s) *Mr Dlamini was corrupt by demanding money from a member, Mr Totiki, in return for a merit award and notch increment. Mr Dlamini received an amount of R800. Mr Dlamini also organised that his wife's form be put into*

a bundle of application forms that were already submitted. Mr Dlamini's wife was subsequently appointed.

- (t) Mr Chere's application form was re-written at Mafikeng. Some of the information was altered or left out on his form.*
- (u) The administration of recruitment office does not comply with the guidelines and policies of the Department.*
- (v) Lack of safeguarding and confidential handling of application forms.*
- (w) The questions for interviews are provided illegally to applicants."*

The investigating team made the following recommendations:

- (a) "Only one advertisement per cycle should be made to prevent confusion. The Head Office is to be advised to amend the current procedure.*
- (b) Mr Hlophe and Mrs Makhanya should be suspended immediately until the finalisation of their disciplinary hearings.*
- (c) Mrs Makhanya should be charged with corruption in accordance with the Disciplinary Code.*
- (d) Mr Hlophe should be charged in accordance with the Disciplinary Code for corruptive behaviour.*
- (e) Both Mr Hlophe and Mrs Makhanya should be charged for damaging the public image of the Department in accordance with the Disciplinary Code.*
- (f) Mr Sekhaolelo should be re-allocated to another post. He should also be charged in accordance with the Disciplinary Code for neglecting to do his work properly.*
- (g) Mr Tshwale should be re-allocated to another post. He should also be charged for neglecting to do his work properly.*
- (h) Mr Sekhaolelo, Mr Mmethi and Mr Tshwale should be removed from this section and utilized in another division. They should also be charged in accordance with the Disciplinary Code for neglecting to do their work properly.*

- (i) *No interviews should be conducted in the future without a short-list. Senior officials should compile the short-list.*
- (j) *All future documents should be kept in an allocated room with a padlock.*
- (k) *Mr Tshwale should be charged with gross negligence in a disciplinary hearing.*
- (l) *All role players should ensure that officials are properly trained before recruitment takes places.*
- (m) *An independent official should be appointed to check all forms once completed and before a short-list is compiled.*
- (n) *The whole idea of the current system is to make management partners in the selection process. Consultations should be made compulsory in the selection processes.*
- (o) *Mr Tshwale should take full responsibility for a shortcoming relating to the applicants not complying with the criteria as advertised. Disciplinary action should be taken against him.*
- (p) *Further checking and control mechanisms should be instituted.*
- (q) *Mr Masango should be reported to the Anti-Corruption Unit. A criminal case of bribery and corruption should be made against him and the case number should be reported to the PC Office. A disciplinary case should also be opened against him for corruption. He should be suspended until all cases against him have been finalised.*
- (r) *In terms of clause 4.1 of the Disciplinary Code, Mr Ngobeni should be charged for corruption for assisting Mr Masango with arranging an interview.*
- (s) *Mr Dlamini should be charged criminally for corruption and the case number should be provided to the PC office. Mr Dlamini should be criminally and disciplinary charged further for unlawful use of government property and he should be suspended from duty.*
- (t) *Disciplinary steps should be taken against the member who re-wrote Mr Chere's application.*
- (u) *Mr Hlophe should be charged with corruption.*

- (v) *An in-depth training session should be arranged for all members involved in recruitment.*
- (w) *The recruitment process should be monitored.*
- (x) *Security measures should be implemented with respect to applications.*
- (y) *No certification of any documents with respect to recruitment should be undertaken at the recruitment office.*
- (z) *Permanent PH recruitment personnel should be appointed*
- (aa) *Specific guidelines should be directed to certain members with respect to application forms.*
- (bb) *The recruitment function should be delegated to management areas. This could be done by placing specifically sealed boxes for application forms at management areas and that the boxes be opened by PH recruitment personnel only.*
- (cc) *Application forms must be numbered numerically.*
- (dd) *An 'office stamp' should be designed for each intake, for control purposes, and must be signed.*
- (ee) *Questions for interviews must be changed daily. Different questionnaires must be prepared and issued every morning.*
- (ff) *Unions must be involved as observers from the screening to the interview phase to ensure transparency.”*

It appears from the report itself that the Provincial Commissioner approved almost all the recommendations made by the investigating team. The recommendations were approved on 21 August 2001.⁷⁸

The investigating team made the following general conclusion in its report:⁷⁹

“The administration of the recruitment of personnel is below the required standard. There are guidelines and policies in place. Workshops are

⁷⁸ See Exhibit ‘W’ of the Leeuwkop Management Area at page 3.

⁷⁹ See Exhibit ‘W1’ of the Leeuwkop Management Area pages 48 and 49.

presented by the administration, which still lacks professionalism. Recruitment of personnel is an important aspect of any institution.

The result of this misadministration is corruption because it is so easy to be corrupt if the system lacks security measures. Without the pre-selection audit, application forms can easily be amended, changed or be removed.

A corrupt person will always misuse the system. It is so easy for applicants to sign the forms on walls and on the backs of other people. This explains the difference in signatures.

It was also observed that the time frame allowed by head office to start and finalise the recruitment process, was very limited. To avoid this problem, recruitment and appointments must be finalised at least three months before recruits are trained at the colleges. This will allow recruits to be exposed to the Departmental environment and work activities as a pre-training phase. The recruits can be utilized in selective posts under the direct supervision of senior officials and this will enhance their maturity level and prepare them for the formal basic training phase. By adopting this philosophy, the shortage of personnel will also be partly addressed.

It is stressed that an Anti-Corruption Unit be established at the PC Office, based on one member for every 1 000 members. This means a team of seven officials for Gauteng. The existence of such a team will be an ongoing process, which will be the foundation for a clean and healthy administration. If this structure is in place, the possibilities of corruption are limited. The telephone numbers of this unit must be published in all provincial newspapers to market and advertise it, to curb corruption.”

ANNEXURE “C”

The investigating team made the following findings

- (a) The seventeen (17) identified officials were indeed paid incorrect/invalid merit awards as no assessment questionnaires are available to prove that they were assessed and all were qualified to receive the merit awards.
- (b) No assessment questionnaires are available for the year 1999/2000.
- (c) Information points on assessment, questionnaires and the moderation committee minutes appear not to be the same.
- (d) The moderation committee minutes were not signed.
- (e) Officials who qualified for merit awards, according to the Moderation Committee minutes and the fax from the Area Manager, do not correspond.
- (f) Mr Zwane was questioned on a document he signed on behalf of the Area Manager.
- (g) There was no control over the documentation/assessment questionnaires for the 1999/2000 financial year.
- (i) It cannot be determined when and how assessment questionnaires got lost and who was responsible for it.
- (j) The investigating team accordingly made the following recommendations:
 - (i) The officials must pay back the money that they received. The back payment must be implemented before the end of July 2002, by way of instalments with interest.
 - (ii) Personnel clerks must be sensitised to ensure that all documents must be handled according to policy.
 - (iii) The chairperson and secretary of the moderation committee must ensure that the information is correct on all relevant documents.

- (iv) The chairperson and secretary of the moderation committee must ensure that the minutes are always signed.
 - (v) Officials must be sensitised to ensure that correspondence is correct before signing.
 - (vi) Officials must be sensitised not to sign their own correspondence on behalf of the Area Manager.
 - (vii) Mr Zwane and Mrs Beukes must be sensitised to ensure that they have control over any assessment questionnaire at all times.⁸⁰
- (k) In its conclusion, the investigating team noted that it would not be possible to do an objective audit on the other officials who received merit awards, as no assessment questionnaires are available to do it.
- (l) No disciplinary action in relation to incorrect payment of merit awards is recommended at this stage, since the event took place during September 1999, almost three (3) years ago.

⁸⁰ See Exhibit 'W2' of the Leeuwkop Management Area.

CHAPTER 6

PRISON SECURITY

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PRISON SECURITY
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CHAPTER 6

PRISON SECURITY

1. INTRODUCTION

One of the most important functions of any prison is the safe custody of prisoners and to control the entry of people from the outside. Although correctional facilities serve many functions, the primary function of the establishment remains the safe custody of those who the courts of our land have ruled are to be restricted to the confines of a prison facility and who should remain there until such time they have served their sentences.¹ They are not in prison to be punished but as punishment. If the prison system succeeds in its basic function, then law abiding members of society can be assured that they can sleep peacefully at night, content in the knowledge that those of the community who choose to conduct themselves in an unacceptable manner have been temporarily removed from society, and that they will return rehabilitated from prison.

Victims of crime can also find solace in the fact that those who have caused pain and trauma to them are as far removed from their lives as possible and are securely locked inside prison. Witnesses who have given evidence against the perpetrators also find reassurance in the fact that the person sentenced will not unexpectedly return from prison seeking revenge.

Knowing that security is the cornerstone of our correctional system, the Commission was disturbed to hear evidence of prisoners who, for a fee, could

¹ See for example "Jailbreaks under Scrutiny" *The Mercury* dated 12 November 1999; "Arrest follows attempted jailbreak and shootings at Pretoria C-Max Prison" *Natal Witness* dated 10 November 2004; "Signs of inside help in prison break" *The Mercury* dated 22 September 2004; "Charges pending after jailbreak" *The Mercury* dated 2 July 2004.

disappear from prison and/or escape. Escapes of prisoners from prison are not a new issue and the Commission has heard evidence about escapes at almost all the Management Areas it investigated. What is new is the practice of members deliberately setting prisoners free. These corrupt members then escape the claws of the justice system because they are not suspended and thereby remain employed in the Department. The number of prisoners escaping from detention demands an effective response from the Department and any failure is likely to cause an outcry from the members of the public who may be of the opinion that the Department is not doing enough to ensure that such escapes are prevented.

It is against this background that the Commission will in this Chapter examine the nature of the current escapes and examine the part, if any, played by any Correctional Services official in the escapes that have occurred. Naturally the Commission will also attempt to investigate whether such escapes are the result of corruption on the part of members or whether there has been negligence by members of the Department. The Commission will also be seeking answers to the question of why these escapes continue to occur and what steps the Department is taking to prevent a recurrence thereof. It goes without saying that safety of prisoners is a necessary component of a successful rehabilitation programme of prisoners.

In dealing with the subject of escapes, the Commission will focus on the following matters, which it dealt with during the hearings:

- The Department's policy and general standpoint on escapes, and
- Mr Sydney Thlloe: a member of the Department employed at Johannesburg Prison who was implicated during the Commission's hearings in facilitating escapes and numerous other illegal activities; and

- The escapades of Mr Mzimase Thungula: an inmate, who is known by the name of McGyver because of his uncanny ability to escape from various prisons.

2. THE DEPARTMENT'S STANDPOINT

On the 21 August 2002, the then Minister of Correctional Services, the Honourable Mr B. Skosana, stated in a media briefing that the core business of the Department is to detain all prisoners in safe custody whilst ensuring their human dignity and promoting the social responsibility and human development of all prisoners and those persons who are subject to community corrections.

The importance of custody is also reflected in the 1998 Act in the following way:

"2 Purpose of correctional system

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."*

As recently as the 13 February 2004, the former Minister, Mr Skosana, made another statement from which it was clear that the then Minister was as concerned as the Commission is about those assisting escapees. He is quoted in the statement as saying:

“Some of those who are found to be accomplices in the current unacceptably high rate of escapes will also become the trophies of our strengthened anti-corruption strategy.”²

Safe custody³ can be interpreted in many ways⁴ but in the Commission’s view, in so far as this Chapter is concerned, it means that there should not be any escapes. The second interpretation is also correct, in so far as the treatment of prisoners is concerned.⁵

² See <http://www.pmg.org.za/briefings/feb2004/040213correct.htm>, accessed 19 November 2004.

³ The Department is obviously obliged to ensure the safe custody of all in terms of section 26 of the Correctional Services Act No. 111 of 1998, that provides as follows:

“26 Safe custody

(1) The right of every prisoner to personal integrity and privacy is subject to the limitations reasonably necessary to ensure the security of the community, the safety of correctional officials and safe custody of all prisoners.

(2) In order to achieve these the objectives referred to in subsection (1) and subject to the limitations outlined in sections 27 to 35, a correctional official may-

(a) search the person of a prisoner, his or her property and the place where he or she is in custody and seize any object or substance which may pose a threat to the security of the prison or of any person, or which could be used as evidence in a criminal trial or disciplinary proceedings;

(b) take steps to identify the prisoner;

(c)

[Para.(c) deleted by s.13(b) of Act 32 of 2001].

(d) apply mechanical means of restraint; and

(e) use reasonable force.

[Sub-s.(2) amended by s.13(a) of Act 32 of 2001.]

(3) In order to achieve the objectives referred to in subsection (1) and subject to the limitations outlined in sections 27 to 35, the Commissioner may classify and allocate accommodation to prisoners.”

⁴ As stated by D. van Zyl Smit, *South African Prison Law Practice* at page 167: “The term safe custody is itself ambiguous. On the one hand, if the custody element is emphasized, it means that a prisoner should be prevented from escaping. On the other hand, the element of safety means that, at the very least, prisoners should be able to serve their terms of imprisonment without physical injury or other damage to their physical or mental health.”

⁵ See the Chapter dealing with Treatment of Prisoners.

The matter of Mr Sydney Thloloe clearly indicated to the Commission that some warders do not share the same vision as the former Minister in respect of the safe custody of prisoners. Some, it would seem, act in concert with inmates to set them free without such freedom being lawfully granted.

To determine whether the Department is succeeding in its stated focus of preventing prisoners from escaping, the Commission considers it important to look at and deal with the statistics given by the Provincial Commissioner of Gauteng, at the time of the hearings, Mr Z. Modise⁶ regarding escapes in the Gauteng Province.

Mr Modise stated in his formal evidence before the Commission that the Gauteng Province has struggled with escapes for a very long time. In fact, according to his testimony, the situation has improved over recent years. In 1999, a total number of one hundred and twenty nine (129) inmates escaped from Gauteng prisons alone. In 2002, however, the figure reduced to only thirty five (35) escapes. Mr Modise stated that the Minister of Correctional Services has put in a lot of effort and commitment into curbing escapes, down to the last warder doing guard duties. Much of the Department's emphasis has been placed on direct supervision and strict disciplinary action taken against officials who allow escapes through their negligence.

Mr Modise admitted, however, that there is a grey area with regard to aiding escapes, which is sometimes difficult to prove. In some instances where escapes had happened, it had been stated that such escapes should be ascribed to negligence. In his testimony, he referred to those Management Areas that have experienced many escapes since the year 2000 as being Johannesburg, Leeuwkop and Baviaanspoort. Most escapes from the Johannesburg Prison,

⁶ Mr Modise has since been appointed as Regional Commissioner of the Free State Province.

according to his testimony, happened at the Chris Hani Baragwanath Hospital.⁷ It has been mainly awaiting trial prisoners and foreigners that have succeeded in escaping.

It is interesting to note that one of the Management Areas Commissioner Modise categorised as a problem area, is in fact, the Johannesburg Management Area. The evidence before the Commission points to the fact that at this Management Area aiding and abetting prisoners to escape has been rife and certain members have been actively involved in it. It is, however, of concern that the Department does not do enough to ensure that the perpetrators are severely punished when caught so as to curb this problem.

That our government considers such conduct as serious is evident from the legislation and the penalty clause of the provision prohibiting such aiding, namely, a fine or imprisonment of ten (10) years.⁸

⁷ See the Ninth Interim Report for an escape where a prisoner used a bolt cutter to cut the chains to his bed and tried to escape from hospital.

⁸ See section 115 of the Correctional Services Act No. 111 of 1998 that provides as follows:

“Any person who-

- (a) conspires with or incites any prisoner to escape;*
- (b) assists a prisoner in escaping or attempting to escape from any prison or from any place where he or she may be in custody;*
- (c) for the purpose of facilitating the escape of any prisoner, supplies or agrees to supply or assists, incites or induces any other person to supply a prisoner with any document, disguise or any other article;*
- (d) without lawful authority relays any document, or articles or causes it to be relayed into or out of a prison or a place where prisoners may be in custody; or*
- (e) harbours or conceals or assists in harbouring or concealing an escaped prisoner,*

is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding ten years or to such imprisonment without the option of a fine or both.”

3. MR SYDNEY THLOLOE

During the Commission's hearings of Johannesburg Prison, the Commission dealt with allegations against a warder, Mr Sydney Thloloe, who was, allegedly, implicated in:

- 3.1 the facilitation of escapes or disappearances of prisoners from Johannesburg Prison;
- 3.2 armed robberies, together with robbery syndicates, in and around the Gauteng and KwaZulu-Natal Province;
- 3.3 motor vehicle thefts and/or hijackings
- 3.4 drug smuggling; and
- 3.5 illicit sexual activities at the Johannesburg Female Prison.

Right at the outset it needs to be stated that besides Mr Thloloe, seventeen (17) other people were, allegedly, implicated in the allegations relating to escapes, including a Captain from the South African Police Services, Captain Senono. Many of those who were implicated were legally represented at the Commission hearings.⁹

A number of witnesses testified in front of the Commission, to wit, Mr Isaac Petros Wolfaardt, Mr Kguketli Louis Pobe, Mr Bhekisisa Vincent Shoji and Mr

⁹ Of the legal representatives, Mr P.J. Coetzee of the Pretoria Bar acted on behalf of the Police Services, representing Captain Senono; Mr Craig Beukes, an Attorney was initially representing Mr S. Thloloe but then later briefed Advocate Kruger from the Pretoria Bar and Advocate Jacobs represented Mr F.J. Muller, who was also implicated. Although Mr Jacobs represented Mr Muller, he never actively participated in the proceedings. He was excused from the proceedings since his client was merely mentioned and not truly implicated.

Madry Pakiry. Mr Thloloe, however, elected not to testify and preferred to hand in an affidavit¹⁰ wherein he denied any involvement in any criminal activities referred to by any witness before the Commission and in any statement made by any person that has been presented to the Commission. He also denied that he had made a pointing out statement to Captain Naidoo or any other police officer and lastly, he denied that any alleged pointing out statement or confession that was reportedly made to Captain Naidoo had been made voluntarily or freely.

In order to deal with the evidence as briefly as possible, the allegations will in short be summarised as they had been set out in the summary of facts, which was served on Mr Thloloe by the Commission's investigators:

3.1 Facilitation of Escapes/Disappearances of Prisoners from the Johannesburg Prison

It was alleged by the Commission investigators that during the period 1992 to 2003, approximately seventy five (75) escapes or “disappearances” of prisoners occurred from the awaiting trial section at Johannesburg Prison. Of these forty eight (48) escapees were listed in the summary of facts handed in. It was alleged that the majority of the escapes or “disappearances” took place while Mr Thloloe was a warder at Medium A Prison.

Further to this it was also alleged that Mr Thloloe also facilitated other escapes and disappearances after he was removed from Medium A and placed at Medium B. Specific allegations were made that he was involved in the escapes of the following prisoners:

1. Mr Robert Madinga Makhoba;
2. Mr Thulani Khumalo;
3. Mr Victor John Mahlangu;

¹⁰ See Johannesburg hearings, Exhibit ‘LLL’.

4. Mr Thembukwazi Sithole;
5. Mr Zama Ndlovu;
6. Mr Thandayiphi Sibiya;
7. Mr Jabu Louw;
8. Mr Solly Mkhize;
9. Mr J. Phiri;
10. Mr D. Mustapha;
11. Mr Z. Kunene;
12. Mr M. Ntshaba;
13. Mr Thabiso Ndlovu;
14. Mr Lucky Dube;
15. Mr Breuwell Ngwenya;

It was also alleged that Mr Thloloe worked in conjunction with several of the following colleagues in the Department to facilitate the escapes:

1. Mr Papi Koai;
2. Mr Solly Mndiniso;
3. Mr Benny Ngoetjane;
4. Mr Kgukutli Louis Pobe;
5. Mr Bhekisisa Vincent Shozi;
6. Mr May;
7. Mr J. Shaik Shabalala;
8. Mr Simphiwe Mkumbuzi;
9. Mr Mto;
10. Mr Mosala;
11. Mr Mazibuko.

The allegations went further to imply that the inmates who made use of Mr Thloloe to facilitate their escapes or “disappearances” paid vast amounts of money for such assistance. In respect of Mr Robert Madinga Makhoba’s escape,

an amount of two hundred thousand rand (R200 000,00) was allegedly paid for the escape. It was alleged that Mr Thloloe in turn rewarded his colleagues who assisted him with the various escapes. In this regard, he allegedly paid Mr Solly Mndiniso and Mr Benny Ngoetjane, fifty thousand rand (R50 000,00) each. Further to this, he also received payment from the family members of the implicated inmates at various locations.

On a number of occasions, he allegedly transported prisoners out of the prison in his motor vehicle. Furthermore, several of Mr Thloloe's colleagues who conspired with him in the facilitation of the escapes have been dismissed by the Department of Correctional Services but somehow this fate has not befallen Mr Thloloe.

3.2 Robberies in Gauteng and KwaZulu-Natal

It was alleged that Mr Thloloe, together with certain prisoners, whose escapes he had facilitated, targeted and robbed banks of foreign currency, traveller's cheques and cash. The allegations were that there was a direct involvement by Mr Thloloe in the following robberies:

- (a) An armed robbery at the Gezina branch of the Standard Bank that occurred at approximately 11H00 on 16 November 2000. On that occasion, Mr Thloloe drove the getaway motor vehicle, a Nissan Skyline, which had been reported as stolen. A prison warder's uniform was found in the Nissan Skyline after it was abandoned. It was alleged that Mr Thloloe worked on second watch on that particular day. It was also alleged that he was involved together with a group of Zimbabwean citizens and escapees in this particular robbery.

- (b) An armed robbery at the Brooklyn Mall branch of the Standard Bank in Pretoria on 13 March 2001, wherein an amount of over seven hundred thousand rand (R700 000,00) in cash, travelers cheques and foreign currency was stolen. During the robbery, Mr Thloloe drove the getaway vehicle, a Volkswagen Caddy, which had been stolen. It is alleged that this robbery was committed together with a group of Zimbabwean citizens, as well as escapees.

It was further alleged that Mr Thloloe was arrested for the robbery but despite having confessed to the robbery and despite having made a pointing out statement, the charges were inexplicably withdrawn against him in court.

- (c) An armed robbery at the Fourways Crossing branch of the Standard Bank on the 14 September 2000, where an amount in excess of two million seven hundred thousand rand (R2 700 000,00) in cash, traveller's cheques and foreign currency was allegedly stolen. Once more Mr Thloloe drove the getaway vehicle and accomplices were Zimbabwean citizens and other escapees.
- (d) An armed robbery at Pietermaritzburg in KwaZulu-Natal on the 5 June 2002. Mr Thloloe was arrested at the scene of the robbery and detained allegedly at the Mountain Rise Police Station. The police docket regarding such investigation disappeared and as a result thereof, Mr Thloloe escaped any prosecution. Once more it was alleged that he was involved in the crime with Zimbabwean citizens and escapees.

3.3 Motor Vehicle Thefts/Hijackings

The third allegation against Mr Thloloe was regarding motor vehicle thefts and/or hijackings, breaking into motor vehicles within the prison precinct and other

related offences. Regarding these allegations leveled at Mr Thloloe, it was alleged that:

- (a) On the 19 January 2001, he was arrested in Parkview whilst trying to steal a motor vehicle. He was with a certain Mr Leslie Boyboy Phanyeko. Implements used for breaking into motor vehicles were also found in his possession.
- (b) In at least two (2) of the robberies mentioned earlier, Mr Thloloe drove the getaway cars, which had been reportedly stolen. Specific reference will be made to the Nissan Skyline used in the Gezina robbery, as well as the Volkswagen Caddy used in the Brooklyn Mall robbery.
- (c) These motor vehicles have been impounded by the South African Police Services. It was discovered that the engine and chassis numbers had been tampered with.
- (d) On at least three (3) different occasions, Mr Thloloe, with the help of inmates, broke into members' cars parked in the vicinity of the prison precinct and removed sound and music systems from them.
- (e) Mr Thloloe travelled to the South African Police Services vehicle pound in Soweto and together with another member and an inmate removed or stole a BMW computer box from one of the BMW's impounded at the premises. At this time, he allegedly himself owned a BMW motor vehicle.

3.4 Drug Smuggling and Sexual Activities

The fourth and fifth allegation related to Mr Thloloe's involvement in drug smuggling in Johannesburg Prison, as well as his sexual activities at the Johannesburg Female Prison.

It was alleged that Mr Thloloe was the leader of a drug smuggling ring that operated at the Johannesburg Prison and that he allegedly brought dagga onto the premises of the prison. The *modus operandi* was, *inter alia*, that some of the dagga would be left in the coal yard behind the boilers to be picked up by a certain Tami, an inmate, who worked in the kitchen. Tami would then sell this dagga to fellow inmates and then pass the proceeds of the sale onto Mr Thloloe.

Furthermore, it was alleged that Mr Thloloe had an illicit sexual affair with a female prisoner called Ms Nomsa Nkosi, at the female prison. They had sex in the area the prisoners referred to as "Ehontshi" in the Female Prison. It is further alleged that he facilitated illicit relations between the female inmates and the male inmates who worked with him.

3.5 Evidence Considerations

The mysterious "disappearances" of prisoners allegedly committing crimes is an important development as it may very well clarify how the policing authorities appear to be unable to solve certain crimes that are committed in the country. If the allegation is indeed proven to be true that "escaped" inmates are in fact committing some of these crimes, then the possibility of solving such crimes is extremely remote as the perpetrators have a cast iron alibi. The alibi will be unshaken because the general public and no doubt the investigating officers investigating these cases would believe that these criminals were safely behind bars at all relevant times.

Most of the evidence produced in the matter of Mr Sydney Thloloe was aimed at the "disappearances" of prisoners from Johannesburg Prison and at the criminal involvement of Mr Thloloe in armed robberies with some of the prisoners who allegedly "disappeared" from the Johannesburg Prison.

This Commission cannot lose sight of the fact that as a Commission of Inquiry, it has to look at all the evidence presented, be it tested or untested. In the matter of Mr Thlooe, it was requested of the Commission that a number of statements that were submitted to the Commission and not confirmed with *viva voce* evidence, had the potential of being unreliable and that the Commission should not attach much weight to such statements. It is the view of the Commission, however, that it would fail in its duty to seek the truth of the allegations if it disregarded those statements solely on the fact that they were not tested and are therefore unreliable. The forum for testing the reliability of those statements is not at the Commission hearings but rather when recommendations are made that criminal action be taken against those implicated in crimes.

Throughout the hearings, the Commission has been extremely accommodating in allowing implicated people to be represented to protect their fundamental right to challenge evidence. However, this case has to be distinguished from the other matters since it is a complex matter and one that has plagued the Department for a long time. The "disappearances" of prisoners out of prisons has always remained a mystery to many in the Department. This necessitated a deviation from the normal means of gathering evidence as applied in criminal trials. In order to fulfill its mandate, the Commission had to relax the rules of evidence and attempt to solve the problem once and for all. Further to this, the Commission is of the view that the procedures followed in a court of law are not a *sine qua non* for procedural fairness before a Commission hearing.¹¹

¹¹ See *Bongaza v Minister of Correctional Services and Others* 2002 (6) SA 330 (Tk) and *S v Sparks NO and Others* 1980 (3) SA 952 (T) where Human J (with whom Theron AJP and Franklin J concurred) gave the following distinction between a court of law and a Commission at 961 C:

"A court of law is bound by rules of evidence and the pleadings, but a Commission is not. It may inform itself of facts in any way it pleases - by hearsay evidence and from newspaper reports or even through submissions or representations or representations on submissions without sworn evidence."

It was of grave concern to the Commission that during these hearings some of the witnesses who came forward and who were prepared to testify, inexplicably had a change of heart and refused to testify when called upon. Given the nature of the alleged transgressions and the facts of these escapes it is reasonable to infer that such a sudden change of heart and attitude was as a result of some undue influence. Something must have occurred between the time these witnesses declared themselves available to testify and the point where they changed their minds and were fearful to testify. Something or someone instilled that fear in them and it would not be unreasonable to infer from the facts that there must have been some intimidation. There was undisputed evidence that Mr Thloloe was feared within the Johannesburg Prison or even the Department as a whole. It is further important in the matter of Mr Thloloe to bear in mind that those who benefited from any assistance to get out of prison are obviously the best witnesses to testify in this matter but it would be completely unreasonable and presumptuous to think that those who "escaped their sentences", would come clean and now participate in an inquiry to implicate the very person they considered their saviour once out of the prison.

Hence, the Commission, in its endeavor to reach a decision, needed to look at all other indicators and all other bits and pieces of evidence to make findings in this particular matter of Mr Thloloe.

Early in the hearings, Mr Wolfaardt of the Department testified that a distinction between types of escape should be drawn. There are escapes where prisoners genuinely overpower a warder or where they escape by damaging the infrastructure of the prison. In both these instances, there is always a trail to follow, something to investigate and clues. This kind of escape would be classified normally as an escape.

On the other hand, Mr Wolfaardt, distinguished the escape from prison where at the time of lock-up, the numbers of all prisoners tally and all prisoners are behind

bars, but come the next morning when the members return to the prison and count the prisoners, it will be discovered that some of the prisoners have simply "disappeared". This was a different case altogether. There is no trail of what happened. There is no indication of any damage to any structure. A warder was in possession of the keys of the cells, and the cells were all locked.

The Commission concerned itself with those escapes where no trail could be found since they pose the greatest threat to the Department's security and safety and are the most difficult to detect.

3.5.1 Mr Kgukutli Louis Pobe

Mr Pobe is an ex-member of the Department of Correctional Services. He worked for the Department from 8 April 1991 until 15 December 2000. He deposed to an affidavit, which was submitted at the hearings.¹² He was dismissed from the Department on the 15 December 2000, and the reason for his dismissal was the fact that he helped two (2) prisoners escape from prison.

The witness made it clear that he wanted to make a full and frank disclosure to the Commission since he not only wanted to tell the Commission of his assistance but of some other escapes or assisted escapes in which he participated with others but for which they were never charged. 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 best sellers are made.

Mr Pobe explained that he started working closely with Mr Thloloe, also a member, in 1999. At that time Mr Thloloe was the supervisor of section D, Johannesburg prison.

¹² See Exhibit 'CCC' of the Johannesburg hearings.

He told the Commission that his job was to take care of the complaints and requests from prisoners in section C2 of the Prison. At the time, prisoners complained that they had been robbed in section D, and when he approached Mr Thloloe, also known as “Biza”, as the supervisor of the section, Biza¹³ gave him money in order to be quiet about the prisoners’ complaints.

(a) Theft, Robbery and Drugs

His evidence was that Biza used to give him between fifty rand (R50,00) and one hundred rand (R100,00) per day and that this practice continued for awhile. The other practice that Biza exposed him to was that they allocated better cells to those prisoners who came from court and, on being searched by them, were found in possession of money than those without money. It was his evidence that in that way, both he and Biza would collect the money daily, which they would then share on an equal basis. At times the amounts involved were as much as five hundred rand (R500,00) per day.

They were also involved in practices where they would go out and buy food and liquor for the prisoners and would then ask for money from the prisoners for such services rendered. He explained that on occasion, he and Biza went to a house of a certain prisoner, Mr Makhoba, and that Biza, in his presence, collected mandrax tablets from Mr Makhoba’s wife.

Evidence before the Commission was that the drugs would be brought in when visits took place and that both he and Mr Thloloe would then supply the drugs to Mr Makhoba. The person who usually brought the drugs was Mr Makhoba's wife. She would bring them in at visitation times.

¹³ The witness constantly referred to Mr Thloloe as Biza and for the sake of clarity, the Commission will from herewith proceed in referring to Mr Thloloe as “Biza”.

It is not a practice that he started but rather a practice that he seemed to inherit when he got to that particular section of the prison as there was already an arrangement that Mr Makhoba, the prisoner, sells the drugs.

(b) Mr Makhoba's Escape

He explained to the Commission that he was briefed about Mr Makhoba's escape. The facts revealed that Mr Makhoba was also one of the prisoners that surprisingly "disappeared" from prison. In the execution of the plan, four (4) of them were supposed to take part, namely, Mr Solly Mndiniso, Mr Benny Ngoetjane, Mr Sydney Thlolo and himself. They were all supposed to work together on the same shift on the day when Mr Makhoba supposedly "disappeared" from prison.

Biza was the supervisor of that particular shift and the members from the reception counted the number of prisoners coming from court. That counting process would be followed by Biza, who would lock the cells. At the time when he would be locking the cells, Biza would take the prisoner, Mr Makhoba, out of the cells and hide him. When the members at the reception went off duty, the arrangement was that Mr Solly Mndiniso would then take Mr Makhoba out of the room where he was hidden. He would take him to the control room where Biza was waiting. Thereafter, Biza would take Mr Makhoba to the main gate where Mr Benny Ngoetjane was working. The arrangement then was that Mr Ngoetjane would take Mr Makhoba to the electric gate, where according to the plan, he, Mr Pobe, was supposed to be working. At that stage, the car that would transport Mr Makhoba was waiting next to the electric gate. Mr Pobe was supposed to be carrying a cell phone in order to communicate with the three (3) colleagues, who were operating from inside.

When Mr Ngoetjane and the prisoner arrived at the electric gate, Mr Pobe would then open the gate and let both Mr Ngoetjane and Mr Makhoba, the prisoner, out

of the gate and into the car that would have been waiting there for them. Mr Ngoetjane would then travel with Mr Makhoba, together with the driver of the car, to Tembisa so that they could come back with the money. Mr Ngoetjane was not going to come back to the prison after leaving Mr Makhoba in Tembisa but would just go to the single quarters where they stayed and they would all meet after they got off duty. The amount that Mr Ngoetjane was expected to return with was two hundred thousand rand (R200 000,00).

Despite all the planning, on the day when everything was supposed to happen, Biza came to Mr Pobe and said that the plan was abandoned. Despite this comment, Mr Pobe heard from other colleagues that Mr Makhoba had "vanished", to use his own words, from the prison. Once he saw the name of Mr Makhoba on the notice board as one of the prisoners who had "disappeared", he approached Mr Ngoetjane and asked him what had happened and he was told that they had carried the plan out without him. According to Mr Ngoetjane, he and Biza shared the money. However, it became clear to Mr Pobe that they had received less money than they anticipated they would be receiving from Mr Makhoba.

Mr Pobe complained to Biza that he did not share in the 'loot' and Biza explained to him that he was not entitled to any money because he did not assist in the escape. After this plan with Biza from which he was excluded, Mr Pobe decided that from thereon he would work on his own.

(c) Messrs Mphenduka and Dlomo Escapes

Mr Pobe then on his own assisted two (2) prisoners, Mr Edmond Mphendukane and Mr Ladelike Dlomo, to escape after being approached by another prisoner, Mr Buthelezi, who asked him to assist the two (2) prisoners to escape. He requested from them the sum of one hundred thousand rand (R100 000,00),

namely fifty thousand rand (R50 000,00) each, which Mr Buthelezi agreed to and assured him that the two (2) prisoners would pay him.

The *modus operandi* was to have the prisoners taken to the hospital section over the weekend at which time Mr Buthelezi would pay him thirty thousand rand (R30 000,00) on behalf of the two (2) prisoners and the rest of the money would be paid once they were out of the prison. He himself reported for duty on that weekend and went to the hospital section where he found the two (2) prisoners. He asked them to remain there until he fetched them. At that stage, arrangements were made with another person outside the prison to come and fetch the two (2) prisoners to collect them in front of the main gate during the lunchtime period.

He himself went to a member on duty at the main gate, Mr Mema. He asked Mr Mema to go on lunch as he would take care of the main gate. Mr Mema then left for lunch. Mr Pobe went back to the hospital section and took the prisoners to the main gate. At the main gate, he released them. Later they got into a car that was waiting for them and left the premises. He said that he never got the balance of the money and that no-one was ever charged for the "disappearances" of these two (2) prisoners.

As far as he knows, members of the South African Police Services killed the one prisoner, Mr Edmond Mphendukane, outside the prison and the other prisoner, Mr Ladelike Dlomo, is still at large.

(d) Mr Oupa Buthelezi

Mr Pobe also revealed that other prisoners were then sent to him for his help and that those who were sent to him from other sections were all sent by Biza. He did not help each and every one that was sent to him as it became clear to him that management was also suspicious.

He did, however, get involved in the escape of another prisoner, Mr Oupa Buthelezi, who asked him for his assistance to escape and the prisoner also said he had been sent by Biza. Mr Pobe requested the sum of thirty thousand rand (R30 000,00) from this particular prisoner, which he negotiated with the wife of the prisoner. The wife gave him ten thousand rand (R10 000,00) during a visitation of which the balance would be given to him later once Mr Buthelezi had successfully escaped from prison. Again, management became suspicious about the planning operation and Mr Buthelezi was then internally charged. He never rendered any assistance to Mr Buthelezi to escape and he never paid the ten thousand rand (R10 000,00) back that he had received from Mr Buthelezi's wife.

Not surprisingly, Mr Pobe revealed to the Commission that the people who were assisted in "disappearing" were all incarcerated on charges of armed robbery. Members acknowledged that armed robbers have lots of money, so those prisoners are identified as people who are in need of "help" and who would benefit from the "assistance" of officials and would have money to pay them.

(e) Messrs Kunene and Ncaba Escapes

Mr Pobe testified about another escape of two (2) prisoners, Mr Zakeli Kunene and Mr Buleliseni Ncaba, whom he and one of his colleagues assisted in "letting them out" of prison. The *modus operandi* adopted in this instance was to escort the prisoners to the places where the money was kept. This revelation of Mr Pobe showed that they were not fearful of the law, nor did they fear any retribution from their seniors or action from police authorities. This points to the fact that the breakdown of discipline has everything to do with the problems the Department is experiencing.

The evidence of Mr Pobe was that each of the prisoners offered him fifteen thousand rand (R15 000,00), despite the fact that he had wanted thirty thousand

rand (R30 000,00) per prisoner. He then turned the first request down as if it were just a normal request for any legitimate privilege. Mr Pobe thereafter received a phone call from a certain Mr Thandayiphi Sibiya, who also had 'disappeared' from prison. Mr Sibiya asked him to render assistance to the prisoners who wanted to "disappear" from prison. Mr Sibiya also informed him that Biza recommended him as the person who could assist. He explained to Mr Sibiya that he required thirty thousand rand (R30 000,00) from each of the prisoners. Later he met with a certain Vusi, who introduced himself as a friend of the prisoners who wanted to escape. Vusi informed him that the money that they had agreed upon was indeed ready. He then realized that he could not arrange this escape all by himself and he approached his colleague, Mr Mdiniso, to assist him in the execution of the escape of the prisoners.

In this plan, they arranged as to where the prisoners would sleep and the next morning at 05h00, they went to the D section, collected the prisoners and took them to the cells. They then checked on whether they were noticed by anyone. Once certain and confident that everything went undetected, he called upon another warder and told him that the two (2) prisoners were going to court. He then hid the prisoners in the lawyer's toilets so as not to be noticed by other members, and when he could see that they were not being missed or looked for, he took them through the main gate.

The prisoners were then taken to the members' rooms and he and Mr Mdiniso came after work and took the prisoners to wherever the money was held. At their rooms they met with another colleague, Mr Papi Koai,¹⁴ who assisted them in transporting the prisoners from the prison members premises.

It is important to note that Mr Pobe together with Mr Koai took the prisoners from Johannesburg to KwaZulu-Natal. Enroute to KwaZulu-Natal, they stopped at Vosloorus Township, where they met with a traditional healer. At that stage, one

¹⁴ Mr Koai was also dismissed from the Department at the time of the hearings.

of the prisoners decided that he no longer wanted to go with them to KwaZulu-Natal but would remain there with the healer. They came to Colenso in KwaZulu-Natal, where they left Mr Koai's vehicle and then took another vehicle belonging to an uncle of Mr Ncaba in order to go and collect the money.

They arrived at the house and eventually eighteen thousand and seven hundred rand (R18 700,00) was handed over to them. Throughout the trip, Mr Pobe was in contact with Mr Mndiniso asking him what was happening at the prison. The next morning, he casually went to work as if nothing had happened.

It was this incident that caused Mr Pobe's dismissal because once the Department interrogated him, he decided to go to the police station and make a full and frank disclosure. He was, however, not criminally charged and not prosecuted. As at the time he testified before the Commission he had not been charged criminally.¹⁵

It is therefore important to note that Mr Pobe was dismissed on the 15 December 2000 and testified before the Commission on the 31 March 2004 and in that four (4) years he was never criminally charged for the fact that he, in a corrupt manner, assisted two (2) prisoners to escape from prison. He also contravened various sections of the Correctional Services Act.¹⁶ Nevertheless, the Commission is grateful that Mr Pobe was prepared to come forward, testify and be challenged on the veracity of his version and render assistance in the proceedings, even though he was no longer employed by the Department.

It is necessary to mention that the evidence of Mr Pobe, albeit very consistent and confidently stated throughout the hearings, was not perfect. In fact, the affidavit of Mr Pobe, Exhibit 'CCC', clearly showed that he said that he went to

¹⁵ This once again is the clear evidence of the failure by members of SAPS to deal with transgressions in the Department. See also Chapter dealing with Sexual Violence in Prisons.

¹⁶ Act No. 111 of 1998.

the house of Mr Makhoba where the wife handed them the tablets. However, during his testimony, he deviated from this and stated that they went to a house in Tembisa and that they were told that it was Mrs Makhoba's house but no tablets were ever given to him in her presence. However, she gave him tablets in the visitors' room at the prison. Mr Pobe was properly challenged by those implicated in the transgression but the contradiction could not be explained.

When Mr Pobe was cross-examined at length by the counsel acting on behalf of Mr Thloloe, he was asked why he was involved in all the wrong-doings and why he had not decided earlier to be honest and divulge the truth. Mr Pobe in answer stated "my eyes had been closed by money". He acknowledged that he exposed the public to dangerous criminals and robbers but in mitigation explained that he had decided now to tell the truth and to assist the Commission to bring it to an end.

3.5.2 Mr Bhekisisa Vincent Shoji

The kind of interference and the level of intimidation to which the witnesses were subjected became apparent at the time when Mr Shoji testified before the Commission.

Mr Shoji deposed to an affidavit that was handed in and marked as Exhibit 'GGG'. The interesting development in his evidence was that when he delivered his testimony in chief, it became apparent that he had a document in his hand which had visible notes on it. The document was confiscated and when perused by the Commission it showed that there were notes made onto the document that were clearly not in the handwriting of Mr Shoji. The nature of the notes indicated that there has been clear interference and intimidation of this witness so as to exculpate Mr Thloloe. The document, which speaks for itself, was handed in and marked as an exhibit.¹⁷ The witness was questioned regarding his deviation in

¹⁷ See Exhibit 'GGG1' of the Johannesburg hearings.

evidence in chief and his evasiveness when trying to explain how the document that was found in his possession came into his possession. All the contradictions and evasiveness showed that Mr Shozi's evidence could not be relied on. In fact it is clear that Mr Shozi committed the crime of perjury because he gave two (2) different or conflicting versions of events under oath.

Mr Shozi was given an opportunity to explain his contradictions but did not take the Commission in his confidence and left the Commission with no other option than to make adverse recommendations regarding his honesty and demeanour in the witness stand. He did not even attempt to give an excuse in order to determine whether such excuse is "just", given the circumstances.

This concludes the evidence dealing with all the allegations against Mr Thloloe at the Johannesburg prison.

3.6 FINDINGS

In the matter of Mr Thloloe, the Commission is satisfied in the light of the evidence adduced that Mr Thloloe was involved in criminal activities and that he was not properly disciplined in all the matters. The evidence shows overwhelmingly that Mr Thloloe, even though he was in charge of the shifts, never faced disciplinary action in all the "disappearances". The fact that he was allegedly involved in criminal conduct and arrested was also not internally investigated.

The number of times that he was involved in criminal conduct surely should have drawn the attention and suspicion of his seniors and should have led to his suspension, since he became a security risk. Instead of suspending him when criminal cases were pending against him, he was transferred to another section where he still had access to keys and prisoners. It is not unreasonable to have expected, given the allegations, that Mr Thloloe would have been re-deployed

where he had no authority over prisoners. The witnesses who testified against him showed no bias; on the contrary, they were prepared to admit their own wrong doing and be crucified for that in the witness stand in order to help the Commission to be in a position to make a recommendation.

The facts presented to the Commission regarding the times when Mr Thloloe was on night duty showed that the aforementioned policies were not adhered to on a regular basis. The disturbing part is that there were no consequences to face when Mr Thloloe arbitrarily interfered with the members manning the posts. If the Department is serious about its own policies, then it should put mechanisms in place that will target those who are not adhering to it, with disciplinary action. The Department should be pro-active in its management strategies and not first wait for a prisoner to escape to investigate. Should there be a relaxation of its security policies by a member, such conduct should be investigated immediately because it poses a potential risk. Members will certainly be more aware of the applicable policies and more diligent in order to protect their employment.

4. MR MZIMASE THUNGULU

As early as 2002, whilst the Commission was hearing evidence in Port Elizabeth, the Commission's attention was drawn to the fact that one (1) prisoner, to wit, Mr Mzimase Thungulu, had escaped from prisons in the Eastern Cape at least six (6) times. What made his case so unusual is the fact that he had clearly been assisted by members of Correctional Services to escape serving his sentences.

At the time of the hearings in Port Elizabeth, no break through was made by the Commission's investigators regarding how and with whose assistance Mr Thungulu escaped. It did not come as a surprise to the Commission that this inmate had acquired the name "McGyver" because it soon became clear that very much like the television character of a series in the 80's, he most certainly,

by escaping from some of these places, committed things that are humanly impossible.

The matter remained unresolved until the Commission arrived at Pretoria Prison and heard the evidence of some of the C-Max prisoners, including Mr Mzimase Thungulu.¹⁸ During his testimony, after he was confronted about his legendary escapes in Port Elizabeth by one of the Commissioners, he indicated to the Commission that he feared to reveal what really happened but that he was prepared to consult with the investigators of the Commission and would give them the necessary information as to how he escaped from a single cell in a Maximum Prison in St Albans.

At all times, one should remember that Mr Thungulu is a serious and dangerous criminal, serving one hundred (100) years of imprisonment and he was convicted of offences, *inter alia*, murder, robbery, possession of an illegal firearm, possession of illegal ammunition and so forth, yet he managed to escape twice within a year from St Albans Prison.¹⁹

Mr Thungulu is a prime example of how dangerous criminals, if they have the necessary funds, can buy their way out of prison. Whilst most people think that justice has been done and that prisoners are serving their sentences behind bars, those very same dangerous criminals are right in the midst of their communities.

The matter of Mr Thungulu also focused on another aspect, which is the unnecessary wastage of resources used to investigate and also apprehend a prisoner not once, but twice within one (1) year whilst that prisoner was supposed to be behind bars. Precious time was wasted by the South African Police Services, which time could have been used in investigating new criminal matters.

¹⁸ See chapter dealing with Assaults at C-Max Prison.

¹⁹ He managed to escape on the 13 December 2000 and also between the 22 and 23 August 2001.

To understand what makes Mr Thungulu's escapes so unique, the Commission will now try and focus on some of the aspects that will illustrate that despite the fact that some correctional officers take their duty very seriously and are very committed to the safe custody of prisoners, there are others who are unscrupulous. These unscrupulous members have no problem in augmenting their income by releasing prisoners in the way Mr Thungulu was "released".

4.1 Escape whilst in transit from Bisho High Court to St Albans Prison on 13 November 2000

On 13 November 2000, three (3) members of the Department, namely Messrs Dasa, Kama and Vava, were instructed to escort prisoner, Mr Mzimase Thungulu to Bisho High Court and back to St Albans. On their return from Bisho High Court, the prisoner's hands and feet were in hand cuffs and leg-irons respectively. He was in the back of the van, which was secured with a padlock. The three (3) members, however, never stopped to check on the prisoner. They only stopped en route to drop off one of the members, Mr Vava at his residence. When Mr Dasa and Mr Kama arrived at St Albans, they discovered that the padlock was missing from the door of the van and that the diamond mesh had a hole in it. Needless to say, the prisoner Mr Thungulu, was no longer in the van.

Now the peculiarity about this particular escape is that the diamond mesh (cast iron) on the inside of the van had been sawed through and there was a hole in the mesh on the inside of approximately twelve (12) centimetres in length by seven (7) centimetres in width. The mesh at the side of the vehicle had been forced out with a piece of iron of approximately thirty (30) centimetres (this iron was part of the bench on which the prisoner was sitting at the back of the van). However, the hole that was made in the mesh was approximately the size of a cricket ball and there were sharp edges of the mesh, which should have clearly inflicted wounds on the arm of the prisoner. However, at the time of the internal

investigation, which was conducted by Messrs R.R. Daniels and M.A. Spyers, no blood was detected on either the mesh or in the vehicle.

It was also clear on the next day when they were video taping the vehicle that from the driver's seat the driver has a full view of the back of the van where the damage was caused. Notwithstanding this, the driver of the vehicle did not observe the prisoner at the back. Further to this, the road between Bisho High Court to St Albans in most part is a highway where the speed limit is approximately one hundred and twenty (120) kilometres per hour. It would therefore have been impossible for the prisoner to jump out of the vehicle without being seriously hurt. It was further observed that there were saw marks, which also left a question as to how the prisoner was searched, if it was the prisoner that had escaped by himself from the back of the van.

It is also evident from the damage to the vehicle and the time that elapsed between Bisho High Court and St Albans that the prisoner could not have escaped without assistance. That particular finding was also made by the internal investigator.²⁰ Furthermore, the prisoner was handcuffed and in leg irons when he was put in the van. The van only stopped once between the Bisho High Court and St Albans, as was eluded to earlier, to drop off Mr Vava.

Neither of these two members could explain where or how the prisoner escaped. They admitted during the investigation that they never stopped to check on the prisoner, not even when they dropped off Mr Vava at his residence. It was found by the internal investigation that the members were clearly grossly negligent and all three (3) of them were charged with transgressions of the Disciplinary Code.

Very little emphasis was placed on the question of how the prisoner managed to escape and no statement was taken from the prisoner when he was again apprehended as to how he managed to escape from the vehicle. What is

²⁰ See Departmental memo dated 13.11.2000, file 1/6/2, as per St Albans Exhibit 'TT'.

disturbing in this particular matter is that although the Department went through the process of a disciplinary hearing, Messrs Vava and Kama merely received written warnings. Mr Dasa, who was the member in charge of the transport and also responsible for the safe custody, was initially dismissed but the Provincial Commissioner of the Eastern Cape decided to put the dismissal aside and to give the member a final written warning. Mr Dasa was also re-instated in his position.

It is common cause that this was one of the most serious cases dealing with an escape and that all three (3) of the members failed in their safekeeping of the prisoner. It is also evident to the Commission that all three (3) should not merely have been issued written warnings but that they should in fact not be in the Department since they do not have the Department's interests at heart.²¹ The message that is sent out is that the escaping of prisoners is not a serious transgression and that it is not serious enough to put your job at risk.

When the Commission re-investigated the matter after Mr Thungulu decided to co-operate, a statement was obtained from Mr Nicholas Charles Esope Meyer, who explained to the Commission the procedure of transporting prisoners. Mr Meyer's affidavit was attached to Mr Pakiry's exhibit.²² What is evident from his affidavit is that despite the fact that he had been involved in transporting Mr Thungulu on numerous occasions to the Bisho High Court, with a crew of members, he was never informed that Mr Thungulu was a dangerous prisoner. It was only at Bisho High Court when the investigating officer of the case approached him that he was told that Mr Thungulu was dangerous but up to that point he was still escorting Mr Thungulu in a sedan motor vehicle, without him being in leg irons. From that day on, he requested that Mr Thungulu be transported in a van to the Bisho High Court.

²¹ See Chapter on Disciplinary Inquiries and the inadequacy of the disciplinary hearings in the Department.

²² See exhibit 'TT' – MP9 of the Johannesburg hearings.

The importance of the affidavit of Mr Meyer is that it should be the duty of the Head of Prison or his delegate to alert the team escorting prisoners to and from court who the dangerous prisoners are, so that extra precautionary and measures can be taken to ensure that the prisoners are, at all times, held in safe custody. Such conduct would not only be prudent but would also be in accordance with good governance.

Mr Thungulu, in a statement to the Commission, gives an explanation for his magical disappearance from a van when he was secured with handcuffs and leg irons. He told the Commission that he had paid the warder fifteen thousand rand (R15 000,00) for his escape but because it was a fellow black man, Mr Dasa, he did not want to get him into trouble. It needs to be stated that Mr Thungulu obviously gave a different version to the internal investigators when they investigated the matter and the Commission therefore does not consider recommending any criminal prosecution against the warder, bearing in mind the burden of proof resting on the State regarding such conflicting statements.

4.2 Escape from St Albans on the 22/23 November 2000

At the time of this escape, Mr Thungulu was detained in a single cell at the maximum prison at St Albans. Mr Thungulu explained how a warder approached him and told him that he could offer him some assistance in escaping but that he would have to pay ten thousand rand (R10 000,00) for the escape. He then arranged with the warder, a certain Mr Jordaan, who then also brought another warder into the plan, Mr Stander.

Mr Thungulu explained how he got the ten thousand rand (R10000,00) to prison and that on the 22 August 2001, whilst he was in the exercise yard with three (3) other prisoners, he then came back to his cell and saw that the window and gauze wire of his cell was already cut but that everything was still in position. Mr Thungulu explained in his statement that he inspected it and saw that it was

loose. He was then approached by Mr Jordaan who asked him whether he would get through the hole or whether it was too small. Mr Jordaan also told him that the single cells on the second floor, which had asbestos gutters would not hold him and that he would be injured if he had to try and escape through the window. Mr Jordaan then told him that he would make a plan to assist him and that he must prepare his bed and put things in his bed so that it appeared as though he was still sleeping. He was also told that he should push the gauze wire with his hands and injure his hands in the process.

His version in his affidavit was that both these warders assisted him and that they helped him from the single cells to the ground floor and unlocked the different grills for him. He then proceeded to the main gate. At the time when he was exiting the prison, he was dressed in jeans and a blue T-shirt. He was told exactly where there was a hole in the fence, which was opposite the reception and this is where he went through the fence, where he was picked up by his sister in a car. Not long after he escaped on the 25 August 2001, he was re-arrested.

Even though there is doubt about the version given by Mr Thungulu, it is clear that there was gross negligence on behalf of the warders, who never properly inspected the cells and during the change of shifts, never ensured that the prisoners were accounted for. The Department then decided to charge the warders, Messrs Stander and Jordaan and also some other supervisors, Messrs Jacobs and Nomsanga. Once again the outcome of the disciplinary hearing was quite alarming, as it appeared that Messrs Stander, Jordaan and Nomsanga were found to be not guilty and that all charges against Mr Jacobs were withdrawn. As for the rest of the warders who were all on duty during the shift, no disciplinary hearings took place.

Irrespective of the outcome of the disciplinary hearings, it was as clear as daylight from the inspection *in loco*, which the Commission had at the St Albans

Prison that it was impossible for an adult person to escape through the window Mr Thungulu allegedly escaped from. Considering the circumstances, it is clear that Mr Thungulu needed the assistance from someone inside the prison to get to the outside and the mere fact that he was arrested outside, shows that such assistance was rendered.

Mr Thungulu could never have got out of the prison without being in possession of the keys of all the gates himself or more realistically, without the help of a member or members. The Department failed to take criminal action against any of its members in both these cases. It cannot be emphasized enough that such failure not only leads to corrupt officials remaining part of its work force but that such lack of action can be seen by the “offenders” as condoning their action. The Commission is convinced that this is not the message the Department wants to send out and hence more vigilant discipline is needed against those who transgress the laws of the country and the policies of the Department.

5. DEPARTMENT’S WHITE PAPER

The Commission has referred to the standpoint of the Department on security of its prisons earlier but to be comprehensive the Commission will also deal with the Department’s White Paper which sets the scene for the years to come. The Department’s response to safety and security is announced in the White Paper of the Department at page 72, particularly section 10.2:

Safety, Security and Order as part of rehabilitation

“10.2 Operating secure, safe and orderly correctional centers;

10.2.1 The Department is obliged to –

- Ensure the safety of the public from inmates who pose a threat to the public;
- Provide a safe environment for inmates; and
- Enforce sentences and ensure that justice is seen to be done.

10.2.2 The balance between security control and justice is the responsibility of all correctional managers. Excessive security and control at the expense of justice, such as oppressive security measures, which exclude rehabilitative programmes, brutal methods of control, lack of justice and disciplinary hearings and unlawful punishments, can lead to situations in which orderly and fair management gives way to abuse of power, violence by both offenders and staff, the possibility of escapes and the absence of constructive activities for inmates.

10.2.3 Principle 4 of the Basic Principles for the Treatment of Prisoners says that: “The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State’s other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society.”²³

It makes little sense that the Department is so concerned about the security classification of offenders by assessing the risk of the offender and taking into account the impact of incarceration on other inmates etc., if the Department does not act firmly and speedily against those correctional services members who assist and aid prisoners to escape. Irrespective of how prisoners are classified, it would be a futile exercise if members assist them to escape. This lack of control over its employees in itself leads to the fact that the Department indirectly puts

²³ See White Paper on Correctional Services on page 72.

the public at risk because these offenders again re-offend as has been seen time and time again.

This lack of control over its employees also shows a complete disregard for the rule of law. Therefore, the Department's failure to act against those correctional service members who, by the use of a single key, undo all the efforts of the National Prosecuting Authority, the Judiciary and the whole criminal justice process, makes a mockery of justice.

One can therefore never lose sight of the fact that a proper disciplinary code, which is properly enforced and respected by all, is ultimately to the benefit not only of the Department, but to the country as a whole and also to the criminal justice system. Over the years, the Department has always made safe custody of prisoners one of its priorities and one of the primary functions of the Department. In the annual report of the Department 1999,²⁴ the Department stated that it is committed to quality service delivery by reducing the number of escapes from custody in order to contribute to the safety of the community. It has also committed to providing a safe and secure prison environment to ensure the personal safety of both prisoners and personnel. As early as 2001, the Department, still focusing on the reduction of escapes, stated the following in its annual report 2000/01:²⁵

“Although the target set for zero escapes from prison was not achieved, there was a significant reduction of 55.4% escapes in comparison with the number of escapes during the previous financial year. Although this figure reflects a major reduction in the prison outbreaks, the Department is not satisfied with this performance and will continue in its efforts to reduce escapes even further during the next financial year.

²⁴ See page 9 of the Annual Report.

²⁵ See pages 68 and 69 of the Annual Report.

Areas that hampered our performance in this regard and which will be critical focus areas during the next financial year, include:

- *Staff shortages*
- *Overpopulation and*
- *Negligence by officials.*

Steps already taken to address the problems and which will be intensified during the coming year:

- *Strict disciplinary action against corrupt and negligent officials;*
- *Criminal prosecution of officials and any other person aiding escapes;*
- *Enforcement of strict compliance and adherence to all the relevant policies and procedures in improving control and security in prisons;*
- *Incentives for prisoners who report escapes or “whistle blowers”;*
- *Budgetary planning to eliminate the current manpower backlog;*
- *Various initiatives to reduce over-population.”*

If one considers the aims and objectives of the Department already stated in its annual report of 2000, then it is clear that the Department failed in the very first step and that is to discipline those involved in corruption and those that were grossly negligent. Whilst it is a sound policy to take strict disciplinary action against corrupt and negligent officials who assist prisoners to escape, and whilst it is sound policy also to enforce the criminal prosecution, it is disconcerting that in the majority of escapes that were testified about during the Commission hearings, the Department very seldom followed its own directive of taking strict

disciplinary action against members. The public at large would also expect the Department to pursue criminal prosecution against those that assist prisoners to escape.

To aid and abet a prisoner is a very serious offence.²⁶ The seriousness of the offence is clearly demonstrated in the penalty clause provided for in terms of the Correctional Services Act and it is clear that the Department had no will to stamp out the corruption that exists amongst its own members when they are involved in corrupt acts by assisting prisoners to escape.

In focusing on the escapes from custody, it appears that one always reads the same refrain, printed every year in report after report, depending on which year of the Department's annual report you are looking at. Looking at the annual report issued by the Department for the year 2001/2002,²⁷ the following was said:

“Although the said target of zero escapes from prison and a 50% reduction of escapes from outside prison was not achieved, there was a slight reduction of three (3%) per cent in the total number of escapes in comparison with the previous financial year. The Department is not

²⁶ See section 43 of the Correctional Services Act No. 8 of 1959, which provides as follows:
“Any person who – (a) Aids any person in escaping or attempting to escape from prison or while in the course of removal and custody from one place to another; or (b) For the purpose of facilitating the escape of any prisoner, supplies or agrees or attempts to supply or aids, incites or encourages any person in supplying a prisoner with any mask, dress, disguise or any other article, instrument, matter or thing; or (c) conveys or causes to be conveyed into or out of any prison or any place where prisoners may come to work, any letter or token encouraging or inciting any prisoner to escape or to contravene a regulation or showing a desire to aid any prisoner to escape or to contravene any regulation; or (d) harbours or conceals or assists in harbouring or concealing an escaped prisoner, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding five (5) years.” Also see in similar vein section 115 of the 1998 Act.

²⁷ At pages 64 and 65.

satisfied with this performance and will step up its efforts to reduce escapes even further during the next financial year.

Negligence by officials continue to be a major cause of escapes whilst staff shortages and over-population also aggravate the situation.²⁸ The following measures are being enforced to combat these causes:

- *Strict disciplinary action against corrupt and negligent officials;*
- *Budgetary planning to eliminate the manpower backlog;*
- *Various initiatives aimed at reducing over-population;*
- *The introduction of advance security equipment;*
- *Safe and security detention of high risk prisoners in suitable prisons.”*

When one considers the annual report of the Department of 2002/2003,²⁹ the same appears:

“The said target of fifty (50%) per cent reduction in respect of escapes was not achieved and the Department is not satisfied with the performance at all. It must, however, be mentioned that to a large extent the Department’s performance in this regard was negatively influenced by one single incident, during which ninety eight (98) offenders escaped while being evacuated for their own safety from the Bizana Prison following the explosion of kitchen boilers. Negligence by officials continue to be a major cause of escapes, whilst the over-population of prisons also aggravates the situation. In an effort to deal with this situation, various strategies were adopted and measures were put in place. These measures focus mainly on aspects such as:

²⁸ Own emphasis.

²⁹ At page 44.

- *Involvement of managers at all levels in monitoring and ensuring adherence to policies and procedures;*
- *Strict disciplinary action against negligent officials;*
- *Various initiatives aimed at reducing over-population.”*

6. DEPARTMENT’S STRATEGY

The Department revealed as early as 3 October 2000³⁰ measures to combat escapes and the Commission lists them:

- Involvement of management at all levels to motivate/guide officials towards adhering to security policy/procedures.
- Strict disciplinary action against officials who are negligent in the performance of their duties.
- Strict disciplinary and criminal action against corrupt officials aiding escapees.
- Optimal utilization of existing security aids and equipment.
- Upgrading of personnel training.
- Sensitisation of prisoners in respect of the negative consequences of escapes.
- Criminal prosecution of escapees and those who assist in escapes.
- Rewarding prisoners who report planned escapes or who blow the whistle.
- Installation of electrified fences and X-ray scanners in so-called “high risk” prisons.
- Incarceration of High Risk Prisoners in C-Max Prison.

³⁰ See Correctional Services Portfolio Committee briefing dated 3 October 2000 <http://www.pmg.org.za/viewminute>, accessed 14 February 2005.

The aforementioned measures cannot be faulted but once more it is not a matter of having a plan but of executing that plan. Without execution these measures remain only ideals and do not serve a useful purpose. What is required is strict compliance with these measures and forceful action against those who transgress them.

7. GENERAL FINDINGS

The evidence in the case of Mr Thungulu and Mr Thloloe proves that security is problematic at our prisons and that members need to be properly disciplined when they assist prisoners to escape. Security, or the lack thereof, almost becomes a commodity for the warders involved in corrupt activities. Unlike other more subtle corrupt practices,³¹ assisting a prisoner to escape is easy to determine as corrupt because it goes against every possible rule of ethics that should exist for members of the Department.

The Commission is of the view that the “disappearances” listed at Johannesburg Prison and St Albans Prison are only the tip of the iceberg. The Department needs to do everything in its power to address security at our prisons. The current systems are fallible and need to be revised to secure our prisons. The evidence tendered before the Commission showed that a multi-faceted approach is required that will address the corruption on all levels. What has been exposed at these two (2) Management Areas is something that had been known to the Department for a long time. One only needs to consider the reported cases to know this is not a new phenomenon. In the case of *S v Davids*,³² the accused for

³¹ For example, practices like not working full hours, not adhering to directives, favouritism, etc.

³² 1998 (2) SACR 313 (C). Also see *S v Strydom* 1994 (2) SACR 456 (W) for ways to assist prisoners to escape from prison and *Van Der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE) for the Department’s delictual liability when its members were negligent in securing the prison.

example, a warder at Pollsmoor prison assisted a prisoner to escape at the cost of five thousand rand (R5000,00) cash and a BMW motor vehicle. The facts of the case are not unique and support our contention that members are prepared to risk the safety of society for a fee. It is therefore essential that members be sensitised and be trained not to succumb to devious and sly criminals. The Department should also be pro-active and regularly train its members in ways to combat the psychological onslaught from prisoners.

It is found by the Commission that a certain group of prisoners are a high risk flight group, namely those in custody for armed robberies, cash heists and fraud.³³ It should not be difficult to know who poses a threat to the security of the prison and an elite group of correctional members, who are regularly trained and who receive regular debriefing sessions from psychologists and other professionals, should guard them. This will address security on one level but more is required.

An examination of the Departmental B-Orders, specifically chapters 3, 5, 6, 12 and 19, dealing with security matters, indicates that the Department cannot be criticised for providing prompt directives that are aimed at securing our prisons. What should be criticized is the fact that the evidence before the Commission displays that very little, and in some cases, no implementation of these policies took place. In the matter of Mr Thloloe it was shown that members were chopped and changed from their posts to fit in with the “escape plan”, yet paragraphs 2.3 and 2.4 of the B-Orders provide as follows:

“2.3 Heads of Prisons must ensure that all gates providing access to the prison are manned by experienced or properly trained officials.

³³ See the Ninth Interim Report dealing with the acts of fraud and monetary transactions for more details of how prisoners serving sentences for Fraud and Robbery are targeted by the members to pay for extra privileges.

2.4 *Heads of Prisons must ensure that officials manning these posts are allocated on a permanent basis and such officials must not be arbitrarily removed/replaced with less experienced officials.”*

8. CONCLUDING REMARKS

The transgressions committed by Mr Thlooe have highlighted a number of issues and shortcomings in the manner in which information relating to prisoners and the staff is being managed within the Department. In this regard, it was even difficult for the investigators to establish whether on these particular days, Mr Thlooe was on duty or not because of the poor record keeping within the Department. The disappearance of prisoners whilst incarcerated and the fact that they are sometimes only detected a number of days thereafter, is clearly another indication of the poor keeping of records.

The Thlooe matter highlighted a number of shortcomings, which the Department needs to address. The one thing that the Commission would like to comment on is the manner in which the South African Police reacted upon hearing the evidence of the Commission and being contacted by the Commission on some of the transgressions Mr Thlooe committed. We have been advised that he has since been arrested. That was the evidence before the Commission at the time of writing this Chapter of the report.

The McGyver matter, even though it did not lead to the arrest of anybody, has however highlighted the shortcomings of the disciplinary system within the Department. In the circumstances, the Department should look at the McGyver matter in the context of the recommendations the Commission made in the very first interim report, namely that there is a problem with disciplinary inquiries and

the Department should seriously consider a system that will ensure there is proper prosecution.³⁴

9. RECOMMENDATIONS

9.1 It is essential that walk-through metal detectors and X-ray scanners are installed at all high risk prisons to enhance the detection of unauthorised items. It is of no use if these detectors and scanners are installed without being operational and functioning. During the Commission hearings, it has been said time and time again that most prisons have such equipment but that it is either malfunctioning or not properly maintained.

It is recommended that where such equipment is installed but not properly managed, that disciplinary action is taken immediately against those Heads of Prisons or Area Managers who failed to see to it that the equipment under their authorisation is fixed and maintained. Their ineptitude to supervise even the equipment at their disposal shows clear maladministration on their behalf.

9.2 It is recommended that the Department again consider the costs, feasibility and benefits of electronic monitoring not only as an option to release prisoners but also to monitor the movement of prisoners to court, hospitals and back. The Commission is of the view that the cost implication of electronic monitoring as opposed to building new prisons should be negligible. In 1997, the Department estimated that the long term implications of electronic monitoring is positive but that it was too costly:

"The cost implication of the implementation of electronic monitoring is approximately R68 million for the first year. This will make provision for the monitoring of 10 000 offenders. The cost

³⁴ For more details on this, see the Chapter dealing with Disciplinary Inquiries.

implication for the next two (2) years will be R95 million and R127 million respectively.”

It is envisaged that the recommendation will not be carried out unless a proper work-study is done taking into account the cost, the manpower that can be saved by electronic monitoring of a prisoner's movement, the cost of escapes, security in general and the cost of building new prisons.

- 9.3 It is recommended that the Department consider a reward system whereby prisoners who report planned escapes will be rewarded for bringing such plans to the attention of the Department.
- 9.4 It is recommended that the Department consider a reward system whereby warders who report a planned escape will be rewarded by an incentive bonus for bringing such valuable information to the attention of the Department.
- 9.5 It is recommended that the personnel be trained regarding the consequences of aiding and assisting a prisoner to escape. Such training should not only focus on the legal implications but also on who are likely targets or potential targets of the prisoners who are flight risks. Members should therefore receive training from professionals in the field of psychology who are best equipped to teach them how to cope with the psychological demands of guarding robbers, fraudsters and gang leaders. The training should not be once-off but should happen on a constant basis to assist the members guarding these prisoners. The Commission has heard so much evidence of members who were bribed and intimidated that it is of the view that more psychological assistance should be rendered to members focusing on the situations.

- 9.6 It is further recommended that greater emphasis be placed on the categorisation of prisoners. The evidence before the Commission revealed that prisoners that are charged mainly with robbery, armed robbery, fraud and cash heists pose a severe flight risk since the perception exists that they are the prisoners with money and that they can pay to avoid serving their sentences. It is recommended that these prisoners be specially classified and that they be guarded by an elite group of members who receive intensive training on security and that performance contracts be entered into with this group, which will be aimed at zero escapes.
- 9.7 The Commission recommends that stricter disciplinary action be taken against officials who are assisting prisoners to escape. Such cases should be investigated immediately and each case should be reported to the South African Police Services.³⁵ Discipline is still the cornerstone of accountability and should be enforced in order to maintain order in the prison. Clearly managers cannot escape liability if the Department's directives are not followed in their prisons. It is therefore recommended that stricter compliance with Departmental directives will have a more positive impact on security and should be viewed as the best practice for managing prisons.
- 9.8 It is recommended that the Department investigate the use of computer software and hardware, which is used in high profile British prisons to monitor the influx of people into the prison and visitors to the prisons.³⁶ Clearly a better system is needed to track the movement of prisoners in the prison because the movement registers are not effective in tracking the trail of prisoners inside the prison. One of the reasons that movement registers are not effective is the "negligence" of members completing them

³⁵ See Chapter on Sexual Violence in prisons where it is discussed that the current system followed by the Police to investigate matters in prisons is not successful and should be changed.

³⁶ See 'Total Security for prisoners' – <http://www.accontrols.co.uk/industry/prison/index.html> accessed on 17/10/05.

when prisoners move through gates and a plan should be devised that will make the system more effective.

Consideration should be given to systems like in the UK and other countries that are using computer systems that electronically track the movement of the prisoner. It is therefore recommended that the Department do a workstudy to determine the usefulness of such a system, taking all costs and benefits into account.

9.9 Specific Transgressions

- a) It is recommended that the *viva voce* evidence of Mr Shozi be transcribed and together with his affidavits³⁷ be submitted to the Director of Public Prosecutions: Gauteng for consideration of prosecution on a charge of perjury.

- b) It is recommended that the conduct of Mr Thloloe as discussed under 3 above be reviewed and that the Department follow up the criminal cases that were pending against him at the time of the Commission's hearings. Should the charges not proceed through the criminal court, it is recommended that consideration be given to proceed with an internal disciplinary enquiry on those "escapes" that he has not been charged with internally. It goes without saying that in the matter in which he received a final warning the Department can take no further steps.

9.10 This report and the transcript should be referred to the South African Police Services so that they can consult with Mr Pobe to decide what action can be instituted against him or any of those who might have

³⁷ Both exhibits "GGG" and "GGG1" should be forwarded to the Director of Public Prosecutions.

transgressed the law and particularly with regard to those matters that the Department or other people never investigated.

- 9.11 Teams that escort prisoners to and from Court should be briefed on the dangerousness/risk of each prisoner they escort so that such teams can take pro-active steps to secure the transport of the prisoners.
- 9.12 It is recommended that the admissions area of all prisons be monitored at all times, but especially when the prisoners from court are admitted. Such monitoring will combat any corruption like prisoners paying members a fee for better cells and beds, etc.³⁸

³⁸ See Chapter on Pretoria Management Area for more details regarding such practices.

CHAPTER 7

TREATMENT OF PRISONERS

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TREATMENT OF PRISONERS
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CHAPTER 7

TREATMENT OF PRISONERS

1. INTRODUCTION

The treatment of prisoners is of importance to this Commission, not only because it was tasked to investigate the issue,¹ but also because it is accepted that a nation's civilization is measured by the way it treats its prisoners.² The human rights of prisoners are internationally recognised and norms have been accepted on how prisoners should be treated. The Universal Declaration of Human Rights, for example, recognises that they should be treated with human dignity and has outlawed torture and cruel, inhuman and degrading treatment or punishment.³ There is accordingly a duty on the Department to adhere to these norms to fulfill its duties.

The Commission was therefore duty bound to investigate the complaints of the treatment of prisoners at various correctional facilities of the Department, some of which were received by the Commission directly.⁴

To put it in context we need to remember that convicted criminals have for a long time been regarded in South Africa as outlaws and a forgotten sector of our

¹ See the Commission's Terms of Reference as Proclamation No 135 of 2001 and amended by Government Gazette No 23558 dated 27 June 2002.

² See John C. Mubangizi "Some Reflections on the promotion of the rights of prisoners in South Africa" *Acta Criminologica* 15 (2) 2002 at page 34.

³ See Article 1 and 5 of the Universal Declaration of Human Rights. Also see the International Covenant on Civil and Political Rights, which sets general standards for the treatment of prisoners in Article 10.

⁴ Complaints were received via the Commission's toll free number and by mail and e-mails. Many incidents could not be dealt with by the Commission as they fell outside the Commission's mandate. They were, however, referred to the Inspecting Judge.

society. We have chosen to deny their existence and consider them as a form of subhuman species deserving of the consequences of their deeds. This lack of concern has allowed a mentality to take root amongst many correctional officials that prisoners can be treated in any manner without fear of sanction.

At the height of apartheid it was left to the courts to remind South Africans that prisoners are entitled to the same rights and protection as the rest of society. As Diemont J stated in *Hassim v Officer Commanding, Prison Command, Robben Island*:⁵

*“The fact of conviction justifies treating the offender, at least for the period of his sentence, differently from the average citizen... Nevertheless, although he lives a twilight existence, he is still a citizen who will in due course return to the community, and as a citizen he has certain basic rights. He must have the right to eat, to be clothed, to be given shelter and to receive medical aid - and if these rights are imperiled he must be entitled to ask the court for relief.”*⁶

The case of *Hassim* is significant in the discussion of prisoners' rights and treatment in that it established that prisoners have certain civil rights and that they have *locus standi* to enforce their rights. Just as the Department has the right to restrain or punish prisoners, prisoners clearly have the right not to be unlawfully subjected to impositions such as solitary confinement, for example, without the correct procedure prescribed by the Act being followed. To the extent that the authorities might exceed their delegated powers, *Hassim's* case clearly establishes that prisoners have the right to seek relief through the courts. It should, however, always be borne in mind that it is not easy for prisoners successfully to prove a wrong done to them due to the existing reporting system

⁵ 1973 (3) SA 462 (C).

⁶ *Op cit* at 472-3.

that exists in the Department and the array of forms, records and documents to which prisoners do not always have access.⁷

It is common cause that when all the political changes took place at the beginning of 1990 the basic human rights of prisoners were not being adequately recognised in the Department. The Government recognised this and prisoners today are no longer without rights when they enter a prison in our democratic country. The rights of prisoners are enshrined in the Bill of Rights of our Constitution. It provides that everyone who is detained, including every sentenced prisoner, has a right to, amongst others, conditions of detention which are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment.⁸ In addition, the Constitution also provides that the prisoner or detained person has a right to communicate with and be visited by that person's spouse or partner, next of kin, chosen religious counsellor and chosen medical practitioner.⁹

2. COMMON LAW POSITION

Even prior to the *Hassim* case and the advent of constitutional democracy in South Africa, the right to acceptable conditions of detention or imprisonment

⁷ For another perspective, see the Chapter on Sexual Violence where the shortcomings of police investigations in prisons are more fully dealt with.

⁸ See Section 35(2)(e), that provides as follows:

*“Everyone who is detained, including every 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.”*

⁹ See Section 35(2)(f):

*“Everyone who is detained, including every sentenced prisoner, has the right-
(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.”*

consistent with the tenets of human dignity had long been established in our jurisprudence.

In *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92, Innes C J stated (at pages 122-123) that, although the freedom of the detainees had been impaired by the legal process of imprisonment, “*they were entitled to respect for what remained*”. In this regard Innes C J said:

*“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.”*¹⁰

This approach of Innes C J was further confirmed in the minority judgment of Corbett J A in *Goldberg and Others v Minister of Prisons and Others*:¹¹

“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

¹⁰ *Ibid.*

¹¹ 1979 (1) SA 14 (A).

*circumstances in which he, as a prisoner, is placed... He must submit to the discipline of prison life and 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.*¹²

The *dicta* of Innes C J and Corbett J A were approved and elaborated upon by Hoexter J A in *Minister of Justice v Hofmeyr*¹³ at 141 C – 142 A:

“The Innes dictum serves to negate the parsimonious and misconceived notion that upon his admission to gaol a prisoner is stripped, as it were, of all his personal rights; and thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations....

The root meaning of the Innes dictum is that the extent and content of a prisoner’s rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common-law rights....

*As to principle, subsequent to the Goldberg case the following general proposition was stated by Jansen J A in delivering the judgment of this Court in *Mandela v Minister of Prisons* 1983 (1) SA 938 (A): ‘On principle a basic right must survive incarceration except insofar as it is attenuated by legislation, either expressly or by necessary implication, and the necessary consequences of incarceration.’¹⁴*

¹² *Op cit* at 39 C-F.

¹³ 1993 (3) SA 131 (A).

¹⁴ *Op cit* at 957 E-F. See also *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others* 1992 (2) SA 56 (ZS) at 60 G – 61 A (per Gubbay C J), cited with approval by Navsa J A in *Minister of Correctional Services and Others v Kwakwa and*

3. CONSTITUTIONAL POSITION

The common law position as set out above has now been enshrined in the Constitution¹⁵ and the Constitutional Court has made certain pronouncements about the rights of prisoners. The Constitution provides also that every person shall have the right to administrative fair conduct which is procedurally fair, and in instances where decisions are made that severely restrict or cancel privileges enjoyed by prisoners it can be expected that such action will only be undertaken in circumstances where the Department adhered to the *audi alteram partem* rule.¹⁶

In *S v Makwanyane and Another*,¹⁷ Chaskalson A, the Chief Justice, made the following observation:

*“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 person’s dignity, but a prisoner does not lose all his or her rights on entering prison.”*¹⁸

The spirit of this judgment was also followed in the Witwatersrand Local Division in the matter of *Strydom v Minister of Correctional Services and Others*¹⁹ by Schwartzman J. Accordingly.

¹⁵ *Another* 2002 (4) SA 455 (SCA) para 24-25 at 467 G – 468 D; *August and Another v Electoral Commissioner and Others* 1999 (3) SA 1 (CC) para 18 – 19 at 10 E – 11 D.

¹⁶ See *supra* (n8).

¹⁷ See *Nortje en ‘n Ander v Minister van Korrektiewe Dienste* 2001 (1) SACR 515 (SCA).

¹⁸ See 1995 (3) SA 391 (CC).

¹⁹ *Op cit* at para 142.

¹⁹ 1999 (3) BCLR 342 (W).

It is now well established in our law that prisoners have to be treated with dignity.²⁰

Notwithstanding all of the above pronouncements by our courts, it has become clear to this Commission that many members of the Department remain trapped in a mindset that prisoners lose all their rights once they enter prison. This mentality is evident from the manner in which members treat prisoners and the way they react when prisoners demand that their constitutional rights be respected. This attitude clearly shows that members do not understand the sentiments expressed above by Chaskalson A that prisoners do not lose their rights on entering the prison.

Much has been said about overcrowding and its impact on prisoners, but it is apparent from the reports and complaints received by the Commission that overcrowding is not the only abuse that affects the dignity and humanity of prisoners and should not be overemphasised when assault and general abuse of prisoners is the order of the day in many Management Areas.²¹ Whilst the Commission is very alive to the challenges that overcrowding poses it cannot ignore that overcrowding is not the only issue that impacts on humane conditions of detention. It should not be ignored that inmates are subjected to assaults, abuse, and even indirect abuse, in that they are expected to do certain duties, which they are not supposed to do in terms of the Correctional Services Act or the general Regulations of the Department. For example, prisoners are coerced into medically treating ill inmates, washing dirty or soiled linen,²² running errands

²⁰ See *S v Tcoelib* 1996 (1) SACR 403 (Nm) in the words of Mohamed C J:
“The obligation to undergo imprisonment would undoubtedly have some impact on the appellant’s dignity but some impact on the dignity of a prisoner is inherent in all imprisonment. What the Constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed of the conviction of the person per se.”

²¹ See the Chapter dealing with assaults at C-Max and also specific assaults at Pretoria Prison as per the Eleventh Interim Report and the Chapter on Sexual Abuse of prisoners.

²² See the Fifth Interim Report on the Bloemfontein Management Area and the Seventh Interim Report on the Leeuwkop Management Area.

for warders,²³ dishing out food to fellow inmates and even clipping the toenails of warders.²⁴

The situation is also aggravated by the fact that on occasion prisoners are even subjected to torture and other treatment that would be deplorable in any democratic and civilised society.²⁵ Humiliating and demeaning prisoners should not be the order of the day in modern-day correctional facilities and such conduct should be decisively stamped out by the Department.

Notwithstanding the stated objectives of the Department of Correctional Services to rehabilitate prisoners, the evidence before the Commission points to the fact that most warders are of the view that prisoners are in prison for punishment and not “as punishment”. Accordingly, it is clear that there is an urgent need to retrain warders to have a totally different approach to the manner in which prisoners are treated. Such training, however, will not achieve much unless all the complaints, which are referred to the various agencies, including the Office of the Inspecting Judge, on the treatment of prisoners are treated with the urgency and seriousness they deserve. At present there appears to be an element of discontent and general dissatisfaction in the manner in which these complaints are dealt with. Many inmates have told the Commission that they have complained to the Inspecting Judge’s office without anything arising from such complaints. It may well be that the problem is that there appears to be no structured and clear feedback mechanism for the complaints by the prisoners, which in itself perpetuates the problem. Those warders who are guilty of improper action are then not reprimanded, which allows them to continue with their conduct with impunity, ultimately creating the impression in prisons that such behaviour is the accepted norm.

²³ See the Fifth Interim Report on the Bloemfontein Management Area.

²⁴ See the Fifth Interim Report on the Bloemfontein Management Area.

²⁵ See the evidence on torture of prisoners at C-Max Prison in this Chapter below.

The Commission will now deal with specific incidents of abuse, which have not been dealt with in the other Reports:

4. SOLITARY CONFINEMENT

It is commonly accepted that solitary confinement is one of the worst forms of torture that can be imposed on another human being.

The trauma caused by such detention has been described repeatedly before the Commission and has been highlighted in our courts, most specifically in *Minister of Justice v Hofmeyr*²⁶ where Hoexter J A stated that:

*“to deprive the average person of contact with his fellows is to cause him to suffer anguish of mind. It cannot be said that any enforced and prolonged isolation of the individual is punishment. It is a form of torment without physical violence.”*²⁷

Former President Nelson Mandela, who had been imprisoned in harsh conditions and forced to perform years of hard labour on Robben Island, said that he found his own brief encounter with solitary confinement, the sum total of which was three (3) days, to be *“the most forbidding aspect of prison life”*.²⁸

²⁶ 1993 (3) SA 131 (A).

²⁷ *Op cit* at 145. In an interview with the Institute of International Studies at the University of Berkeley, California, the International Red Cross’s medical co-ordinator for detention-related activities, Herman Reiss, elucidated prisoners’ reactions and assessment of torture and stated, when asked what was the worst form of torture, that it was being in solitary confinement for months on end.

²⁸ Also see *“Winnie Mandela Her Life”* by Anne Marie du Preez Bezdrob at page 156.

Mrs Winnie Mandela also did not escape the cruelty of solitary confinement. She had been in solitary confinement for thirteen (13) months. Her ordeal is described as follows:

“In solitary confinement once more, she forced herself not to think about the horror of interrogation. She tore one of the blankets to shreds, then wove the threads together as her grandmother had taught her to do when she was a child making traditional mats with a grass called uluzi. For days she knitted the strands together, undid them, wove them together again. To keep her hands and her mind occupied she unpicked the hem of her dress. When there was nothing else to do she scoured the cell inch by inch to see if she could find an insect. Once she found two ants, and spent the whole day playing with them on her finger. The wardess noticed and switched off the light plunging the cell into darkness.”²⁹

The severe impact on one’s mental health of any solitary confinement has been described before many Commissions, and not only our Commission.³⁰ Ms Z.

²⁹ *Op cit* at 149 –150.

³⁰ Another witness who testified on solitary confinement before the Truth and Reconciliation Commission was Ms Jean Middleton, who said the following:

“The prison authorities themselves know it is ill-treatment, that’s why they use it as punishment. People found guilty of prison offences are kept in isolation. It is a punishment. I can’t describe its effects on you very well, because you do go slightly crazy, and it’s very difficult to describe your own craziness. Colonel Frik van Niekerk of the Special Branch once told the court that prisoners started showing evidence of disorientation within three days.”

Mr M. Naidoo also testified and said that with regard to solitary confinement:

“After making a statement, I was taken back to my cell where I was kept in solitary for four months under the 180 day law. I must confess that solitary confinement is the worst part of torture that can be inflicted on a human being. No amount of physical torture can equal that of solitary confinement. I had absolutely no contact with any of the other prisoners who were almost entirely common law prisoners, but I could continually hear the beating and shamboking of other prisoners.”

See Volume 4 Truth and Reconciliation Commission of South Africa Report Chapter 7: Institutional Hearings.

Markedien, who was a witness before the Truth and Reconciliation Commission, described the effects of such isolation as:

“I had to go down and live in the basement in isolation for seven months. That was very painful. I don’t even want to describe psychologically what I had to do to survive down there. I will write it one day but I could never tell you but it did teach me something and that is that no human being can live alone for more than, I think, even one month ... because there is nothing you can do to survive by yourself every single day. Then my suggestion is that no prisoner, regardless of their crimes, should ever be in isolation per se.”

These short extracts of the experiences of fellow South Africans who have suffered the mental anguish and torture of being in solitary confinement, together with the comparative studies, should leave no one in any doubt as to the long-term effects of this form of punishment on prisoners. Solitary confinement is a product of our past and should not be resorted to as a norm by prison officials in our new democratic order.

It was therefore with deep concern that this Commission discovered during the course of its hearings that the imposition of this form of detention is not only not properly understood, but is being arbitrarily resorted to by Heads of Prisons in many Management Areas investigated by the Commission as a form of punishment, contrary to the clear provisions of the Act.

It is anticipated that the Department and its officials will argue that solitary confinement is hardly, if ever, used in our prisons and that prisoners are seldom placed in solitary confinement, but are merely placed in isolation or segregation. The Commission is well aware of the difference between solitary confinement and the detention of a prisoner in isolation in terms of the legislation.

Although the 1959 and 1998 Correctional Services Acts expressly permit the detention of inmates in isolation cells,³¹ it is clear, when the locality and size of such cells is examined, and the procedures followed and the reasons given by the officers when they detain prisoners in “segregation” that the practice is ultimately nothing more than solitary detention.

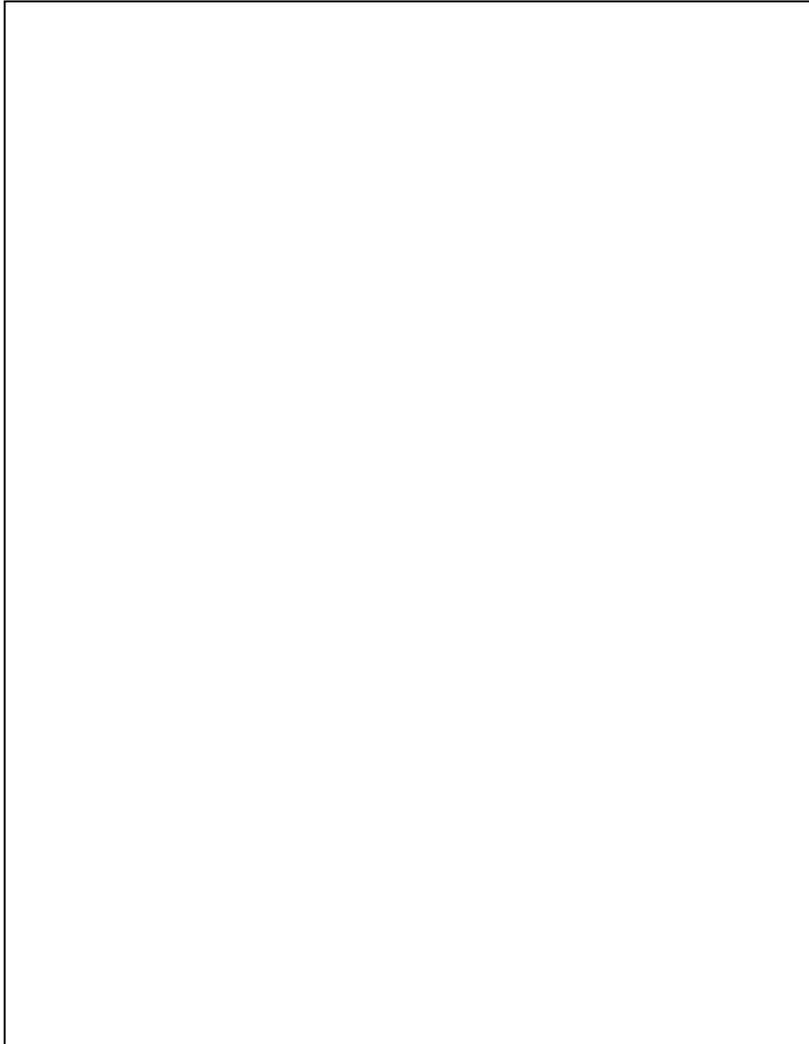
Furthermore, if such detention is used for the purposes of discipline then the detention is penal in nature and cannot be justified in terms of section 79 of the 1959 Act or in terms of section 30 of the 1998 Act which deals with the segregation of prisoners and provides in terms of section 30(9) that segregation may never be ordered as a form of punishment. The majority of examples will refer to the 1959 Act, since the 1998 Act only came into operation once the Commission had finished its official hearings.

The Commission is not, however, convinced that the 1998 Act will change the actions of members. In fact they ignored the B orders, which purported to comply with the 1998 legislation long before the legislation came into operation.

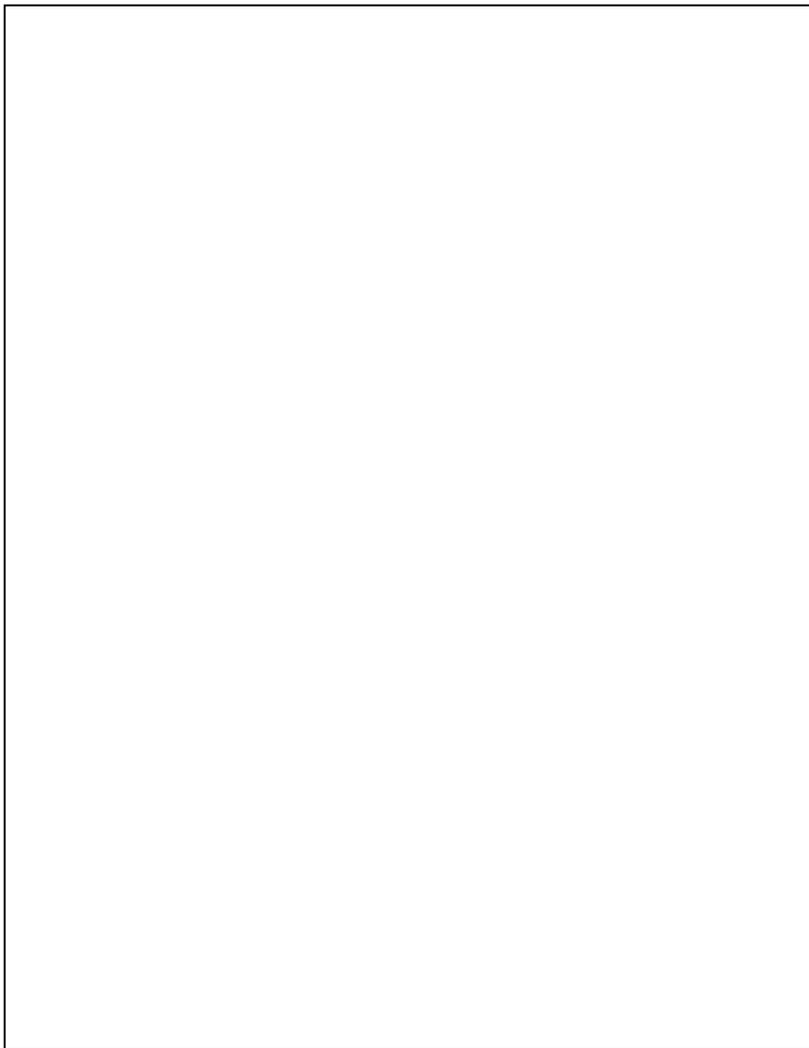
To understand the harshness of the detention conditions in isolation it is appropriate to consider some of the pictures of the cells taken at Leeuwkop prison.³²

³¹ See section 79 of the Correctional Services Act No. 8 of 1959 and section 30 of Act No. 111 of 1998. Also see: *Hassim and Another v Officer Commanding, Prison Command, Robben Island and Another Venkatrathnam and Another v Officer Commanding, Prison Command Robben Island and Another* 1973 (3) SA 462 (C) Diemont J remarking at page 408 B – C: “I can think of few greater hardships than for an active man to be locked up in a small cell day and night, week after week and months after months in enforced idleness.” Also, *Pretorius and Others v Minister of Correctional Services and Others* 2004 (2) SA 658 (T).

³² See further Appendix ‘E’



**Outside view of Segregation Cell at
Leeuwkop Prison taken on 13 October 2005I**



**View of the inside of the same segregation cell
at Leeuwkop Prison also taken on 13 October 2005**

The evidence of a number of Heads of Prisons showed complete confusion in dealing with solitary confinement and segregation in the isolation cells as provided for in the legislation. In fact, they called solitary confinement, “segregation” or even “detention in a single cell”. They seemed to be under the impression that the mere re-naming of the confinement removed all harm that results from this form of detention.

This problem is further exacerbated by the fact some Heads of Prison and those delegated to detain a prisoner in isolation, order such prisoners to be detained without ensuring that the amenities that should come with that form of segregation are provided for, which effectively results in the detention being nothing more than solitary confinement.³³ The only advantage for the officials is that if they call it segregation then they do not need to comply with the strict rules that should be complied with for solitary confinement. The evidence to the Commission of Mr Hlaethoa, the Head of Pretoria Central Prison, was as follows:

“[P]ursuant to what powers do you send prisoners to the Bomb³⁴?”

Well up to the SCO, they may send inmates to the Bomb.

But using that power, what regulation, what section of the Act?

Section 79(1)(a), (b), (c) and so on. Some of these are on their own request, some of them it’s for security purpose, for further

³³ See the evidence of Mr David Nkuna, who testified as follows regarding his detention for his own safety when he complained about threats made to him by gang members:

“My blankets were confiscated, I was forced to sleep on the ground. One blanket in that cold condition. Now, that meant punishment for me. That wasn’t a simple reason for taking me to isolation for safety, it was more than that.” (See Leeuwkop transcript pages 2721 and 2722.)

³⁴ The Head of Prison of Pretoria Prison described the “Bomb” as a nickname given to isolation cells at the prison. See Pretoria transcript at page 3 212.

charges, some of them for disciplinary cases.

In disciplinary cases are prisoners sent there for - as a form of punishment to the Bomb?

That's correct."

Mr Hlalethoa went further to admit during the hearings that the cells are used as a punitive measure. When questioned on whether section 79 permits such detention he stated that prisoners are sent there to correct their behaviour. He also stated the following:

"I am using it with the intention to demoralise the inmates, it's just a corrective measure, and I visit the place, and I check and talk to them, I discuss, as I say, take complaints and check whether they get medication, they get food, and they get all those. They get – the medical officer visits them also."³⁵

The evidence of Mr Hlalethoa supports what the Commission suspected regarding the use of "segregated detention". On the positive side of his testimony it should be said that unlike some others he did not try to escape the consequences of his conduct but rather took the Commission into his confidence and sought guidance from the Commission. Once it was a foregone conclusion that the detention was abused the Commission considered the testimony of the other Head of Prison in Pretoria, Mr N. Baloyi.

In the matter of Karp, it became clear that the correctness of the "solitary detention" that was ordered in terms of section 79 of the 1959 Act was questionable, particularly as it was done three times. Karp's detention in single cells played a major role in the psychological trauma he suffered. In fact, when

³⁵ See Pretoria transcript at page 3 217.

the circumstances of the three (e) instances are examined, it shows that Mr Baloyi in reality wanted to punish him, particularly when he was ordered to be detained in a single cell with mechanical constraints (leg irons). An analysis of the instances will show that Mr Baloyi ordered the first detention when he “escaped” from the prison and was brought back, the second when he ordered that he be detained as a sexual victim to comfort him and the third when he allegedly attempted to escape.

An analysis of the applicable provisions of the Act will show that there appear to be no justifiable circumstances that permit sexually abused victims to be put into isolation after having been raped. Certainly, in the case of Karp,³⁶ this action brought no comfort to him and it is clear that the officials failed in their duties to assist the victim. By placing the victim in isolation they showed that they had no understanding whatsoever of the trauma suffered by the victim.³⁷ Not only is such confinement not appropriate for protecting sexual victims but also it leads to secondary victimisation.

If one looks at the wording of the Act, it is clear that the parameters in which an official can exercise his right to order detention in isolation for a prisoner are spelt out. The rules for the segregation of prisoners are to be found in section 78 of the 1959 Act, which reads as follows:

- “(1) *In the administration of prisons the rule for convicted prisoners shall, as far as possible and depending on the type of prison, be association at work and segregation at rest.*
- (2) *The Commissioner may order –*
 - (a) *the complete segregation of convicted prisoners at work as well as at rest for any period in pursuance of any scheme of classification or treatment or otherwise;*

³⁶ For the circumstances leading to his detention see the Chapter on Sexual Abuse in Prison.

³⁷ For a detailed discussion of the case see the Chapter on Sexual Abuse in Prison.

- (b) *the complete segregation of a convicted prisoner at work as well as at rest for any period upon the written request of such prisoner.*
- (3) *Complete segregation at work as well as at rest shall not be ordered or enforced if any particular case or at any time the medical officer certifies that any such complete segregation would be dangerous to the prisoner's physical or mental health.*
- (4) *The complete segregation described in this section shall not be deemed to be of solitary confinement for the purposes of any provision of this Act whereby solitary confinement for a limited period is or may be ordered as a punishment."*

Evidence before this Commission indicated conclusively that although the officials purported to either segregate or isolate the prisoners concerned, the steps taken by them resulted in the solitary confinement of such prisoners. The Commission therefore considers it necessary to look at some of the cases to examine the discretion exercised by the Departmental officials and the legal position regarding the exercise of discretion by a public official.

At the outset it can be accepted that in exercising their discretion the principle of *Liversidge v Anderson*³⁸ will no longer hold and hence there should be at the very least sufficient and meaningful reasons for a detention once an official orders that a person be segregated.³⁹ Evidence has shown the exact opposite and that is that officials do not adhere to the requirement of establishing sufficient and meaningful reasons when they exercise their powers to detain prisoners in single cells in terms of section 79 of the 1959 Act.

By exercising their powers without considering the psychological impact of segregation on the prisoner's mental well-being, the officers acted, in many instances, in bad faith and without applying their mind to such orders. In fact, it could be argued that in the majority of the segregated detention cases that

³⁸ (1942) AC 206.

³⁹ Own emphasis.

surfaced before the Commission, the officers lost sight of the basic common law rights of a detainee, which are stipulated in the case of *Rossouw v Sachs*,⁴⁰

“to be released with his physical and mental health unimpaired.”

It goes without saying then that when the segregated detention of a prisoner is ordered, it should be ordered sparingly and with sufficient reason because such detention has the potential to harm a prisoner’s mental health. The Commission has heard evidence about a prisoner previously detained at Leeuwkop Prison, Sonnyboy Malika, who was placed in isolation because he allegedly damaged a television set. When he reported to the chairman of his recreation committee that the television slipped from his hands as he placed it on a stand, his apology was not accepted and he was placed in isolation. The chairman of the Case Management Committee accepted the recommendation of the chairman of the recreation committee and Mr Malika was sent to isolation for 30 days.⁴¹ Mr Malika committed suicide shortly after his solitary detention.⁴²

To put the abuse in perspective the Commission shall select a few cases of prisoners who were segregated. The documentation ordering the segregation was submitted to the Commission.⁴³ One of the registers that was submitted was the Single Cell Admission Register for the Basement at Pretoria Prison. The following was written on the first page of the register:

- *“After Consultation at the basement, prisoner must consult with medical officials or doctor.*

⁴⁰ 1964 (2) SA 551 (A) at 561.

⁴¹ See Leeuwkop transcript at pages 2 591 and 2 592.

⁴² The case of Mr Malika is not unique. A number of inquiries regarding deaths in prison in the Management Areas revealed that some commit suicide whilst in solitary detention. Also see the inquiry into the deaths at Cell 227 in Pollsmoor Prison on 23 August 2004 - <http://www.pmg.org.za/docs/2005/050624raga.htm>, accessed 20 July 2005.

⁴³ See Exhibit ‘NNN5’ of the Pretoria hearings.

- *On each day at 08h00 prisoners (including awaiting trial prisoners) are eligible for an hour exercise at the courtyard.*
- *Write down surname, number, particulars in the register book including the date of admission, release date and specify if the said inmate is sentenced or an awaiting trial prisoner.*
- *After release, scratch (sic) the said prisoner's particulars and write down the date of the release in the book.*
- *Attend prisoner's problems.*
- *No other prisoners from other floors should come down to the basement."*

The Head of the Prison, Mr Baloyi, has also admitted that he had made the following inscription in the front of the register:

*Mr Sibanda, please ensure that we utilise the correct G311 register
And keep it updated.*

Signed: N. Baloyi

Date: 22 March 2004.

When the register was produced to the Commission it showed that despite Mr Baloyi's instructions that from 23 March a new register should be kept and used in accordance with Departmental instructions, the register contained the names of prisoners who were detained on 7 and 19 January 2004, before the register was supposedly opened. The confusion of the dates was cleared up by Mr Baloyi when he admitted that there were two registers for the same period. He also admitted that the registers at Pretoria Prison were in a shambles, and that they did not reflect: (a) who exercised the discretion to put the prisoner in isolation and (b) for how long the prisoner was ordered to be detained in isolation.⁴⁴

⁴⁴ See Pretoria transcript at pages 5 621 and 5 622.

What follows are a few extracts from the register, unedited and noted verbatim from the old register.⁴⁵

TABLE A – THE OLD REGISTER

Section	Name Prisoner	Date Adm	Date Release	Condition	VA/DA	Days
H	J MATHE	16/10/03	25/11/03	NO VISITS	DA	40
C	PETER MOHAPI	18/12/03	-----	POGING TOT ONTVLUGTING	VA	-----
D	DENNIS RUDMAN	28/12/03	09/01/04	SELFOON	VA	12
C	JAY RULE	30/01/04	02/01/04	AANRANDING	VA	NIE GESTRAF
D	C UGOCHUKWA	02/02/04	12/02/04	GELD IN BESIT	DA	10
G	S CHAUKE	13/02/04	15/02/04	GEPLAAS TE	KELDER VLOER	OMDAT HULLE BAKLEI HET
H	VUSI SEBOLA	01/02/04	03/02/04	AANRANDING MESSTEEK	DA	NIE GESTRAF
G	D THWALA	07/01/04	16/01/04	NO VISITS - DAGGA	VA	10
G	A SENWAMADI	07/01/04	16/01/04	NO VISITS - DAGGA	VA	10

TABLE B – THE NEW REGISTER

Reg No	Name	Condition	By Whom	Section	DA/VA	Date of Admission	Date of Release
202623658	Victor Moghoshoa	Safety	Mr Baloyi	D section	DA	2004/01/07	2004/05/03
93622921	Sipho Mziako	Studies	Mr Sekele	B section	DA	2004/01/19	
379267	Jakobus Vd Mans	Studies	Mr Sekhele	B section	DA	2004/01/19	
202383086	Z Mahlatsi	Hofsaak	Mr Baloyi	Potchefstroom	VA	2004/01/22	
203611680	P Malatsi	Hofsaak	Mr Baloyi	Potchefstroom	VA	2004/01/22	

⁴⁵ See Exhibit 'NNN5' of the Pretoria hearings.

TABLE B : THE NEW REGISTER CONTINUED

Reg No	Name	Condition	By Whom	Section	DA/V A	Date of Admission	Date of Release
201384761	O Karools	Hofsaak	Mr Baloyi	Potchefstroom	VA	Transfared (sic) to Top floor	
202382947	P Zemane	Hofsaak	Mr Baloyi	Potchefstroom	VA	2004/01/22	
202382854	S Mpila	Hofsaak	Mr Baloyi	Potchefstroom	VA	Transfared (sic) to Top floor	
201620737	Daniel Mulder	Jali	Mr Baloyi	H-seksie	DA	2004/02/27	
204628667 Ontvangs	GJ Rosslee	Attempted Escape	Mr Potgieter	Section 79(1)F	VA	2004/03/20	Transfared (sic) to Top floor 2004/03/29
203640025 D section	Hans Mahlangu	Safety	Mr Baloyi		VA	2004/03/22	Transfared sic to C section 2004/03/31
202623239 C section	JM Da Silva	Attempted Escape	Mr Baloyi	Section (80)(1)E ⁴⁶	VA	2004/03/24	Transfared sic to Top floor 2004/04/07
203612577 Ontvangs	Stefaans Tlhakanye	Attending court	Mr Sekhele	Section 79(1)B	DA	2004/03/04	204/05/10 Transfared sic to H section
203642070 E/F section	D Masinga	Sodomy	Mr Baloyi	Section 79(1)C	VA	2004/03/29	2004/04/08 Transfared sic to C section
203641647 H section	Andries Makhado	Fighting	Mr Baloyi	Section 79(1)C	VA	2004/03/30	2004/04/04
203624714 H section	J Vorster	Protection	Mr Sekhele	Section 79(1)B	VA	2004/04/09	
202633829 H section	M Nkosi	In Possession Of dagga and money	Mr Sekhele	Section 79(1)C	DA	2004/04/23	2004/05/08

⁴⁶

It should be noted that section 80 of the Act provides for the application of mechanical means of restraint. Such an order is made when the prisoner is already kept in isolation, section 80(1)(e) stipulates that such order can be made to prevent the prisoner from escaping. Where a prisoner is kept in isolation it seems like overkill unless the prisoner is “punished” because he tried to escape.

The excerpts from the two registers show clearly that members do not consider the consequences for the mental state of prisoners when they order detention in isolation. The excerpts also show that they do not have any idea of the importance of keeping proper records of those prisoners sent to isolation. The first few excerpts reflect that when they made the entries they thought that what they needed to record was which section each prisoner was from and not that they had to keep record of the applicable section of the Act in terms of which they ordered the detention.

Mr Baloyi, the Head of the Pretoria Prison, tried to mislead the Commission when he was asked to produce his registers dealing with the prisoners who were kept in isolation. At first he brought photostat copies of the register to the hearing and when he was ordered to bring the originals it emerged that there were two registers, neither of which reflected all of the prisoners who were sent to isolation. He could, for example, not produce the register that reflected when Ms Karp was sent to isolation for escaping. Mr Baloyi did not comply with the provisions of even the 1959 Act and the only excuse he could offer the Commission was that they had no G311 registers in stock. One would think that in the absence of a register a prudent head of prison would still keep record of important data in whatever form. His response shows that he had no idea of the serious impact of his conduct on fellow human beings, albeit that they are prisoners.

Mr Baloyi testified before the Commission on 25 May 2004. However, it is apparent from the registers that some of the prisoners were still in isolated detention if one looks at the date of admission and the fact that there is no date of release. The release date is of the utmost importance because in terms of legislation the period of isolation should not exceed 30 days. Either the registers were incomplete on the date Mr Baloyi testified or the prisoners were still in isolation on 25 May 2004. Mr Baloyi, like many others, showed very little respect

for the rule of law. The Commission is very concerned that in the Department there is almost a culture of contempt for the administration of justice as if members consider themselves above the law.⁴⁷

The Commission has heard evidence from a number of prisoners, in various Management Areas, that detention in isolation is mostly used as punishment and that such orders are made in most instances without the application of the rules of natural justice. These orders are given despite the Act prescribing that such orders not be given as a disciplinary measure.⁴⁸ Most of the records at Pretoria for example show that detention is ordered as punishment and there is no indication that prisoners were sent there through a fair process.

The Commission has heard evidence at Leeuwkop Management Area of a prisoner, David Nkuna, who explained in detail how Heads of Prisons and their delegates abuse the power to order such detention. In his words:

“When I was taken to isolation for the first time, I asked the Head of Prison, ‘Why are you taking me to isolation. What have I done which is wrong’. I further said to him since 1991 that I’m incarcerated behind bars I have never committed a single offence in prison. I have never fought with a member. I have never fought with a fellow prisoner. Since I was given A group in 1995 I never lost it because of behaviour. So I inquired ‘Why are you taking me to isolation’. He said to me that being a member of PAMACO,⁴⁹ being the chair, I am likely to be instigating prisoners to protest against him and that that was the reason why he was taking me to isolation.”

⁴⁷ For a more in-depth analysis of the existing culture and lawlessness in the Department see Chapters 1-3 of this report.

⁴⁸ See section 79(2) of the Act that reads as follows:

“(2) The detention of a prisoner in a single cell shall take place in the manner prescribed by the Commissioner: Provided that such detention shall under no circumstances be applied as a disciplinary measure.”

⁴⁹ PAMACO was a Prisoners’ Participative Management Committee that previously existed in the Department to convey prisoners’ grievances to the management.

It is therefore important to look at the detention of prisoners who are segregated in isolation cells and what is dictated by the policy of the Department. In the matter of Karp, the Commission heard the evidence of Dr Hlongwane who explained the provisions of the 'B' Orders dealing with detention in isolation and also dealing with the use of mechanical restraints. The policy of the Department is contained in the 'B' Orders, Chapter V, Treatment Programmes for Prisoners (Service Order 6: Detention of Prisoners in a single cell and the application of mechanical restraints). The provisions of the 'B' Orders correspond in the main with section 79 and 80 of the 1959 Correctional Services Act. Of paramount importance, however, are sections 79(2) of the 1959 Act and 30(9) of the 1998 Act that provide that the detention shall not be used for discipline.⁵⁰

There is a very good reason why the 1998 Act is drafted in the way it is and that is that studies all over the world have shown that the effects of detention in isolation are psychologically very harmful and hence it should be used with caution and only in very rare instances, if at all. For example a comparative study in the United States of America describes the effects of solitary confinement as follows:

*"A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition from which it was next to impossible to arouse them, and others became violently insane, others still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be on the subsequent service."*⁵¹

It is clear from this that to be detained in isolation is, in many ways, still barbaric and affects the psychological well-being of inmates and should be used as a last

⁵⁰ Own emphasis.

⁵¹ See Sallyann Romano: "If the Shu fits: Cruel and unusual punishment at California's Pelican Bay State Prison", *Emory Law Journal Summer* (1996) at page 1 089.

resort. The Commission heard evidence from many prisoners who went so far as to say that the impact of such detention led to the suicide of some of their fellow inmates. In fact, serious consideration should be given to whether confinement in isolation serves any purpose. It is appreciated that the 1998 Act is a step in the right direction by providing strict rules for segregated detention.⁵² Whether the Department will better control such segregated detention and issue directives that prisoners should be detained under such conditions as an exception rather than the norm, remains to be seen.

The effect of segregated confinement on inmates is clearly very harsh and in most instances constitutes inhumane and cruel punishment. Clearly our system of justice gives the judiciary the power to punish persons convicted of a crime in a court of law by imposing sentences, but the one thing that the judiciary never intended doing when imposing such sentences was to allow the authorities to drive people insane through solitary confinement.

5. SUPER-MAXIMUM PRISONS

Having considered the abuse of segregated isolated detention the Commission is of the view that it would be failing the number of prisoners who testified on its impact if centres such as C-Max Prison are not dealt with.⁵³ The Commission needs to examine the use of Super-Maximum Prisons such as C-Max and others, which are merely institutions of solitary confinement. It should be obvious that, if the Department is committed to being an institution of correction, the question had to be posed whether Super-Maximum Prisons serve a purpose and whether such prisons assist in the efforts to rehabilitate prisoners and correct

⁵² Section 25 dealing with solitary confinement and section 30 of the 1998 Act, dealing with segregated confinement.

⁵³ Specific attention is paid to C-Max Prison since it fell within the Pretoria Management Area that was part of the Commission's terms of reference.

their behaviour. It should furthermore be considered whether such an institution can be defended on any constitutional basis.

The Commission will therefore review the need for such institutions because there should be no doubt that they relate to the way prisoners are treated in our prison system as a whole.

5.1 Humanity vis-à-vis Super-Maximum Prisons

The Commission will show that continued incarceration of inmates in such institutions cannot be justified in terms of the Constitution, the Correctional Services Act, the Regulations or Departmental Policies.

The rights of arrested, detained and accused persons are enshrined in the Bill of Rights. Section 35(2)(e) of the Constitution of the Republic of South Africa provides that everyone who is arrested for allegedly committing an offence, has the right –

“To conditions of detention that are consistent with human dignity, including at least exercise and the provision, at the State expense, of adequate accommodation, nutrition, reading material and medical treatment.”⁵⁴

Section 12(1) of the Constitution deals with the protection of freedom and security of a person and provides as follows:

“Everyone has a right to freedom and security of the person, which includes the right –

⁵⁴ Chapter 2 of the Constitution of the Republic of South Africa Act No. 108 of 1996.

- (c) *to be free from all forms of violence from either public or private sources;*
- (d) *not to be tortured in any way;*
- (e) *not to be treated or punished in a cruel, inhumane or degrading way.”*

The right of prisoners to be treated with dignity is also echoed in Chapter 4 of the 1998 Act, dealing with sentenced prisoners. Section 37(2) of the 1998 Act provides that in addition to providing a regime, which meets the minimum requirements of this Act, the Department must seek to provide amenities, which will create an environment in which sentenced prisoners will be able to live with dignity and develop their ability to lead socially responsible and crime free lives.

The Department of Correctional Services has at long last recognised and acknowledged that its responsibility is not merely to keep individuals out of circulation in society, nor to merely enforce punishment meted out by the Courts. 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.⁵⁵

Rehabilitation and correction has been adopted by the Department as one of its main objectives and rehabilitation is placed at the centre of the Department's activities.⁵⁶ In terms of the Final White Paper it is the responsibility of the Department of Correctional Services to correct offending behaviour in a secure, safe and humane environment.⁵⁷

Pretoria C-Max Correctional Centre is one of six (6) correctional centres in the Pretoria Management Area. It is regarded as one of the most secure prisons in the Republic of South Africa. Only sentenced prisoners in the Maximum Security

⁵⁵ White Paper on Corrections in South Africa chapter 4, pages 36-37.

⁵⁶ *Op cit* at page 9.

⁵⁷ *Ibid.*

classification, who are mainly problematic cases or regarded as dangerous and awaiting trial prisoners with a high escape risk are incarcerated at Pretoria C-Max Prison. No scientific studies nor persuasive evidence have been put before the Commission that justify the establishment of institutions like C-Max or the retention of such detention conditions in our prison system. The Commission considered it necessary on a number of levels to examine the use of Super Max centres in our new democracy and also in the light of the objectives of the Department.

5.2 Admission Criteria for Incarceration at Pretoria C-Max Prison

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, an SAPS 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.

5.3 Duration of Incarceration at C-Max Prison

A Departmental Circular, 1/3/13, dated 22 June 1998, determines the length of incarceration of a prisoner at C-Max Prison. This document mainly deals with the management of offenders at C-Max Prison. The following are some of the important clauses of this document:

- “3. The following criteria apply when an inmate can leave C-Max Phase Two (2) and to be transferred to an ordinary prison;*
- 3.1 Prisoners with further charges who are presently in C-Max Phase Two (2) must be kept in this unit until their cases have been finalised;*
- 3.2 Escapees/inmates who are found guilty of assaulting further inmates or members must be detained in C-Max for the same period as they were sentenced for the specific crimes;*
- 3.3 Inmates serving long sentences or prisoners who murdered other prisoners/members/policemen should be kept there until they have completed approximately a quarter of their sentences;*
- 3.4 All other inmates must be evaluated after three (3) months on Phase Two (2) and depending on their prognosis, co-operating, etc, be transferred to a maximum prison;*

3.5 *Inmates in C-Max Phase Two (2) who have maintained a group status for a period of two (2) years within that phase may be considered for transfer to a maximum prison irrespective of their criteria set out in paragraphs 3.1 to 3.3 supra.”*

According to the Acting Area Commissioner of the Pretoria Management Area, Mr E. Ntebele as at 23 September 2003, more than two hundred (200) prisoners were accommodated at C-Max Prison, which has the capacity for two hundred and eighty one (281) prisoners. According to Mr Ntebele, the lower number of prisoners incarcerated at Pretoria C-Max Prison was largely due to the stringent criteria for placing prisoners in this facility.⁵⁸ The unsentenced prisoners are kept in a separate section of the prison and they are not allowed to mix with sentenced prisoners.

An official of the Commission, Ms C. Goodenough, visited C-Max Prison on 25 February 2005. She noted that C-Max Prison was being upgraded due to an alleged attempted escape towards the end of 2004 which led to the fatal shooting of two prisoners and two members, including the Head of Prison, Mr Gomba, This includes the upgrading of the CCTV system which is currently limited and the obtaining of additional equipment and scanners.

A task team was formed by the Minister of Correctional Services after the shooting of Mr Gomba and others. This team recommended that the majority of prisoners in C-Max be transferred to other prisons. This occurred between 20 December 2004 and 29 December 2004. The prisoners were transferred to centres including Kokstad, Zonderwater, Leeuwkop, Grootvlei and Drakenstein prisons.

⁵⁸ See Exhibit ‘BB’ at page 2, a presentation delivered to Commission at Pretoria Management Area hearings.

Prisoners who were not transferred were those who faced further criminal charges, particularly in Pretoria or Johannesburg, and those who were receiving psychiatric treatment. The latter were initially transferred to Kokstad Prison, but on their arrival it was discovered that no psychiatric treatment was available and as a result they were returned to C-Max Prison.

Since the transfer of prisoners out of C-Max, only one prisoner has been admitted to this institution. The details of this prisoner are dealt with later in this report. A total of twenty six (26) members have been transferred since the attempted escape and the shooting of the Head of Prison at C-Max Prison. These include members who requested to be transferred and those who have been deemed to be unfit to work at C-Max Prison.

Ms Goodenough also noted that the staff complement at C-Max Prison is to be increased. As of 25 February 2005 there were one hundred and one (101) staff members, although the total staff complement should be one hundred and fifty one (151).

She noted the following statistics about the prison:

- (a) C-Max can accommodate two hundred and fifty eight (258) prisoners.
- (b) At the time of the alleged escape there were two hundred and forty four (244) prisoners incarcerated at C-Max, whilst on 25 February 2005 there were one hundred and twelve (112) prisoners which included sixty two (62) sentenced prisoners of which twelve (12) were in Phase One (1) and twenty seven (27) in Phase Two (2).
- (c) There were also fifty (50) awaiting trial prisoners in C-Max Prison.

(d) During 2003 one hundred and fifty five (155) prisoners were incarcerated for the following reasons at C-Max:

- (i) 6% for length of sentence.
- (ii) 25.3% for escaping.
- (iii) 28.7% for aggression.
- (iv) 18.8% for behaviour.

5.4 Death of Prisoners at C-Max Prisons

Between 1997 and 2004, according to Ms Goodenough's research, six (6) prisoners died at the institution under the following circumstances:

- Two (2) during the shooting of Mr Gomba, the Head of Prison, when the prisoners committed suicide.
- Another committed suicide by hanging himself with a rope. He murdered a DCS official in 1998 in order to escape from prison and was only arrested three (3) years later. He committed suicide within two weeks of being arrested.
- The fourth died of an overdose. He ran away from Leeuwkop Prison after hitting the warder with a spade-file on a work team. He obtained medication from other prisoners at C-Max to overdose himself.
- Two prisoners died of natural causes.

5.5 Assaults at C-Max Prison

Assaults during the period 9 September 1997 to 2 February 2005.

Criteria	No of Incidents	Comments
Member on Prisoner	64	Incidents as reported to the medical staff and reflected in the G336.
Prisoner on Member	26	Injury on duty as reflected in G111 including prisoner Leso who stabbed a doctor. Only two (2) officials killed by prisoners.
Prisoner on Prisoner	63	Incidents reported to medical staff and reflected in the G336.

The evidence of Mr Gomba, the then Head of the Pretoria C-Max Prison, has been dealt with in the report dealing with assaults.⁵⁹ According to Mr Gomba, there are no communal cells at C-Max Prison, and cells are similar to the isolation cells in ordinary prisons. The prisoners incarcerated in these cells have no contact with anyone other than warders.

Phase One (1) prisoners are allowed out of their single cells, which are divided by brick walls, for one (1) hour per day. During this time they are allowed to shower and exercise and both these activities occur in locked cages. The prisoners are cuffed while being moved from their cells to the courtyard. In the first six (6) weeks of their stay at C-Max Prison, prisoners are allowed one (1) visit of ten (10) minutes.

⁵⁹ See Chapter dealing with the assaults at C-Max for more details.

Phase Two (2) prisoners are allowed out of their cells for three (3) to four (4) hours per day. They are allowed access to a television and on application they are allowed a computer in their cells. They can also interact whilst exercising in the courtyard and are not caged while showering.

They are serviced by one psychologist and one social worker. The contact between the psychologist and the social worker depends on the needs of an inmate. If they need to be seen by either the psychologist or the social worker, they are allowed to do so. No pre-evaluation procedures by either social workers or psychologists are carried out to determine if a prisoner, upon admission, is capable of sustaining the first phase of incarceration at C-Max Prison. This is a serious shortcoming and should be addressed since it is imperative that the mental state of a prisoner be established before he is put in solitary confinement for a long period of solitary detention in C-Max. The Department is in breach of its own regulations when it places prisoners in C-Max without them being psychologically evaluated. The consequences may be severe for those prisoners who are already psychologically affected by their incarceration.

Admission at Pretoria C-Max Prison is approved by the Regional Commissioner. Mr Gomba never disputed that an initial admission at Phase One (1) at Pretoria C-Max Prison amounts to a guaranteed thirty (30) days' incarceration in an isolation cell. Phase One (1) incarceration lasts for a minimum of three (3) months. Furthermore, such isolation usually lasts longer but never shorter than three (3) months. Mr Gomba conceded that sending a person to an isolation cell is a drastic step and that it is not done in accordance with the Act. He could not produce any register where he himself kept record of those prisoners that he had sent to isolation.

During Ms Goodenough's visit to C-Max Prison she observed that a sixteen (16) year old prisoner, Lewellyn Baker, was incarcerated at the prison.

The application form for his transfer to C-Max Prison reveals the following:

“He was previously incarcerated at Emthonjeni Juvenile Prison Centre. He had been sentenced to three (3) years’ imprisonment for housebreaking and theft. He is presently in C group category. The motivation for the application also states that since admission he has transgressed the disciplinary code of conduct for offenders (5) five times. The offender’s behaviour is deteriorating at a very fast rate. He has turned out to be a problematic case. He is very difficult to control at the institution. He is presently held at the isolation cell and was on various occasions requested to abstain from fighting and misbehaving. On 22nd October 2004 he once more attacked a fellow inmate and he uttered a lot of insulting words and threats to officials during that week. He is a threat to himself, to fellow employees as well as officials and therefore a high security risk to be detained in this institution.”⁶⁰

He was admitted to C-Max Prison on 29 November 2004. It was realised that he was very aggressive in the first three (3) to four (4) weeks of his admission. The official at C-Max, Mr Muller, stated that this prisoner would probably be moved out of C-Max at the next appearance before the Case Management Review Team. He had been accommodated in Phase One (1) since his detention in C-Max because in Phase Two (2) he would be at risk of mixing with hardened criminals because the prisoners have access to one another in the courtyard and in the bathrooms.”

⁶⁰ See Pretoria Exhibit ‘RRRR’ relating to the observations made by Ms Goodenough during her visit at the C-Max prison.

The Commission finds it shocking that a sixteen (16) year old juvenile who has been sentenced to three (3) years' imprisonment for housebreaking and theft could be incarcerated at an institution like Pretoria C-Max Prison. There is no suggestion in the motivation for this application that this young man actually assaulted members of the Department, save for the allegation that he threatened officials.

It is the Commission's view that the continued incarceration of this prisoner at the Pretoria Central Prison is unlawful and contrary to the criteria set by the Department itself since the prisoner is a juvenile and only serving a sentence of three (3) years.

Furthermore, the Commission is of the view that this is another example of the abuse of power by the Head of the Correctional Centre who granted the application to have this juvenile incarcerated at C-Max Prison.

According to Mr Gomba the maximum period of stay at C-Max Prison by a prisoner is five (5) years and no more than five (5) inmates have been there for five (5) years. Mr Gomba's view is that prisons like Pretoria C-Max Prison are needed in South Africa for certain categories of aggressive inmates, for example, persons who assault others.

The admission criteria at Pretoria C-Max Prison are contained in the admission policy document, which has been dealt with earlier. The management of offenders at Pretoria C-Max Prison is also dealt with in the document dated 22 June 1998, emanating from the Office of the Commissioner for Correctional Services.

Section 2 of the 1998 Act deals with the purpose of the correctional system.⁶¹ Section 79 of the 1959 Act deals with the detention of prisoners in a single cell and section 30 of the 1998 Act deals with the segregated detention of a prisoner.

A comparison between section 79 of the 1959 Act and section 30 of the 1998 Act shows that there are certainly more safeguards in the 1998 legislation than in the 1959 Act. Whether the intended safeguards will serve as better protection for prisoners remains to be seen. Much will depend on the implementation by the officials who order such detention. The Commission is of the view, however, that section 30 could be amended to ensure that abuse will not take place or at least limit the abuse of the provision.⁶²

In terms of section 24(5)(d) of the 1998 Act, solitary confinement for a period not exceeding thirty (30) days may be imposed in the case of serious or repeated infringements. The 1998 Act, however, makes provision for some safeguards in the event that prisoners who are placed in solitary confinement are abused. Section 25 of the 1998 Act deals with solitary confinement.⁶³

Evidence led before the Commission from a number of prisoners in various Management Areas indicates that detention in isolation has been used by the Heads of Department solely for the purposes of punishment. As stated earlier this conduct is contrary to the spirit of section 79(2) of the 1959 Act.

⁶¹ Section 2 reads as follows: “*The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society –*
(a) *enforcing sentences of the court in the manner prescribed by this Act;*
(b) *pertaining all prisoners in safe custody whilst ensuring their human dignity;*
(c) *promoting the social responsibility and human development of all prisoners and persons subject to community corrections*”.

⁶² See the recommendations *infra*.

⁶³ Section 25(1) provides as follows:
“*A penalty of solitary confinement must be referred to the Inspecting Judge for review. The Inspecting Judge must, within three (3) days, after considering the records of the proceedings and a report from a registered nurse, psychologist or the medical officer, on the health status of the prisoner concerned, confirm or set aside the decision or penalty and substitute an appropriate order for it.*”

Mr Gomba conceded when he testified that the incarceration of prisoners in single cells at C-Max Prison is tantamount to detaining such prisoners in isolation on a permanent basis during their stay at C-Max Prison.

As indicated above, in terms of section 24(5)(b) of the 1998 Act, in the case of serious or repeated infringements, solitary confinement for a period of not exceeding thirty (30) days may be imposed upon a prisoner.

If it is accepted that the incarceration of prisoners at C-Max Pretoria Prison amounts to being placed in permanent solitary confinement or for the duration of a prisoner's stay at C-Max Prison, then the next inquiry should be whether the authorities complied with the provisions of sections 24 and 25 of the 1998 Act, when prisoners were transferred to C-Max Prison. No evidence could be led before the Commission indicating that prior to transferring prisoners to C-Max Prison, disciplinary hearings were held for those to be transferred and incarcerated at C-Max Prison.

Furthermore, solitary confinement in terms of section 24(5)(d) is limited to a period not exceeding thirty (30) days. The evidence before the Commission shows that a prisoner will remain in Phase One (1) for a minimum of three (3) months, without any compliance to the Act.

Mr Gomba testified that the maximum period of stay at Pretoria C-Max Prison by a prisoner is five (5) years and that in total five (5) inmates have been to C-Max Prison for a period of five (5) years. This therefore means that inmates incarcerated at C-Max Prison may be subjected to solitary confinement for a period of five (5) years, which is not only contrary to the policy and the provisions of the Correctional Services Act, but on all levels brutally inhumane.

Although Mr Gomba distinguished between Phase One (1) and Phase Two (2) incarceration, it has been indicated above that a Phase One (1) incarceration at C-Max Prison amounts to a minimum of thirty (30) days' solitary confinement. The analysis of Mr Gomba's evidence indicates that there is not much difference between Phase One (1) and Phase Two (2), save for the fact that in Phase Two (2), prisoners are locked up only for twenty (20) hours instead of twenty three (23) hours per day and that in the courtyard they can interact with other prisoners.

If one considers the criteria for admission of inmates at Pretoria C-Max Prison, there is no doubt that its purpose is to further punish and even torture these inmates.

The high rate of escapes in South African Prisons is not due to the physical infrastructure of South African Prisons, but is largely due to collusion between members and prisoners, which amounts to corruption and/or negligence on the part of the members.⁶⁴

Recently there was an attempted escape at C-Max Prison, which resulted in the death of prisoners and warders including the Head of Prison, Mr Gomba. South Africa has a number of other maximum security prisons, which have served the purpose of incarcerating dangerous prisoners. However, security *per se* cannot justify the existence of Super Maximum Prisons like Pretoria C-Max Prison.

The Department has adopted rehabilitation and correction as its primary purposes in the incarceration of prisoners. The question, therefore, which needs to be answered is whether or not rehabilitation and correction are possible at an institution like C-Max Maximum Security Prison. The view held by Dr Jurgens van

⁶⁴ See the chapter dealing with escapes for a more in-depth analysis of the security at prisons and the conduct of warders who aided and abetted prisoners to escape for a "fee". See comment of the National Commissioner Correctional Services who acknowledged same in *The Cape Argus* dated 27 September 2005 at page 11.

Onselen, a clinical psychologist, is that no rehabilitation is possible at a Maximum Security Prison. Dr van Onselen has described Pretoria C-Max Maximum Security Prison as “inhumane, depressing, debilitating, and destructive”. Dr van Onselen was testifying in the Pretoria High Court trial of convicted murderer, Casper Kruger, who is claiming Five Hundred Thousand Rand (R500 000,00) damages from the Correctional Services Department. He claims that he suffered emotional trauma when sent unlawfully to C-Max Prison.

Mr Kruger claims that the forty (40) months he spent in C-Max Prison have impacted on his whole existence, he can no longer sleep, has nightmares and cannot tolerate any noise of people around him. Dr van Onselen said he consulted with Mr Kruger for about eighty (80) hours following his removal from C-Max Prison. He visited C-Max Prison to examine the circumstances there. This was an experience he said he would never forget and made the following comment on it:

“It was one of the most traumatic experiences in my life. I have never seen human beings treated like that. I find it inhuman and I still get nightmares and the place still haunts me.”

He stated that being incarcerated under these circumstances, with loud music blaring all day long, can induce psychosis. He further stated:

“My Lord, today you see it. You don’t even see any ray of sunlight or blade of grass, it is just cement all around you.”

Dr van Onselen said while at C-Max Prison, Mr Kruger had to face his visitors in chains, another humiliating experience.⁶⁵

⁶⁴ The court earlier heard that Mr Kruger twice escaped from gaol (in 1996 and in 1997) and was presumably involved in an attempted escape once while on his way to court. A firearm and ammunition were found in the wheel of the vehicle in which he was due to be transported. During one of the escapes, he and a fellow inmate held a prison official

The Department of Correctional Services said it cannot allow its officials to be exposed to inmates who might harm them. Mr Kruger, however, was placed at Leeuwkop Prison after the Court of Appeal ruled that his incarceration at C-Max Prison was unlawful.⁶⁶ It has to be borne in mind that most prisoners at these Super Maximum Prisons do not have the ability or the means to approach the high court to contest their detention in isolation at the aforementioned institutions and hence remain detained in these inhumane conditions. In light of the Court of Appeal's ruling in the Kruger case the likelihood exists that the incarceration of all the inmates at C-Max Prison might be unlawful.

There is a possibility that the Department may be flooded with similar actions by inmates, as the case of Mr Kruger has opened the floodgates for court challenges to their continued incarceration.

If the major purpose of the Department is to rehabilitate prisoners and if rehabilitation is not possible at C-Max Prison, then there is no justification for the existence of an institution like C-Max Prison or any similar institution.

The Commission, whilst sitting in Pietermaritzburg, heard evidence that the construction of a prison similar to C-Max Prison has been completed at Kokstad. The Commission also heard evidence that the admission criteria at Kokstad Prison are similar to those at Pretoria C-Max Prison.

Although the Kokstad Maximum Security Prison does not fall within the Terms of Reference of the Commission, it is the Commission's view that a similar argument regarding the desirability of the existence of C-Max Prison, can also be

hostage in the prison hospital and hijacked the getaway car. Mr Kruger said he was punished for this by a month in solitary confinement in Pretoria Central Maximum Division.

⁶⁶ See *The Witness* dated 16 November 2004 – Article entitled “C-Max Prison is Inhumane”.

raised with regard to the existence of the Kokstad Maximum Security Prison. In the light of what has been said with regard to the existence and the desirability of the Pretoria C-Max Prison, it is also the Commission's view that an institution like the Kokstad Maximum Security Prison and any further proposed similar institution, cannot be justified on any legal or moral grounds.

The Commission has pointed out above that it is commonly accepted that detention in isolation is one of the worst forms of torture. The trauma caused by such detention has been described repeatedly before the Commission and has been highlighted in our hearings. It needs to be addressed as a matter of urgency.

6. DISCIPLINARY HEARINGS FOR PRISONERS

A discussion of the treatment of prisoners would be incomplete without a focus on discipline in the prison system and an evaluation of the process followed to punish those who transgress the rules. The Commission is of the view that the manner in which prisoners are treated when they have complaints or when they have transgressed any of the prison regulations clearly shows that the entire system is not meant to rehabilitate the prisoner, or to have a positive effect on the prisoner. Part of rehabilitating prisoners is to teach them to have respect for the law. One way to do that is to lead by example and adhere to rules and regulations in the disciplinary process. The disciplinary process is a prime example of abuse by officials. In our view such disregard for the law breeds contempt.

If prisoners complain, they are then subjected to punishment. For example:

- (a) The prisoners who uncovered corruption at Grootvlei Prison were victimised and subjected to searches once their “complaint” was made known;⁶⁷
- (b) The prisoner, David Nkuna at Leeuwkop Prison, who complained about the fact that the gangsters wanted to stab him, is the one who was sent to isolation and not the gangsters;⁶⁸
- (c) The prisoner in Pretoria who complained about being sodomised is the one who ended up being detained in isolation;⁶⁹
- (d) When the prisoner, Abel Ramarope, requested help from a nurse to assist in arranging food for a group of prisoners waiting to be tested for Aids, he was sent to isolation when he told the nurse that her advice was not helpful.⁷⁰

In these incidents, the prisoners could easily identify the people who were violating their rights, but they were the ones who were subjected to punishment. This is to ensure that nobody complains because then the prisoners are regarded as being orderly.

According to the prisoner, David Nkuna, the disciplinary hearings in respect of prisoners in Leeuwkop Prison are:

⁶⁷ See the Fifth Interim Report regarding the victimisation.

⁶⁸ See Leeuwkop Transcript Volume 34 at page 2 677.

⁶⁹ See the evidence of Louis Karp dealt with in detail in the chapter on Sexual Abuse of Prisoners.

⁷⁰ See Leeuwkop proceedings at page 5 469 where he described the incident as follows:

“Mrs Gabela answered me in a way that I took it, it was very illogical. It lacked some responsibility, because those people came to the hospital seeking help and I was working with them and she is the one who instructed me to work with those people, and she said to me I must get away and those people must be locked somewhere, even if they don’t get food, it is none of her business. So I said, Mrs Gabela, this lacks sense... So she charged me and I was called to Mr Shongwe who was actually the presiding officer in terms of that kangaroo court I would dub it, because it was operating illegitimately and unprofessionally, and they called me in and while I was there, there was one of the guys who was sitting as an assessor.”

- (a) Seldom held. Prisoners are sent to isolation usually without any inquiry;
- (b) If an inquiry is held at all, it is held *in camera*. No one is allowed to be at the inquiry when it is held. The warders make decisions and do whatever they want to do, without the scrutiny of observers.

Therefore it should be considered setting up a procedure, which will ensure that there are disciplinary inquiries. In addition, such inquiries should comply with the rules of natural justice, including the *audi alteram partem* rule and the hearings should be held in public. A prisoner should be allowed to be assisted by another prisoner, if he so wishes.⁷¹ That is before he is assigned to segregation.

The very essence of our Constitution is transparency, openness and accountability. There is no better way to ensure accountability than to make the hearings open to the public. The warders have to be transparent and accountable for their actions. In being accountable and transparent, they should allow public scrutiny and representation given to prisoners. Such a procedure would be a more effective instrument of accountability. If proceedings can't be open to the public to attend then the results of proceedings need to be made public. The transcripts of proceedings should be kept and be made available to the affected prisoner upon his/her request.

In terms of section 24(1) of the 1998 Act, a prisoner may be subjected to a disciplinary hearing, which must be fair and may be conducted either by a disciplinary official or the Head of Prison. This presupposes that prior to the imposition of any sanction, a prisoner must have been subjected to a fair hearing.

In terms of section 24(2) of the 1998 Act a hearing before a Head of Prison must be conducted informally and without representation. At such a hearing, the prisoner must be informed of the allegations against him or her and have the right to refute the allegations. It is in the view of the Commission not possible to

⁷¹ See section 3(3) of the Promotion of Administrative Justice Act No. 3 of 2000 *supra*.

have a fair hearing without representation of some kind. Whilst there may be a need for a summary procedure there appears to be no need for the withholding of assistance.⁷²

The procedure prescribed in section 24(2) of the 1998 Act is problematic. The Commission has seen and heard what happens in cases where Heads of Prisons ordered prisoners to be detained in isolation without adhering to the rules of natural justice or to departmental policies. The Commission is therefore of the view that it is unlikely that justice will be done in cases where a disciplinary matter is dealt with by a head of prison without the prisoner having any assistance or representation.

The process prescribed by the Act also goes against the grain of just administrative action. Furthermore it is noted that in terms of section 24(5) a hearing before a disciplinary official is silent on representation, as opposed to section 24(2) where the provision explicitly states that the hearing should be conducted without representation. It is hard to follow the reasoning for such explicit exclusion in an environment where there is such an unequal power balance, albeit for minor transgressions.⁷³ The Commission is of the view that the provisions add to the unfairness of the disciplinary process and that they should

⁷² See section 3(3) of the Promotion of Administrative Justice Act No. 3 of 2000 that provides as follows:

“In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to-

(a) obtain assistance and, in serious or complex cases, legal representation;”

⁷³ An analogous provision would be section 112(1) of the Criminal Procedure Act, No. 51 of 1977 that provides for a summary procedure in cases of petty offences. The court has limited punitive jurisdiction in that it can impose a maximum fine of R1 500 or three (3) months' imprisonment. Despite its limited punitive jurisdiction an accused may still be represented by a legal representative, which shows that the right to be legally represented is not compromised by either a summary procedure or a limited punitive jurisdiction.

be amended to be in accordance with other administrative guidelines and basic constitutional guarantees.⁷⁴

It is doubtful that justice can truly be served in cases of serious offences against the discipline of the prison where the adjudicator is the disciplinary official.⁷⁵ The Commission is well aware of the need for discipline in the prison⁷⁶ for the proper functioning of the system. However, the Commission is also alive to the procedure adopted by officials and the negative attitude of the members towards prisoners. It is therefore unlikely that the word of a prisoner will be believed above that of a colleague. Should the Department consider fairness as the cornerstone of its disciplinary system it is the view of the Commission that in cases of serious transgression the disciplinary matter be referred to an independent adjudicator⁷⁷ similar to the practice in the United Kingdom. The role of the adjudicator would be to preside in those cases that are so serious that a conviction requires a possible sentence to restricted detention.

The Commission is of the view that a three-tier process of discipline would take care of the concerns of the prisoners that they are not treated fairly and at the

⁷⁴ See *Campbell and Fell v United Kingdom* (1985) 7 E.H.R.R. 165 and more specifically Article 6(1) of the European Convention that reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.”

⁷⁵ See section 24(5), which deals with the penalties imposed by a disciplinary official.

⁷⁶ See *Campbell and Fell v United Kingdom* at para 69;

“However, the guarantee of a fair hearing, which is the aim of Art 6, is one of the fundamental principles of any democratic society, within the meaning of the Convention (see the Golder J judgment...) As the Golder Judgement shows, justice cannot stop at the prison gate and there is, in appropriate cases, no warrant for depriving inmates of the safeguards of Art 6.”

⁷⁷ In the UK the adjudicators are district judges who visit the prisons on a regular basis and similarly such duty could be exercised by the district court magistrates in the district of the prison.

same time such process would ensure that any detention in isolation for the purposes of punishment will be restricted to those deserving of such punishment.

It should never be overlooked that a guilty finding has severe implications for the prisoner and when sentenced to restricted confinement the finding can impact on his/her consideration of parole. Ultimately this could make the difference between early release or extended incarceration, should the prisoner be found in contravention of the prison discipline.⁷⁸

The Commission is therefore not convinced that the safeguard in terms of section 25 goes far enough. Whilst the finding has to be reviewed by the Inspecting Judge when a prisoner is sent to isolation to confirm the finding of solitary before the prisoner is placed in solitary confinement, the likelihood is that a member, not legally trained, would have presided in the matter, drafted the record and given his view of what transpired on the day. Independence is compromised by the procedural provisions of the Act. The mischief, which the 1998 Act sought to remedy, will thus not be remedied because the Office of the Inspecting Judge will still be reviewing a document where the disciplinary official has an opportunity to favour the case of the Department. Simply put, it would be like sending criminal matters on review to the High Court in instances where the South African Police had been the judge, jury and the prosecutor. Thus, the necessity for an independent adjudicator, a proper transcript of the hearing, or even a handwritten transcript by an independent person who would act as secretary of the disciplinary tribunal, can never be over-emphasised in a case which could have serious implications for the transgressor. The evidence before the Commission, however, supports that officials have very little regard to any statutory provisions.

⁷⁸ See *Ezeh and Connors v United Kingdom* (2004) 39 E.H.R.R.1 and when a disciplinary hearing would be labeled as a criminal charge.

7. SHORTENING OF VISITS

There is a bigger problem regarding visits, as they are either abused in that prisoners have to pay for visits, or they are deliberately shortened for no apparent reason. Sometimes they are shortened because the members want to attend to their personal affairs and thus do not have time to sit most of the day on Saturdays to allow prisoners to get their visits.

Before evaluating the evidence presented to the Commission regarding the extra special visits, the Commission wishes to comment on other disturbing evidence that emerged at these hearings regarding prison authorities unilaterally shortening the visiting time that inmates are entitled to.

In this regard, the Commission heard the evidence of the prisoner, Mr David Nkuna, who testified that this practice was commonplace at Leeuwkop Maximum Prison.⁷⁹ Instead of receiving their full quota of forty five (45) minutes per visit as they are entitled to, prisoners were only allowed a visit of ten (10) minutes. The shortening of the visiting time is largely due to the prison authorities attempting to accommodate the large number of prisoners receiving visits on any particular day.

From what has been heard by the Commission, the problem is not only confined to Leeuwkop Prison. On 12 August 2003, the Commission heard the evidence of Mr T. Tana, the Head of Medium A Prison, Johannesburg, who admitted that prisoners at Johannesburg Prison also only enjoy visits of five (5) to ten (10) minutes, due to the prison being overcrowded. Mr Tana admitted that the Departmental Orders governing the duration of prisoners' visits were not being adhered to. He attempted to justify the infringement of the privileges of prisoners

⁷⁹ See Leeuwkop transcript 17 June 2003, at pages 2 744-2 745.

on the grounds of the prison being overcrowded and that the Department does not have enough personnel to supervise these visits.

It is essential that prisoners have the full benefit of contact with their families and friends and prison authorities depriving prisoners of their full visiting time is clearly not in accordance with the Department's policy and is also inhumane and unconstitutional.

Imprisonment is a harsh and humiliating experience with inmates being deprived of their liberty and many of their fundamental rights. The right to receive visits from family and friends in these desperate circumstances is surely one of the few cherished rights and privileges that any inmate clings to and relies on to maintain his family ties during incarceration. Such visits represent hope and surely have a positive rehabilitating effect on the inmate. They represent the hope of eventual freedom and a return to a normal life in society. Tampering with this right by the Department could result in serious and dangerous consequences.

Whilst it is recognised that overcrowding remains a huge challenge facing the Department, the Commission would expect the Department continuously to explore alternative and innovative ways to address the problem. The B Orders clearly authorise Heads of Prison to allocate "more than one" weekday to alleviate visit-congestion over weekends.

The Department should investigate and address this problem as soon as possible.

8. NUTRITION

The Commission has heard numerous complaints from prisoners in almost every Management Area regarding the fact that they do not receive three meals every

day, that warders eat the food that is intended for them,⁸⁰ that they seldom get sufficient meat and so forth.

In its earlier reports the Commission has acknowledged the fact that food is an important commodity inside the prison and that it is used as a commodity not only by prisoners but also members. Internal corruption was ultimately exposed in Grootvlei Prison where a number of members augmented their income by selling chickens to the prisoners.⁸¹ The only reasonable inference that we could draw from the facts is that if the intended food gets sold then there would be a shortage of food that should have been served for prisoners and that such corruption impacts on the nutritional value of the food served to prisoners. To add to the dilemma, prisoners work in the kitchens and they also contribute to the corruption by smuggling the food out of the kitchen and selling it to their fellow inmates. In some Management Areas like Pretoria Central prisoners dish out the food to the prisoners in the cells, so even if they do not work in the kitchen they work with the food and once more have control over it and have opportunities to favour some prisoners above others. This works to the detriment of the health of some prisoners. There can hardly be a right more basic than the right to nutritional food for everyone and that includes prisoners.

The 1998 Act recognises the importance of proper nutrition in terms of section 8 that provides as follows:

- (a) Each prisoner must be provided with an adequate diet to promote good health, as prescribed in the regulations.
- (b) Such diet must make provision for the nutritional requirements of children, pregnant women and any other category of prisoners whose physical condition requires a special diet.
- (c) Where reasonably practicable, dietary regulations must take into account religious requirements and cultural preferences.

⁸⁰ See chapter dealing with the Theft of Prisoners' Food at the Pretoria Management Area.

⁸¹ For more details see the Fifth Interim Report.

- (d) The medical officer may order a variation in the prescribed diet for a prisoner and the intervals at which the food is served, when such a variation is required for medical reasons.
- (e) Food must be well prepared and served at intervals of not less than four and a half hours and not more than six and a half hours, except that there may be an interval of not more than 14 hours between the evening meal and breakfast.
- (f) Clean drinking water must be available to every prisoner.

The supply of food is a well developed industry in South Africa. It requires special skills and training and its focus is on the supply of nutritional food, whether the supply is to an airline, hospital or business. The focus of the Department and its members should be on its core functions, namely securing prisons and rehabilitating prisoners. In outsourcing the supply of food the Department can combat corruption on two levels. Firstly, it can get rid of its kitchens which have been rated by prisoners as the most corrupt places in any prison. Secondly, the Department will have time to focus on its core business since the responsibility to give prisoners food on time and to ensure that the food meets the necessary nutritional norms, will no longer rest with the Department but with the company that takes care of the food supply. The members who work in the kitchen could then be utilised in other areas where they are better trained.

The Department could also address overcrowding by outsourcing the kitchens. If the Department is innovative it will assign some space to the outsource company where the food will be delivered and then use whatever space that is no longer needed, like store rooms, dining halls etc, to make room for prisoners. The Commission has heard evidence that at some prisons, prisoners do not use the dining halls at all because of internal management problems.⁸²

⁸² See the evidence of Mr Motsepe at the Pretoria Management Area as per transcript pages 3 143-3 144.

The Commission is aware that the Department has embarked on a programme to outsource its kitchens in some areas. These programmes are only pilot programmes to determine the success of outsourcing the supply of food. The Commission did not investigate the viability of these programmes, but is of the opinion that by outsourcing the supply of food, members will be able to free up their time to take care of other duties and hence alleviate the burden on their colleagues that is caused by overcrowding. Whilst outsourcing can hold benefits for the Department on a number of levels, the Commission is mindful that such recommendation can only be accepted once a proper cost analysis is done, taking into account the cost and the responsibilities that the supply of food holds for the Department as opposed to the cost of an outside catering company supplying and making the food.

It is also clear that the Department is not acting in accordance with section 8 of the 1998 Act since at most prisons only two meals are served and this means that prisoners receive their lunch and their supper at once. If one takes into account that lunch is served between 12h00 and 13h00, then it means that in some cases eighteen (18) hours have elapsed between the meals, a situation that is untenable and inhuman.

9. FINDINGS

9.1 Solitary Confinement

The Commission finds that the Department uses *de facto* solitary confinement without adhering to the safeguards of the Act, which has severe implications for the psychological well-being of prisoners. Having considered all the evidence and the trauma suffered by prisoners detained involuntarily in isolation once convicted for a disciplinary transgression, the Commission can find no justification for such detention other than that the objective is to punish prisoners

who transgress the rules of the prison. To allow the use of mechanical constraints when a prisoner has attempted to escape and then been placed in isolation is inhuman and reduces the person subjected to such constraints to the level of a hobbled animal.⁸³

Solitary confinement has a shameful past in South African history. The Commission recommends that the concept of solitary confinement be abandoned in order to recognise the trauma suffered by so many who were detained in this way. In its place the Commission recommends that the term “restricted confinement” be used, but that it may only be ordered in very serious disciplinary cases. It should be subjected to strict monitoring to ensure that it is not abused.

9.2 Super-Maximum Prisons

The Commission finds that institutions like Pretoria C-Max Prison are institutions of torture and further punishment of inmates.

- (a) Correction and rehabilitation are not possible in an institution like Pretoria C-Max Prison.
- (b) These institutions are designed to break down the spirit of prisoners and make them suffer.
- (c) These institutions cannot be justified in terms of the Constitution, the Correctional Services Act, the Regulations or the policies of the Department of Correctional Services.
- (d) These institutions are not consistent with the basic common law right of prisoners to be released with their physical and mental health unimpaired.
- (e) The Commission has found that in various Management Areas, escapes of prisoners are a result of either negligence or corruption of members and

⁸³ See *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 2000 (6) BCLR 671 (Nms) where the court had to make a value judgment on the use of leg irons or chains, and declared such use unconstitutional.

- therefore these institutions cannot be justified on the grounds of safety and security of prisoners.
- (f) The safety and security of maximum prisoners can be adequately achieved in ordinary maximum prison centers.
 - (g) Prisoners incarcerated in these institutions are subjected to indefinite solitary confinement, contrary to the Department's policy.

9.3 Admission Criteria for Super-Maximum Prisons

In this report, the Commission deals with the criteria for admission of prisoners to C-Max Prison. The Commission would like to make the following comments in respect of criteria No. 1 and No. 6:

- (a) With regard to criterion No. 1, it is clear that the juvenile who was found by Ms Goodenough at C-Max Prison was there notwithstanding the fact that he had been sentenced to a shorter period than twenty (20) years. The question then is, why was the juvenile at C-Max Prison contrary to the Department's own policies and directives.
- (b) The Department has a problem with gangsterism, which it does not convincingly deal with in its White Paper.⁸⁴ This is notwithstanding the fact that it is a major problem, which is affecting the functioning of the Department in general. The question then is, why are the gang leaders still in the various prisons and why are they not at C-Max, if C-Max was meant to achieve what the Department purported to be the intention at the time of establishing the prison? The gang leaders are known to the various Heads of Prisons. Some of the Heads even told the Commission that they have regular meetings with the gang leaders to try and achieve peace within the prisons.

⁸⁴ See Chapter on Gangs for more details.

- (c) The majority of the prisoners who were at C-Max at the time when the Commission investigators were there, were prisoners who had either escaped or assaulted DCS officials. The likelihood is that C-Max Prison is being used as a form of punishment for those who attack officials. The Commission finds that all evidence points to the fact that it is not used to correct general bad behaviour within our prisons.

10. RECOMMENDATIONS

10.1 Dirty Linen

Prisoners should under no circumstances be required to wash contaminated and dirty linen in prison hospitals. This puts them at a very high risk of contracting various diseases. It is accordingly recommended, that this practice cease with immediate effect and the Department is directed to provide a laundry service in all its prison hospitals, including Leeuwkop Maximum Hospital.

10.2 Prisoners' Disciplinary Tribunals

The Department should give serious consideration to setting up a disciplinary procedure for prisoners, which will recognise their Constitutional rights and also the rights of natural justice including:

- the right to call witnesses;
- the right to cross-examine witnesses;
- the right to be assisted/represented, at least, by another prisoner;
- the right of appeal or review;
- the reasons for the judgments or decisions, which are given against them;
- the right to be tried in an open hearing where fellow prisoners and members of the prisoner's family may be allowed, provided that security

permits it. In cases where security prevails, the right to have the decision of the disciplinary tribunal be made public.

10.2.1 Re-training of Warders

The Department should give serious consideration to the re-training of the warders, in the following:

- The Constitution and human rights culture;
- Conflict resolution skills;
- Chairing and prosecuting in the Prisoners' Tribunals.

10.2.2 Amendment of Legislation

The Department should give serious consideration to changing the existing procedures as prescribed by the 1998 Act since the likelihood exists that some provisions will not pass constitutional muster. It is therefore recommended that section 24 of the 1998 Act be amended as follows:

- (1) Disciplinary hearings must be fair and may be conducted either by a disciplinary official, a Head of Prison or an adjudicator in serious cases of discipline, who will be either a magistrate or any legal practitioner.

- (2)
 - (a) A hearing before a Head of Prison may be conducted informally.
 - (b) At such hearing the prisoner must be informed of the allegation against him or her, whereupon the prisoner has the right to refute the allegation.
 - (c) The proceedings of a hearing contemplated in paragraph (a) must be recorded in writing.

- (3) Where the hearing takes place before the Head of Prison the following penalties may be imposed severally or in the alternative:
 - (a) a reprimand;
 - (b) a loss of gratuity for a period not exceeding one (1) month;
 - (c) restriction of amenities for a period not exceeding seven (7) days.

- (4) At a hearing before a disciplinary official or an adjudicator a prisoner-
 - (a) must be informed of the allegation in writing;
 - (b) has the right to be present throughout the hearing, but the disciplinary official may order that the accused prisoner be removed and that the hearing continue in his or her absence if, during the hearing, the accused prisoner acts in such a way as to make the continuation of the hearing in his or her presence impracticable;
 - (c) has the right to be heard, to cross-examine and to call witnesses;
 - (d) has the right to be represented by a legal practitioner of his or her choice at his or her own expense, unless a request to be represented by a particular legal practitioner would cause an unreasonable delay in the finalisation of the hearing in which case the prisoner may be instructed to obtain the services of another legal practitioner; and
 - (e) has the right to be given reasons for the decision.

- (5)
 - (a) Serious disciplinary transgressions may only be heard by an adjudicator.
 - (b) The Commission determines whether a charge is serious.
 - (c) The Commissioner must refer a serious transgression

to the adjudicator within twenty eight (28) days of the alleged infringement.

- (d) At a hearing before an adjudicator a prisoner has the right to be legally represented.
- (6) Where the hearing takes place before a disciplinary official, the following penalties may be imposed severally or in the alternative:
- (a) a reprimand;
 - (b) a loss of gratuity for a period not exceeding two (2) months;
 - (c) restriction of amenities not exceeding forty two (42) days.
- (7) Where the hearing takes place before an adjudicator, the following penalties may be imposed severally or in the alternative:
- (a) a reprimand;
 - (b) a loss of gratuity for a period not exceeding two (2) months;
 - (c) restriction of amenities not exceeding forty two (42) days;
 - (d) in the case of very serious infringement, restricted detention for a period not exceeding thirty (30) days.
- (8) The penalties referred to in subsections (3), (6) and (7) may be suspended for such period and on such conditions as the presiding officer of the tribunal deems fit.
- (9) (a) At the request of the offender proceedings resulting in any penalty other than segregated confinement must be referred for review to the Commissioner.
- (b) The Commissioner may confirm or set aside the decision or penalty and substitute it with an appropriate order.

The Commission recommends that the term “solitary confinement” be deleted from the 1998 Act. It is recommended that the term be replaced throughout the Act with the term “restricted detention.”

10.2.3 Appeal or Review Committee

The Commission recommends that a Committee be set up in each Province or Management Area under the Chairmanship of the Inspecting Judge or his nominee to act as an Appeal or Review Committee in respect of transgressions by prisoners.

10.3 Segregation

It is recommended that section 30 be amended to read as follows:

- (1) Segregation of a prisoner for a period of time, which may be for part of or the whole day and which may include detention in a single cell, other than normal accommodation in a single cell as contemplated in section 7 (2) (e), is permissible-
 - (a) upon the written request of a prisoner;
 - (b) to give effect to the penalty of the restriction of amenities imposed in terms of section 24 (3) (c) or (6) (c) to the extent necessary to achieve this objective;
 - (c) if such detention is prescribed by the medical officer on medical grounds;
 - (d) when a prisoner displays violence or is threatened with violence;
 - (e) if a prisoner has been recaptured after escape and there is a reasonable suspicion that such prisoner will again escape or attempt to escape; and

- (f) if at the request of the South African Police Service, the Head of Prison considers that it is in the interests of the administration of justice.
- (2) (a) A prisoner who is segregated in terms of subsection (1) (b) to (f)-
 - (i) must be visited by a correctional official at least once every four (4) hours and by the Head of Prison at least once a day; and
 - (ii) must have his or her health assessed by a registered nurse, psychologist or a medical officer at least once a day.
 - (b) Segregation must be discontinued if the registered nurse, psychologist or medical officer determines that it poses a threat to the health of the prisoner.
- (3) A request for segregation in terms of subsection (1) (a) may be withdrawn at any time.
 - (4) Segregation in terms of subsection (1) (c) to (f) may only be enforced for the minimum period that is necessary and this period may not, subject to the provisions of subsection (5), exceed seven (7) days.
 - (5) If the Head of Prison believes that it is necessary to extend the period of segregation in terms of subsection (1) (c) to (f) and if the medical officer or psychologist certifies that such an extension would not be harmful to the health of the prisoner, he or she may, with the permission of the Inspecting Judge, extend the period of segregation for a period not exceeding thirty (30) days.

- (6) All instances of segregation and extended segregation must be reported immediately by the Head of Prison to the Area Manager and to the Inspecting Judge.
- (7) (a) A prisoner who is subjected to segregation must be advised of his right to refer the matter to the Inspecting Judge to be reviewed immediately when taken into segregation.
- (b) A prisoner who is subjected to segregation may refer the matter to the Inspecting Judge who must decide thereon within seventy two (72) hours after receipt thereof.
- (8) Segregation must be for the minimum period, and place the minimum restrictions on the prisoner, compatible with the purpose for which the prisoner is being segregated.
- (9) Except in so far as it may be necessary in terms of subsection (1) (b) segregation may never be ordered as a form of punishment or disciplinary measure.

10.4 Overall Recommendations

Accordingly, the Commission makes the following recommendations:

1. The admission criteria and the rules covering prisoners at Pretoria C-Max Prison and Kokstad Maximum Security Prison should no longer be utilised in their present form.
2. The incarceration of inmates at these institutions in their present form should cease to exist.
3. The policies governing these institutions should be upgraded by the Department to be brought in line with ordinary Maximum Prisons as they exist in various management areas.

10.5 Short-Term Recommendations

1. The Department should ensure that in sending people to restricted detention and/or segregation to Super Max Prisons that it complies with its own regulations in that there is a proper medical evaluation as to whether the person can survive the detention in segregation, as anticipated in terms of the Act.
2. A proper record of all people sent to isolation in the C-Max Prison should be kept and proper reasons recorded and the provisions of the Act, which are applicable, be recorded.
3. The circumstances of the juvenile who was sent to C-Max should be investigated and the officials who abused their powers, should be charged accordingly.
4. The Department should review the cases of all the prisoners who are currently at C-Max to see:
 - (a) whether there was full compliance with the rules and regulations in terms of proper hearings, prior to sending them to C-Max;
 - (b) the reason for sending them there;
 - (c) the duration of their incarceration; and
 - (d) whether there is medical evidence to indicate that the said inmates could withstand incarceration at C-Max.

The Inspecting Judge should confirm the above review.

10.6 Nutrition

It is recommended that the current practice of serving three (3) meals at two (2) specified times be ceased and that prisoners be served as specified by the 1998 Act.

It is recommended that the Department as a matter of urgency do an analysis of the costs and benefits of outsourcing the supply of food since the Department lacks the necessary capacity to comply with the supply of food.

CHAPTER 8

SEXUAL VIOLENCE IN PRISONS

CHAPTER 8

SEXUAL VIOLENCE IN PRISONS

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CHAPTER 8

SEXUAL VIOLENCE IN PRISONS

1. INTRODUCTION

This Chapter highlights the horrific scourge of sexual violence that plagues our Prisons where appalling abuses and acts of sexual perversion are perpetrated on helpless and unprotected prisoners. In dealing with the subject, the Commission will examine the factors that contribute to such sexual violence, the treatment meted out to prisoners (sentenced and awaiting trial) who have been sexually abused, the existing policies within the Department dealing with such abuses and the vulnerability of gay and transsexual Prisoners.

The Commission, during its hearings in Pretoria, heard the testimony of a number of victims of sexual abuse¹ at Prisons situated in the Pretoria Management Area. The testimony of one particular sexual victim showed that sexual violence in Prison remains a huge problem confronting the Department. This witness described in detail the abuses that he had suffered and the Commission will deal with this witness's evidence in greater depth in order to demonstrate the shortcomings in the system as well as the Department's failure to render assistance to this Prisoner during his eighteen (18) months' incarceration at Pretoria Local Prison.

¹ The Commission would have felt much more comfortable to refer to these abuses as rapes but at the time of writing this report, rape was still defined as "a male having unlawful and intentional sexual intercourse with a female without her consent." See Snyman Criminal Law (1995) at page 424. This traditional definition emphasises clearly the notion that a man cannot be raped, whilst most cases heard showed that male rape is a reality and that rape is as bad for a male as it is for a female.

The evidence of the victims who testified before the Commission underlined the fact that sex is nothing more than a tradeable commodity in Prison and that vulnerable, young Prisoners become mere possessions or sex slaves whilst incarcerated. Prison warders sell them to the highest bidder despite the fact that they are dependent on these very same Prison warders to secure their safety whilst in Prison.

Furthermore, the transmission of HIV² exacerbates the Department's problems because this dreaded epidemic impacts both on the Prison community and on the society at large. prisoners do not remain incarcerated forever and at the end of their sentences are again reintroduced into, and accommodated in, the wider society. This crisis dictates that the Department act vigorously to address the problem or face the domino consequences of its lack of action, as its failure to combat effectively the transmission of HIV within the Prison is likely to result in such infections contributing and/or spreading to the outside community.³

The evidence given to the Commission mainly by gay and transsexual prisoners also showed that homophobia is alive and very real amongst the Prison warders whose prejudice impacted negatively on how they treated prisoners who are sexually abused by their co-inmates. This was more prevalent in cases where the victims who complain are gay.

² Human Immune Deficiency Viral Infection commonly known as HIV and also internationally recognised as the cause of Aids (Acquired Immune Deficiency Syndrome).

³ Statistics show that 40% of Prisoners are incarcerated for less than one (1) year and that an average 25 000 Prisoners are released from Prison every month. Consequently, 300 000 Prisoners return to the community each year. If they are infected, whilst in Prison, then they bring their infections with them. Undoubtedly, the risk of HIV in Prison does not remain in Prison but impacts on people outside the Prison. See K.C Goyer "Prison Health is Public Health" *SA Crime Quarterly* (2002) at page 1.

The imprisonment of Karp⁴ caused particularly interesting challenges to the Department. Karp explained that he is a woman trapped in a man's body and described himself very aptly as being "a woman mentally and at heart, but physically a man". In appearance, Karp presents himself as a woman and at all times wants to be recognised as a "woman". Karp appeared to the Commission to be confident about his distinctive sexuality and it was no doubt this confidence that led to numerous clashes with the members, who were uncomfortable with Karp's presence in the male Prison.

Another factor that added to the vulnerability of prisoners in general and placed them at risk of being sexually abused in Prison was the fact that our Prisons are completely overcrowded.⁵ prisoners are forced to share beds and the resultant close proximity of Prisoners creates ample opportunity for sexual abuse to take place. The statistics relating to overcrowding show that there are more unsentenced Prisoners in the different Management Areas than sentenced Prisoners. The number of Prisoners who are accommodated in a cell, in some Management Areas, exceeds the norm for which such a cell is designed by anything between 200% and 400%.

The sexual abuses at Pretoria Local Prison also compelled the Commission to focus on a related issue: the slow process of finalising criminal cases emanating from the Prisons through the criminal justice system. The undue delay in finalising these matters results in prisoners being detained for longer periods than is normally necessary, which only increases the potential of them being subjected to some form of abuse at some time. Examining the matter of the prisoner, Karp, the facts, as they were presented to the Commission, indicated that Karp was in detention on a charge of motor vehicle theft after his former lover had laid a

⁴ Although Karp identifies himself as a woman in every respect, the legal definition of his gender defines him as a male. While the Commission would have preferred to have respected Karp's own identity of himself as a woman, because of the legal nature of this report, the Commission is compelled to refer to Karp throughout this report as a male. This is done without any intent to disrespect Karp's own self-definition.

⁵ See the Chapter on Overcrowding for more details.

charge of illegal use of a motor vehicle without the owner's permission, which was then changed to a charge of theft of a motor vehicle. There was nothing particularly complex about the case nor did there appear to be any reason for the delay and yet the prisoner was detained for eighteen (18) months before the matter was heard and finalised.

In theory, the conditions for unsentenced prisoners should be better than those of sentenced prisoners since they are not yet convicted of any offence and should be entitled to be presumed innocent by law.⁶ However, when the Department's policies are discussed and the procedures the Department applies are examined, it will become clear that unsentenced prisoners in South Africa have far fewer rights inside the Prison than sentenced prisoners. The inequality will be shown in a comparative analysis of the policies that apply to sentenced and unsentenced prisoners who fall victim to sexual abuse.

Through the discussion in this Chapter, it will also be shown that unless the Department takes decisive action, the basic human rights enshrined in the 1996 Constitution⁷ are likely to have no meaning to prisoners who are sexually abused in Prison. It will also need to be considered whether the detention of prisoners under the circumstances that will be sketched in this Chapter really conform to the guarantees as stipulated in the Constitution. More so, whether the detention conforms with Section 35 (2)(e) of the Constitution, which provides as follows:

“Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise, and the provision, at State expense, of

⁶ See section 35(3)(h) of the 1996 Constitution, which provides:

“Every accused person has a right to a fair trial which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings.”

⁷ The Constitution of the Republic of South Africa, Act No. 108 of 1996, which is referred to in this report as “the Constitution”.

adequate accommodation, nutrition, reading materials and medical treatment.”

It needs to be noted too that warders who fail in their duty to protect the physical integrity of the detainees, contravene section 12(1) and (2) of the Constitution, which provides that prisoners will be free from all forms of violence, both public and private.

The Correctional Services Act⁸ provides specifically in section 2 of the Act that:

“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.”*

As the evidence discussed in this Chapter will indicate, there was a shocking lack of empathy and sensitivity by some members of the Department for the Prisoner, Karp, when a fellow inmate sexually abused him. Instead of the perpetrator of this vile deed being punished, it was Karp instead who was put in the isolation cells, ostensibly for his own protection, while the Head of Prison left the offender in his cell to mingle, without any restriction, with his fellow prisoners. It will also be shown that the case of Karp is not unique. In fact, the number of cases the Commission heard all point to the fact that sexual abuse in South African Prisons is rife and that sexual abuses should be curbed in order to uphold the basic rights of those in detention.

⁸ Act No. 111 of 1998.

From the evidence, it appears that Karp suffered most at the hands of members working at Pretoria Local Prison and suffered many kinds of abuse during incarceration of eighteen (18) months at Pretoria Local Prison. Karp gave testimony regarding the things that had happened during this incarceration and stated that it would be a lifelong haunting experience. It is evident from the evidence of the Chief Psychologist of the Department, Dr Lorinda van der Bergh, that it is likely that Karp is right in the assumption that the circumstances will have a lifelong impact.

On admission, this Prisoner, even though Karp was presented as a woman, was treated no differently from any other male Prisoner. Despite Karp's unmistakable female physical appearances that rendered him extremely vulnerable in any male Prison cell, no special arrangements were made to separate him from the others, pending further investigation into his sexual orientation. It was the testimony of Karp that no one even asked about Karp's sexual orientation despite the way it was outwardly presented. In fact, the only questions that were put to Karp on admission were questions pertaining to religion and home address. Karp spent the first night in the court cells, which are locally known amongst the inmates as "Marabastad", and it was here that one of the first things that was observed was the filthy state of the cell. Even though Karp was an awaiting trial Prisoner, supposedly cloaked with the presumption of innocence, he was exposed to a filthy cell with insufficient bedding for the number of inmates present to sleep on. Such was the bedding arrangement, or the absence thereof, that Karp had to sleep on the concrete floor in the corner near the ablutions.

2. HEALTH PROCEDURES AND POLICIES

The Commission also gained some insight into the prevailing health policies of the Department when the evidence of Ms Kasluto Maria Mabena, the Director:

Health and Physical Care in the Department, was presented. Ms Mabena testified that she is responsible for the drafting of the health policies of the Department and for the health Service the Department provides. She was thus more than adequately qualified to comment on the procedures and applicable policies that exist in the Department in dealing with victims of sexual violence and Prisoners who have been exposed to possible HIV transmission.

She admitted during her testimony that what is lacking in the system regarding the implementation of policies is that there is, at present, no way of checking whether the doctors the Department uses are aware of the existing policies in the Department of Correctional Services. Furthermore, the Department of Health appoints the doctors in Gauteng and when such doctors are allocated to certain divisions within the Department, it is accepted that they would have been orientated regarding the policies.

Ms Mabena considered the policies of the Department contained in the 'B' Orders as the most important policies applicable in dealing with matters of sexual violence. She referred the Commission to Chapter 4 of the 'B' Orders in particular, which provides for assaults and injuries in general but then makes specific provision, in terms of Clause 5 of Chapter 4, for sexual assault. The following is stated regarding the procedure after a sexual assault has occurred:

- “1. The incident is reported to the responsible registered nurse by the Prisoner or the official;*
- 2. The registered nurse interviews the complainant in privacy;*
- 2. The examination and treatment of the Prisoner shall not be delayed two hours after being reported;*
- 3. In the absence of the Medical Officer/Practitioner such cases shall be referred to the provincial hospital after receiving the patient's consent (a standard form should be designed);*
- 4. No Prisoner shall be turned away from the Prison clinic;*

5. *Care should be taken not to interfere with the evidence as it appears on the complainant e.g. bloodstains, semen stains, tears, abrasions, etc.;*
6. *Procedure as for injuries and assaults becomes applicable – (including reporting to the Head of Prison);*
7. *In case of a minor (under 14 years of age) the child protection unit of the South African Police Service must be contacted for further investigations (within 12 hours) by the Head of the Prison;*
8. *The sexual assault survivor is to be referred to the multi-disciplinary approach team for further management;*
9. *Prisoners and officials must be sensitised on a monthly basis on sexual assaults and this should be recorded in the Division Head: Nursing Service' and Head of the Prison's diaries."*

From this specific policy, it is clear that none of the sexual assault victims who testified before the Commission was given the treatment the policy envisages. What is apparent is that the Department's well-designed policies relating to sexual abuse will remain meaningless pieces of paper unless such policies are properly communicated, implemented and adhered to.

The Commission has heard evidence over and over again, as early as the Cape Town hearings during 2003, that some of the warders consider the policies of the Department to be merely pieces of paper.⁹ Therefore it is of vital importance for the proper functioning of the Department that all policies be properly distributed by the Department to subordinate levels. It should not be too difficult for the Department to have a plan of action to ensure that all its policies, particularly those recently amended, are made known to each and every member working at the Prisons. Furthermore, written acknowledgement should be obtained from the

⁹ See Cape Town transcript dated 25 February 2003 when Mr Theron, a member of the Department, acknowledged publicly that members regard some policies as mere "pieces of paper".

members, who have to implement such policies, together with some form of monitoring to ensure implementation thereof. In this way, the Department will be in a position at all times to act fearlessly against those who have transgressed these policies, leaving no excuses for non-compliance with these policies. Such action on behalf of the Department will be pro-active and will address the issue of members raising lack of knowledge as a defence on a charge of non-compliance with Departmental policies.

With regard to the Department's policy of sexual assaults, it is clear that it is designed to assist a Prisoner who has to deal with the physical and emotional trauma as best as he/she can in any Prison environment. However, when these policies are not complied with, such assistance becomes non-existent.

The Department's policy with regard to management strategy and Aids in the Prisons was also handed in and marked as Exhibit "TT8". This document has been in operation since 14 October 2002. Those sections, which are relevant to matters of sexual assault in Prison and the way Prisoners should be treated in such circumstances, will be discussed.

The policy provides particularly for cases where there is non-consensual (coercive) sex amongst Prisoners and we quote as follows:

" 6.11. NON-CONSENSUAL (COERCIVE) SEX AMONG PRISONERS

- *All officials and Prisoners must be sensitised on admission and on a continuous basis about the existence of sex between same sexed persons in Prison.*
- *Both Prisoners and personnel must be sensitised about the dangers of unprotected sex, violation of human rights and the criminalisation of non-consensual (coercive) sex.*

- *All rapes and coercive sex must be reported and be investigated.*
- *Prisoners must be empowered to protect themselves from rapes, coercive sex and abuse by fellow Prisoners.*
- *Sodomy and rapes should be managed according to Departmental protocols.*
- *The victim must receive medical intervention and counselling according to Departmental protocols.*
- *Anti-retroviral medication for rape and coercive sex shall be provided in keeping with Department of Health protocols and policies.” (Own emphasis)*

When the policy, which is applicable to coercive sexual acts inside the Prison, is considered, it is abundantly clear that sexual victims must receive medical intervention and counselling when they have been sexually abused. Despite the fact that policies are in place, it is clear from the cases heard that members from the different health sectors, be they nurses or doctors, do not adhere to it. It is therefore necessary to address non-compliance by instituting disciplinary action against professional staff. However, the Department would only be in a position to act with force against these transgressors if it were pro-active in ensuring that a proper system of disseminating the policy information to different members of the health sector is in place.

It is imperative that, in order to deliver a service to Prisoners who are sexually abused, members of the health profession should adhere to the existing policies of the Department. Without adherence, these policies are truly meaningless and serve no purpose at all.

“6.12 PROMOTION OF THE RIGHTS OF PRISONERS AND PERSONNEL TO PROTECTION

- *The observance of human rights is critical for the protection of the vulnerable.*
- *Both Prisoners and personnel in all Prisons should be trained in human rights issues.*
- *Custodial staff must take responsibility for protecting Prisoners against sexual assaults by fellow Prisoners and to report the occurrence of such practices.*
- *All sexual assaults must be reported and recorded and criminal action taken against the perpetrators.*
- *Prisoners must be empowered to be able to protect themselves and fellow Prisoners through capacity building and the provision of information on legal mechanisms available to Prisoners.*
- *All Prisoners including HIV positive Prisoners have the right to privacy, bodily autonomy, integrity and safety and these and other rights shall be protected.” (Own emphasis.)*

It is interesting to note that, in terms of the abovementioned Aids policy of the Department, more specifically paragraph 6.9, the Department considers compliance as mandatory for all officials at all levels in the Department and for all Prisoners. However, if one considers the case of Karp and others, it is clear that, from the nurse to the custodial member to the Head of Prison, there was no compliance with the policy of the Department, despite the fact that the Department considers it mandatory that the policy is implemented.

Even though the Department has an Aids policy, the Department’s Director of Health and Physical Care handed in another document, which deals with the protocol for post-exposure prophylaxis. This however, will not be discussed, as it is merely a guideline and a working document, which was not yet in operation at the time of writing this report.

It is important that the Department, together with the Department of Health Service, consider a new protocol to address the treatment given to Prisoners, in order to combat the Aids epidemic in Prison.

3. SPECIFIC INCIDENTS PRETORIA: KARP

As the testimony of Karp focused on some specific incidents, which implicated some of the warders working at the Pretoria Local Prison, it is necessary to briefly summarise some of these. These incidents will also highlight some of the shortcomings found in the Prison system in handling sexual violence.

3.1 Sold For Sex

The first incident the Commission wishes to deal with relates to the alleged sale of Karp to other inmates for the purposes of sex. According to the evidence of Karp, this incident occurred when required to share a bed with another Prisoner in a communal cell in G Block. On 18 May 2001, a warder, namely Mr Thokozani Nxumalo, took Karp and four (4) other Prisoners to a storeroom, which was located on the same floor where Karp was kept. The leader of the four (4) gave this warder an amount of cash. Shortly after the exchange of money took place, Karp was told to remove the goods belonging to him to the beds where the other four Prisoners were sleeping after which the Prisoners told Karp to sleep on the bottom part of the bunk bed. They also told Karp that from that day onwards, Karp would have to do their washing, cleaning and to obey any other instruction they gave him.

In the early hours of the morning of 19 May 2001, the other four (4) Prisoners woke Karp up and thereafter all four (4) of them penetrated him anally. Even though condoms are available in Prison, they were not used and Karp was severely injured by the conduct of these four (4) men.

During Karp's testimony, it became clear that he was extremely upset and disturbed by what had happened and struggled from time to time to keep composed on the witness stand. Karp explained that the incident was never reported to the authorities because the Prisoners threatened him that if Karp did so, then he would be "damaged beyond repair". As Karp believed that the perpetrators of this vile deed had the ability to carry out their threats, he chose rather to remain silent and, out of fear, never reported the matter.

The testimony of Karp was that there had been a close bond between the four (4) Prisoners and the warder, Mr Nxumalo. This was borne out by the fact that, on various occasions, Mr Nxumalo would bring them dagga, food and alcohol. He would pass these items to the inmates through the cell window.

3.2 Oral Sex With Warder

Karp also testified regarding another shocking incident where four (4) Prisoners forced him to give oral sex to the warder, Mr Nxumalo, through a window. Karp graphically explained how fellow Prisoners pushed Karp's head against the opening of this window in order to fulfill the sexual needs of the warder, who was on the other side of the window. Shortly after having given this testimony, Karp emotionally broke down on the witness stand. It was obvious to the Commission that this whole experience was extremely traumatic and that Karp was still struggling to come to terms with it.

3.3 Rape

This incident occurred on the 6 November 2002 after Karp had been told to move to Cell 14 in 'B' Section. On the day in question, Karp was doing some washing in the cell when another Prisoner, namely Mr Oupa Pahla, came into the cell. Mr Pahla then, by force, had sexual intercourse with Karp. Immediately after the incident, Karp reported the matter to Mr Desmond, who was one of the warders

in charge. Karp was then taken to two other officers, namely Messrs Mashali and Sibiya, who referred Karp to the clinic.

At the clinic, the nurse who saw Karp merely wrote down the details of the incident and thereafter Karp was sent back to the cell. Karp was never seen by a doctor nor medically attended to. In fact, the nurse never even offered to call the doctor but merely explained that the doctor's examination would only take place on the following day. The nurse did not take any swabs or run any tests. The nurse also never applied her mind to the fact that she was dealing with a sexual victim and clearly failed to offer any support or assistance to Karp as a sexual victim. She did not even offer to let the victim stay in the hospital in order that his psychological condition could be monitored throughout the night. In short, she did absolutely nothing to assist Karp. It was Karp who decided to keep the underwear, which was full of semen, and went back to the cell where he had a wash after the rape.

On the following day, Dr Kumari very briefly examined Karp. On Karp's version, such examination lasted no more than eight (8) seconds. The doctor asked Karp to stand at the bed and merely looked at the anal injury. He did not carry out any HIV tests nor did he offer any anti-retroviral treatment or counseling. In fact, the sum total of his medical effort in the matter was to merely note that it was a serious assault.

The ineptitude of the medical staff and the insensitivity with which they handled this matter left much to be desired. Karp's requests to the clinic nurse and Dr Kumari that an HIV test be conducted fell on deaf ears and they chose rather to do nothing about the matter. It was only three (3) weeks after the incident, on 26 November 2002, when Karp complained to an independent Prison visitor, that tests were conducted. Even then it appears that minimal effort by the medical personnel was the order of the day as Karp was then tested only for HIV and no other sexually transmitted diseases.

Prison officials' efforts to protect the Prisoner from further harm were ineffective or non-existent. It was rather the Prisoner Karp who took the initiative to ensure protection and asked one of the members, namely Mr van Zyl, whether they could move him to another cell so as to avoid having to face the perpetrator who had committed this foul deed. The general lack of empathy on the part of the Department in this matter can be seen from the fact that although Karp had initially reported the matter to the internal investigators. On 8 November 2002, the police did not arrive at the Prison until Monday, 11 November 2002, so that Karp could report the rape to them.

The conduct of the police who handled this matter as well as the challenges facing them when investigating criminal cases inside a closed environment like a Prison, will be discussed and examined later in this Chapter.

3.4 Post-Rape Treatment

The Commission found the treatment meted out to Karp after the rape to be most alarming. It is shocking and beyond comprehension that any victim, who has experienced the harrowing trauma of sexual abuse, should be treated with so much insensitivity and contempt. A high level of professionalism is at all times expected from trained medical staff. The nurse, who was the first medical member to deal with the victim, was concerned more with the history and nature of the incident than with offering assistance to the victim. The doctor, at a later stage, also ignored the fact that the victim had been exposed to a potential HIV transmission. The conduct of officials of the Department also fell far short of the normal standards expected of officials exercising a custodian function over inmates. A far more supportive role could have been played, particularly by the staff member who escorted the victim back to the cell, who failed to offer any psychological assistance or intervention to the helpless victim. The final straw, however, was when the Head of Prison, Mr Baloyi, took a decision that was likely

to have a severe impact on the psychological well-being of any human being, let alone someone who had just been sexually abused, and moved this victim, supposedly for the victim's own protection, to the isolation cells. Under such circumstances, where an inmate has been exposed to severe trauma, such as enduring a sexual assault, the Head of Prison's decision to detain the victim in an isolation cell cannot be seen as either assistance or protection.

It cannot be emphasised enough how disturbing the conduct of the Head of Prison, in these given circumstances, was to the Commission. That such a senior official of the Department could make a decision to relocate a traumatised victim to an even more psychologically damaging environment, whilst the perpetrator remains in his safe and known environment, is beyond reason and understanding. It is commonly known that victims, like Karp, in these circumstances need the assistance and support of their fellow inmates and friends, in order to cope psychologically. The unsympathetic attitude of the members was best displayed when the victim was requested to furnish them with a written request for removal from the isolation cells and to state that Karp would take full responsibility for anything that would happen as a result of being released from the isolation cells. Clearly, victims who have just been sexually abused inside the Prison and who are under severe mental stress should not be forced to decide upon their fate. It is not unreasonable, only humane, to expect warders, senior members and Heads of Prison to treat every sexual victim with humanity and dignity after being sexually abused, especially when the protection of such inmates in the closed environment of a Prison lies squarely on their shoulders.

4. SPECIFIC INCIDENTS: GROOTVLEI VICTIMS

The Commission would fail in its duty if it did not also underline the suffering and trauma of the victims of the Grootvlei Prison. Most of the evidence of the

Grootvlei victims has been discussed and dealt with in the Fifth Interim Report.¹⁰ Their pain and bad treatment was no less severe than that of Karp and others at the Pretoria Prison.

The young witness, Kenneth Busakwe, was, at the time of his detention, a juvenile who was detained at the special care section of the isolation cells at the Medium A Prison at Grootvlei. Mr Busakwe was a very brave young man who chose to tender his testimony in an open court because he wanted the whole world to know of the terrible abuses he suffered after two (2) inmates at the Grootvlei Prison had sodomised him. What makes this incident so distressing is the fact that Mr Busakwe went to the warder, Mr Sam Mohanoe, to report the fact that he had been sexually abused by two (2) of his fellow Prisoners. Instead of receiving comfort and protection, the warder, in whom he had put his trust and faith, also sodomised him. Mr Busakwe also testified about a number of abuses that followed after this warder had sodomised him for the first time.

The extent of sexual abuse is so rife that even witnesses who had themselves participated in such vile acts came forward and explained to the Commission how they got access to the other Prisoners and juveniles. In particular, a certain Mr Wilson Tebogo Mohodi, who was a Prisoner at Grootvlei Prison, testified that he worked as a cleaner in the Prison and hence had privileges and rights to move around freely. Warders opened the gates for Mr Mohodi and also brought juveniles to him when he asked for them because he had obtained the status of a cleaner and had a relationship of trust with these warders.

Besides having access to juveniles and certain illegal privileges, Mr Mohodi also explained to the Commission that the warder, Mr Mohanoe, ran a soccer club in the Prison and that Mr Mohanoe regularly called these young boys to his office to have sex with them. Sometimes Mr Mohodi would keep watch and observe how Mr Mohanoe would have sex with the juvenile Prisoners. In fact, the abuse went

¹⁰ See the Executive Summary of the Fifth Interim Report attached to this report.

further and on occasions this warder would ask him to bring a particular young Prisoner to him. After the warder had sexually abused the young boy, he would hand him over to Mr Mohodi to do with him whatever he wanted to do. This is the disgusting relationship that existed between Mr Mohodi, the young Prisoners and Mr Mohanoe, the warder.

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 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.¹¹

The Commission has already addressed the wrongful conduct of the officials and made certain specific recommendations in its Interim Report, particularly regarding the criminal and Departmental charges that should follow. Specific recommendations were also made regarding the movement of young prisoners in the Prison and the fact that a register should be kept of the prisoners being moved around in order for the members to be accountable. It was clear in the

¹¹ See Fifth Interim Report for a more detailed account of all the sexual abuses and the number of witnesses that testified before the Commission.

cases dealt with in the Grootvlei matter that no proper record was kept when people were removed from their cells and taken to other cells. Without limiting their liberty of moving around in the Prison, it is essential that juvenile prisoners are at all times separated from the adult prisoners and the Department will have to take proper action to adhere to these rules.

5. PSYCHOLOGICAL SERVICE AVAILABLE TO SEXUALLY ABUSED VICTIMS IN PRISON

The Commission also heard the evidence of an expert in the Department, Dr Lorinda van der Bergh, the Director of Psychological Service for the Department, who was most helpful in her assessment of the Karp matter at Pretoria Prison. She generously gave her time to the Commission by not only testifying but also by observing a part of the hearing to determine the psychological impact of these abuses on a specific victim, namely Karp. A full detailed report from Dr Van der Bergh was handed in as an exhibit to the Commission.¹²

In outlining the Service available to sexually abused victims in Prison, Dr Van der Bergh testified that social and psychological Service had to be provided to prisoners in order to develop, support and promote their social functioning and mental health.¹³ Prisoners, particularly those who have been harmed or traumatised, can therefore utilise and benefit from any such support or psychological Service on offer.

Dr Van der Bergh indicated further that the Department also had to provide, as far as practicably possible, any other development and support programmes, which meet the specific needs of sentenced prisoners, which, regrettably, is the only category of prisoners who have the right to participate in such programmes.

¹² See Pretoria hearings, Exhibit “TT6”.

¹³ See sections 2 and 31 of the Correctional Services Act.

Understandably, due to the lack of manpower and resources, it is not always practical to address the needs of all prisoners. The Correctional Services Act does, however, attempt to alleviate the consequences of this difficulty by extending the responsibility of the Department to inform inmates of their rights regarding development and support Service that are available outside the Prison environment. The relevant provisions in the Act read that:

“When the Department does not provide such Service, the Commissioner must inform Prisoners of Service available from other sources and put Prisoners who request such Service in touch with the appropriate agencies.”¹⁴

The Act furthermore provides that every Prisoner has the right to be examined by a medical practitioner of his or her choice and, subject to the approval of the Head of Prison, may be treated by such practitioner, in which event the Prisoner is personally liable for the cost of such consultation, examination, service or treatment.¹⁵

From Dr Van der Bergh's testimony, it clear that the Department accepts that when trauma occurs in a Prison context, the affected prisoners are in the care of the Department and that accordingly, it is the responsibility of the Department to deliver support Service to such affected Prisoners.

In order to determine whether there was adherence to the Department's policies, it is important to consider the Service the Department should have provided to a victim, like Karp, who was sexually abused, and to compare that with the treatment actually received. The comparison will clearly indicate whether the Department really failed in its duty to assist the sexual victim.

¹⁴ See section 16(2) of Correctional Services Act.

¹⁵ See section 12(3) of the Correctional Services Act.

In carrying out this exercise, the Commission is again grateful for the expert opinion of Dr Van der Bergh, who assisted in drawing a comparison of the service that should have been offered and what was offered. The following extracts from her report are of relevance:

1. *“In the instance of Karp (or any other Prisoner in a similar situation), it is my opinion that it is the responsibility of the health care official (e.g. medical practitioner/nurse) who initially/first comes into contact with any Prisoner that has been sexually assaulted/sodomised/raped to refer the person to the psychologist/social worker immediately for counselling. If this is not done, the psychologist/social worker will be unaware of the incident or the Prisoner who might be in need of counselling.*

2. *There are a limited number of psychologists in the Department. Therefore, psychologists (if available) will only become aware of a need for counselling if:-*
 - 2.1 *The need is registered with them (by the medical practitioner, the head of the Prison, any other correctional official, professional, family member or friend)*
 - 2.2 *If a Prisoner/offender requests to see a psychologist himself/herself.*

3. *On the other hand, most Prisons have at least one social worker available that can attend to the counselling Service himself/herself or in turn refer the Prisoner to a psychologist.*

4. *It is evident from the information provided to me by the Jali Commission that Karp was severely traumatized while in Prison by Prisoners as well as correctional officials (“every time I think of it I*

feel a storm of fear, sadness and emptiness all over again'). (See par. 7 at page 3).¹⁶ The length of time involved – several months – already indicates that severe trauma occurred ('these four Prisoners raped me over a period of two months, regularly')(See par.12 at page 4). The trauma also included sexual harassment, victimisation, verbal or sexual abuse from officials as well as Prisoners. Being in close proximity to the rapist is also traumatising to any victim, which is confirmed by this Prisoner (See par.13.7 at page 10): 'it was a nightmare to look into his face every day'.

5. *Karp reported many incidents to various persons without success, e.g. Section Heads (see paragraphs 12.3, 12.10), Assistant Heads of Prison (see paragraph 12.10), Heads of Prison (see paragraph 12.4) and no one attended to her plight. In my opinion, the Department failed this Prisoner as she received no support, assistance or any referral to a professional (e.g. psychologist or social worker) or Independent Prison Visitor (see section 21(5) Correctional Services Act).*
6. *Even though Karp was examined by a District Surgeon and the injuries were confirmed (see par. 12.11), she was again not referred to a social worker or psychologist ("I received no counselling or any assistance in this regard")(See par. 12.11 at page 9).*

Dr van der Bergh also expressly gave the Commission her opinion as to the trauma suffered by the victim, Karp, whilst incarcerated. She also listed the following, which she thought severely impacted on the trauma Karp suffered:

1. *"Her safety and human dignity was not ensured;*

¹⁶ The excerpts quoted by Dr van der Bergh are from Karp's affidavit, which was handed in as an exhibit.

2. *Prisoners raped her over a period of two (2) months and she came face to face with her rapists on a daily basis, which was humiliating and a nightmare every day;*
3. *Totally unacceptable behaviour from Correctional officials who should have protected and supported her as this is their duty;*
4. *The disrespectful, degrading and de-humanising manner in which she was treated;*
5. *Extreme physical and verbal abuse, harassment and victimization;*
6. *The length of time during which these abuses and traumatic events occurred;*
7. *She was forced to participate against her will and was rendered helpless (she could not get away from it as she was in a confined and restricted Prison environment);*
8. *The lack of support from Departmental officials and particularly, authority figures;*
9. *The negative attitudes and unsympathetic manner in which the requests, needs and discomfort were managed;*
10. *The whole system.”*

Her concluding opinion was that she was in agreement with the evidence leader of the Commission that it was imperative that Karp should have received counselling and/or treatment for the trauma that was suffered and is still suffering. Ultimately, her view was that the authority figures that Karp contacted failed him during his incarceration.

It is clear that the distinction made between sentenced prisoners and unsentenced Prisoners, when it comes to the treatment programmes that prisoners can attend, operates to the extreme disadvantage of unsentenced prisoners in need of support. Karp, who was clearly in acute need of counselling and assistance to survive the sexual abuse and resultant trauma, was instead left unprotected to survive and deal with everything on his own. It is envisaged that

the Department will soon face court actions where awaiting trial prisoners will claim rights equal to those that sentenced Prisoners have.¹⁷

The testimony of Karp highlighted the fact that, even though the Department has many laudable programmes and policies aimed at making the Prison environment a humane and secure environment, it is most certainly the case that such policies are all likely to fail if committed and diligent staff do not implement them properly. Furthermore, much more should be done to see to it that there is a balance in dealing with sexually abused victims.

6. DEPARTMENT'S RESPONSE TO THE COMPLAINTS OF KARP

While the Commission was hearing evidence on the Karp matter, Mr S.J. Wilkins, who was the Provincial Head: Prison Service as at 13 March 2003, explained to the Commission how he, on behalf of the Department, had dealt with the complaints of Karp.¹⁸

From the evidence, however, it is clear that it was only once an article appeared in *Rooi Rose*, a weekly Afrikaans magazine, on 8 March 2003, in which Karp made certain allegations about the incarceration whilst still an awaiting trial prisoner at Pretoria Local Prison, that the Department reacted. Mr Wilkins'

¹⁷ See *Pretorious and Others v Minister of Correctional Services and Others* (2004) JOL 12496 (T) at par 38:

“Because a Prisoner awaiting trial is entitled to the full measure of his constitutional rights which are not lawfully restricted or invaded by his incarceration while his trial is being conducted, the applicants are entitled to as much of their right to privacy as may be retained by them beyond the terms of the court order which decrees that they must spend the better part of every day in solitary confinement. Instead, as unsentenced Prisoners, particular regard must be taken to respect the applicants’ dignity and privacy inasmuch as these can be accorded to them in their particular circumstances. Put differently, the order of court consigning them to solitary confinement pending the finalisation of their trial must be interpreted strictly and, in case of any doubt, restrictively.”

¹⁸ See his affidavit that was handed in and marked as Exhibit ‘TT3’.

version was that it was the Regional Commissioner of Correctional Services Gauteng, Mr Z.I. Modise, who gave specific instructions that contact should be made with Karp so as to enable the Department to institute an investigation into the allegations appearing in the magazine. After managing to get the contact details of Karp, he then requested Karp to come and see him with the view to commencing an investigation into the allegations.

The first meeting between the parties to discuss the matter and to agree on the way forward was held on 12 March 2003, in Mr Wilkins' office. Present at the meeting were Karp, Ms Wendy Isaacs, a representative of the Gay and Lesbian Equality Project, Mr Vosloo from the Office of the Provincial Commissioner and Mr Wilkins himself. Three (3) issues were identified for consideration and action at the meeting:

- Karp's needs of the Department's assistance to help overcome any fears;
- The incidents that occurred in Prison and the assistance of Karp to identify the alleged transgressors;
- A request, lodged by the Gay and Lesbian Equality Project, for the Department to assist other gay prisoners in Prison with similar problems to those of Karp.

As regards the first issue relating to Karp's needs, it was clear that psychological service were required and a follow-up HIV test and medication/treatment to deal with a skin disease, which was allegedly contracted in Prison as a result of malnutrition. Mr Wilkins' version was that the Regional Commissioner of Correctional Services had ruled that due to the fact that Karp was a self-confessed transgender homosexual, who acknowledged involvement in several relationships in this regard, the possibility was there that Karp might have contracted any disease relating to such relationships outside the Prison after his release from Prison. It was argued on behalf of the Department that by allowing Karp to go for an HIV test at the Department's expense, after Karp had left

Prison, would be an acknowledgment from the Department that, if tested positive, the disease was contracted in Prison. Consequently, the Regional Commissioner decided that the Department of Correctional Services could not be held responsible, at that stage, for any diseases Karp may have contracted and thus should Karp wish to institute a civil claim against the Department, he could do so.

During the meeting on 12 March 2003, it was also alleged that sores broke out all over Karp's body due to malnutrition in Prison but that he had been treated for such sores whilst still in the Prison. These sores initially went away, but returned after Karp's release from Prison. Mr Wilkins obtained the necessary consent and perused Karp's medical file whilst still in Prison. It appeared from the medical file that Karp had indeed complained, on 10 April 2002, about these sores. Karp was referred to a dermatologist, Dr Wentzel, but there was insufficient proof that the sores were as a result of malnutrition. It was therefore decided that the Department would not carry the burden of the medical treatment in this regard.

Mr Wilkins testified that he had informed Karp that he would try to acquire the assistance of a psychologist from the Department (at the community corrections office) with the view of assisting Karp to talk to a specialist regarding the trauma suffered. Mr Wilkins said that Karp, however, was not interested in such Service the Department might provide and insisted upon private Service at the expense of the Department. He furthermore alleged that since the allegations of Karp had not been investigated or tested in a court of law and that Karp still had to assist in an identification parade, a decision was taken to place this particular aspect on hold until such time that a more informed decision could be made.

As regards the incidents that occurred in Prison, Mr Wilkins' stated that he had received a copy of a letter setting out the allegations in full, but that he had requested Karp to provide the office with a full statement pertaining to the alleged ordeals in Prison. Mr Wilkins further pointed out that at a second meeting with Karp and Ms Isaacs, held on 17 March 2003, he reported that the member, Mr

Kramer, from Pretoria Local Prison, had been criminally charged with *crimen injuria* as a result of their previous inquiries. The South African Police Service had investigated the case but the Senior State Prosecutor had refused to proceed with the prosecution.¹⁹

As far as the criminal case of the alleged rape was concerned, Mr Wilkins advised that he informed Karp that the court case had been scheduled for 10 March 2003, in Court 62 of the District Court, Pretoria. However, the investigator from the South African Police, a certain Inspector A.H. Matthysen, had not followed the correct requisition procedures and the case was then struck off the roll until the South African Police Service had properly summoned the alleged perpetrator, Mr Oupa Pahla. Another meeting was held on the 18 March 2003, when Karp again visited the offices of the Provincial Commissioner with the sole purpose of submitting a sworn statement in which he set out the allegations perpetrated inside Prison.

Further to this, Mr Wilkins mentioned that criminal charges were laid against the two alleged transgressors and that the case pertaining to Mr Oupa Pahla was *sub judice*.

Mr Wilkins also brought the Commission's attention to the further steps he took within the Department to give attention to Karp's matter. He alleged that he had contacted the Acting Area Commissioner of the Pretoria Management Area, Mr P.J. P. Killian, on 18 March 2003, to inform him of the matter and requested Mr Killian to send someone to collect a copy of Karp's affidavit from his office. Mr Wilkins also arranged for the Pretoria management team to handle the matter and that the South African Police Service should arrange an identification parade to finalise the complaints Karp had made. Mr Wilkins stated that on 21 March 2003, he had informed Karp of his request to the Area Commissioner of Pretoria,

¹⁹ For reference see Pretoria Police Station Cas 1437/04/02.

to arrange for an identification parade in conjunction with the South African Police Service and that the police would contact Karp for further consultation.

From Mr Wilkins' evidence, it appeared that a further meeting was held on 7 April 2003, again at the Pretoria Management Area, at which meeting Mr Wilkins maintained that Karp indicated that psychologically he was not ready to attend an identification parade. Karp rather indicated that he required at least three (3) sessions with a psychologist from UNISA (University of South Africa), Dr Jean Nel, who is an expert with regard to gay and lesbian persons, before attending an identification parade. A request was also made at that meeting that subsequent consultations with the therapist should be arranged and again that such consultations should be at the expense of the Department of Correctional Services. Mr Wilkins said that the matter was discussed with the Regional Commissioner: Gauteng on 20 May 2003, who then indicated that the Department could not pay the requested Service as it would mean that the Department would, by such conduct, be admitting guilt to the alleged neglect without any formal investigations and subsequent hearings being conducted in the matter.

Mr Wilkins maintained that Karp was informed of the Regional Commissioner's decision and was requested to contact the office if he wished to participate in an identification parade without any conditions. It is unfortunate that copies of the letter and fax to Karp and to the Area Commissioner in Pretoria could not be found on the registration file, as they had apparently been misfiled. Hence, Mr Wilkins submitted to the Commission copies from his own computer, which were then included in his statement and marked as Annexure "SJW11".

An examination of the conduct of the various officials, particularly Mr Wilkins on behalf of the Department, shows ineptitude in dealing with the circumstances that caused the psychological harm. There was almost a disregard of the Prisoner's rights after the Prisoner's discharge. Mr Wilkins was at pains to explain that the

Department cannot be held accountable, even though all factors point to the fact that the Department never properly protected Karp nor attended to his pleas for help. Instead of rendering assistance, the Department was looking for a route to escape liability. Whilst it is not suggested that the Department should blindly accept liability in each and every case, it is a reasonable expectation that the Department should apply its mind to the merits of each case with a sense of responsibility and fairness.

7. OTHER SEXUAL ABUSES AT PRETORIA PRISON

The Commission also heard the evidence of Mr Jacob Johannes Maartens, who testified that he was detained at the Pretoria Local Prison in June or July 2000 and that, soon after his detention, he was raped by another Prisoner, a certain Oscar, who was the cleaner of the cell where he was staying. He further stated that different Prisoners also raped him on numerous other occasions. He testified that he complained to the Head of the Prison, Mr Baloyi, regarding these traumatic experiences and had requested that he be placed in single cells so as to receive some protection during his detention. His request, however, was not granted.

Although Mr Maartens was quite vague as regards the incidents of sexual abuse that he related to the Commission, it was clear that he suffered immense psychological trauma due to the incidents that happened to him. Warders specifically indicated by Mr Maartens were Mr Richard Freddy Makanye, who used to request Prisoners to pay for the use of the phone, and Mr Malisa, who did not consent to his request to be again moved from the 'C' section to the Court cells in 'B' section. However, other than these two warders and also the Head of Prison, Mr Baloyi, Mr Maartens could not directly implicate any other individual. This, however, did not diminish his testimony when he referred to specific incidents of sexual violence.

Mr Maartens was challenged in cross-examination regarding the fact that his memory of some of the incidents appeared to be much better in the witness stand than it had been in the past. The Commission needed to consider whether the defence's contention that what he was stating in the witness stand was a fabrication or whether Mr Maartens, due to the immense stress that he was subjected to, had suffered trauma that could have impacted on his memory. The Commission requested a psychological report from the Chief Psychologist, Dr L Van der Bergh, to be compiled, which was ultimately handed in and marked Exhibit 'UU1'. In her report, Dr Van der Bergh dealt with the fact that someone like Mr Maartens, who has been subjected to severe trauma and who suffers post-traumatic stress, will be prone to suffer from depression and anxiety and that common symptoms resulting from this would be a failing memory, difficulty in concentrating, emotional stability, headaches and vertigo.

Furthermore, she added that it was evident, from the information that was provided to her, that Mr Maartens was severely traumatised whilst in Prison by both prisoners and correctional officials. This has led to post-traumatic stress disorder, which debilitated him and resulted in extreme emotional distress. She recommended that Mr Maartens be referred for:

- *“HIV testing with pre- and post-test counselling as this is a huge concern following the many rape incidents in Prisons by several persons;*
- *Treatment for PTSD (psychotherapeutic, family therapy and trauma counselling) at a centre where they might be able to assist him by involving him in a support group which would allow him to meet and share with other sufferers of PTSD their common experiences and to learn coping techniques and strategies. In this regard referral of Mr Maartens to the following organization could be recommended:*
 - *The Wits Trauma Clinic (Johannesburg)*

- *The Depression and Anxiety Support Group (Johannesburg) – where medical and counselling Service are available*
- *Any Non-Governmental Organization who deals with such persons in his immediate environment.”*

Dr Van der Bergh stated in her report that if Mr Maartens did not receive the recommended treatment, the prognosis for his future would be poor. He appeared to have very limited coping skills and there were no support structures in his immediate environment. He had already tried to commit suicide three (3) times. The lack of adequate treatment would only heighten the bleak outlook on his future, which in turn would only increase the risk of him again attempting to inflict harm on himself.

8. POLICE INVESTIGATIONS

The Karp matter also brought to the fore how the police investigate criminal offences committed within the Prison environment. Karp insisted that a charge had been laid of *crimen injuria* against a member, Mr Kramer, who had impaired Karp's dignity with some utterings. He also laid a charge of rape and, at the time of testifying, Karp had no idea what had happened to either charge and was indignant that no proper attention had been given to these charges. The officers who handled the matters were Director van Zyl and Inspectors Steyn and Gerber of the Pretoria Local Police Station, who investigated the *crimen injuria* and rape charges.

Regarding the first charge, it is clear that, on 4 July 2002, the Prosecutor at Pretoria Magistrate's Court decided not to prosecute Mr Kramer on the charge of *crimen injuria* since there was insufficient evidence. The suspect received notice that the matter would not be proceeding before the criminal court but the

complainant in this case, Karp, never received such notification.²⁰ It is clear that victims inside a Prison have to rely on the authorities to notify them whilst victims outside Prison are directly informed of the outcome of their complaints. Victims inside Prison are already disadvantaged in the manner in which their matters are investigated and should be properly informed.

When the Commission examined the charge of rape,²¹ it was found that there is an indication on the cover sheet of the docket that was handed in as an Exhibit that it was struck off the roll because the accused was not properly brought before court.²² The police officers were asked to explain their role in the criminal matter and most of them elected to testify. Based on their testimony, the Commission cannot make a finding that the officers were negligent or failed in their duty. Despite such findings, there are certain issues that raised concern regarding investigations that the police do in the Prison environment. It was the testimony of Mr Gerber that they have to share offices with the investigators of the Department and that there is no separate facility for them where they can do their investigations at the Prison. This state of affairs is unacceptable for the following reasons:

- a) The officers can never conduct an investigation freely without interference because the complainants are inside the secure environment and complaints can therefore only be brought to the police officers with the co-operation of the Department.
- b) The investigations can hardly be done in confidence because of the required co-operation of the Correctional Services members in bringing and taking complainants to the police.
- c) Most importantly, it is very problematic if a complainant lays a charge against a member. There is ample opportunity and time for intimidation

²⁰ The reference of the case is Pretoria Central MAS No. 437/04/2002.

²¹ The reference is Pretoria Central MAS No. 789/11/2002.

²² See Exhibit 'TT4', page 7.

and interference in the criminal matter because the Department and the South African Police Service function independently from each other.

In fact, in another matter the Commission heard,²³ the Head of the Emergency Support Team, who assisted in the investigations at the Prison, stated that they consider themselves as working hand-in-hand with the police when investigations are done. He also said that co-operation needs to exist between the Department and the South African Police Service when criminal investigations are carried out against members of the Department. It is therefore clear that members of the Department see themselves as part of the investigation team of the South African Police and that such a relationship is not conducive to combating crime in the Prisons, particularly when the members of the Department are the perpetrators of crime.

It is plain to see that this situation is untenable. It gives the members of the Department of Correctional Services the advantage of interfering, coercing and intimidating witnesses when matters are investigated against them and at the same time, many acts of corruption, assault and criminal transgression are not reported because the person reporting such corruption will not be protected as a result of his or her exposure to the greater personnel working in the Department.

Therefore, complainants, who do complain about the conduct of Correctional Services members, are certainly not in a position to do so in confidence to the South African Police Service. The police, on the other hand, are also hampered in their investigations because they cannot investigate, without making it known to the personnel of the Department, whom they are investigating and who the complainant in the matter is. The successful completion of these investigations becomes virtually impossible and justice is seldom done due to the limited access of the police to the Prison.

²³ The matter concerned a member of the Johannesburg Prison, a Mr Thloloe, who was implicated in aiding in escapes.

In demonstrating this point, the Commission has requested that charges laid against members of the Department and reported to Pretoria Central Police Station, are handed in so that a proper analysis can be made of the information received. Before going into that analysis, it is necessary to say that the investigations seldom result in successful prosecutions or in being brought before a court of law. Most cases are stopped even before they get to the criminal courts, either because there is insufficient evidence or because matters are not properly investigated due to police having fettered and hampered access to the Prisons, which does not enable a proper investigation into criminal cases.

Pursuant to the Commission's request that all the matters that Pretoria Central Police investigated in 2003 should be handed to the Commission to determine objectively how many of these matters resulted in successful prosecutions or were withdrawn etc., a copy of this was handed in, through an affidavit made by a senior member of the South African Police Service, who obtained a computer printout of all the cases reported at the Prison in 2003.

An analysis of all the cases prisoners had reported to the Pretoria Central Police Station in 2003 reflected that 92% of all the cases were withdrawn while about 7% resulted in being on the court roll, some of which were not finalised at the time of writing this report. It was, however, envisaged that given the general statistics of the successes of the criminal justice system, it is very likely that only 50% of the 7,07% would result in the conviction and sentence of the offender.²⁴

Pursuant to the outcome of the Pretoria statistics, the Commission decided to obtain statistics from three (3) other Police Stations that serviced the area in

²⁴ The statistics were based on the information submitted to the Commission by the South African Police Service as contained in Exhibit 'PT17', which indicated that 531 cases were reported to the Pretoria Central Police Station and that 490 cases ended up being either withdrawn or untraceable or struck from the roll. As for the rest, 41 cases ended up before court and resulted either in finalisation, where some people were acquitted or convicted, or, as in the majority of cases, were still pending and being remanded.

which there are three other Prisons, namely Kirstenhof Police Station, Prestbury Police Station and Mondeor Police Station, dealing with all reported cases of Pollsmoor Prison, Pietermaritzburg Prison and Johannesburg Prison respectively.

In 2003 in Pollsmoor Prison, three (3) rape cases were reported as well as two (2) cases of indecent assault. The total number of cases reported from Pollsmoor was one hundred and twelve (112). From this total, 34% were withdrawn while 33% were “undetected”.²⁵ Of the twenty (20) reported cases in which the suspects were warders, 10% were cases of rape. Prisoners were suspects in the cases of indecent assault. With regard to the rape cases, one warder was found guilty and sentenced to six (6) years imprisonment, while two (2) cases, one against a warder and another against a Prisoner, were withdrawn. It should be noted that in 2004, when the Commission did the investigation, there was only one policeman at the Kirstenhof Police Station assigned to investigate all cases emanating from Pollsmoor Prison.

The statistics from the New Pietermaritzburg Prison show that one (1) sodomy case against a prisoner was reported to the Prestbury Police Station, which serves the whole of Pietermaritzburg Prison. In total, sixty nine (69) charges were laid in 2003. Twenty two (22) cases involving warders were all cases of assault, 41% of these were assault with the intent to do grievous bodily harm and the rest assault common. The outcomes of these complaints were that the prosecution withdrew 36% while complainants withdrew 14% and 7,25% (five cases) resulted in convictions and were successfully finalised.

Although Mondeor Police Station also provided the Commission with statistics, the statistics did not reveal the names of the suspects or whether the Department employs them. In fact, no indication was given whether the suspects were

²⁵ This is a general term used by the Police to convey that the crime is not solved, due to either the suspect not being known or traceable or in some other way it is not detectable.

warders or prisoners. Of the two hundred and sixteen (216) cases reported in 2003, 78% of the suspects were unknown. Of the cases reported, 31% were assault common, 19% were theft, two (2) cases were sodomy, two (2) rapes and one (1) attempted rape. At the time the police provided the information to the Commission, the suspect had been identified in both rape cases but the cases were still under investigation, while the one sodomy case had been withdrawn and the other sodomy investigation was closed as “undetected”.

The statistics the Commission obtained relating to crimes committed on Prison premises show that the number of successfully prosecuted cases are extremely low. This is a reflection on both the functioning of the police Service in an environment like the Prison and the functioning of the criminal justice system as a whole.

It shows that criminal investigations in Prisons are extremely problematic and, further, that there is no incentive for victims to report any crime committed in a Prison, be it corruption at the highest level or abuse, because it is unlikely that the matter will be successfully prosecuted and the risks are higher for the victim to complain than not to complain. The discussion and analysis above of the statistics of the four (4) Police Stations servicing the Prisons reveal a shockingly low success rate of detection of crime and prosecution. Most of the crimes committed in the Prisons end up being closed and filed by the police as “undetected”.²⁶

This brings the Commission therefore to the conclusion that, unless something is done in the immediate future to address the problem, Prisons will continue to be fertile ground for criminals to commit crimes with impunity. If an environment

²⁶ The reasons for this could either be that the victims fear to report the crime, knowing that such complaint will expose them, or, if they do complain to the police, that the police are hampered in their investigation because they have to rely on the Department to get access to the complainant or permission to investigate the premises.

prevails where more crimes are committed inside Prison than outside, then the whole aim of transforming or rehabilitating Prisoners is *per se* defied.

9. SUBMISSIONS MADE TO THE COMMISSION BY NON-GOVERNMENTAL ORGANISATIONS

During the sexual violence hearings in Pretoria, the Commission also received submissions from the following non-governmental organisations:

- the Treatment Action Company (TAC);
- the Lesbian and Gay Equality Project;
- OUT (previously the Gay and Lesbian Organisation – Pretoria), and,
- the AIDS Law Project of the University of Witwatersrand.

All four of these organisations testified before the Commission and submitted documentary evidence to the Commission.²⁷

On behalf of the AIDS Law Project and the TAC, Mr Yusuf Saloojee testified before the Commission and explained their interest in the hearings regarding the sexual offences committed against Prisoners. In short, Mr Saloojee, on behalf of the two organisations, testified that they viewed their submission as important because HIV/Aids exacerbates the existing problems in Prisons. He said Prisons are an intervention opportunity to reach a segment of the population most likely to need government Service related to HIV/Aids but is also least likely to receive them through any other channel.

It was their submission that, without an appropriate response to HIV/Aids in Prisons, the potential consequences will be increasingly tragic for both Prisoners and the communities they represent. Prisoners are most likely to come from a

²⁷ For the formal submissions made to the Commission see Exhibits ‘KKK’ and ‘LLL’.

group made up of young, unemployed or uneducated black males and many of the socio-economic factors already place these individuals at high risk of contracting HIV/Aids.

According to them, a substantial proportion of prisoners will have HIV/Aids even at the time of entering the Prison. Once inside the Prison, which is a closed environment, there is high-risk behaviour for transmitting HIV/Aids, which includes sexual assaults, high-risk sexual encounters, same sex intercourse, tattooing and the use of contaminated instruments. It is generally accepted that conditions of overcrowding, stress and malnutrition compromise the health and safety of all the inmates and particularly those living with HIV or Aids.

Very importantly, the focus of this group was on the existing policies of the Department to deal with HIV/Aids, criticism of these policies and the evidence of senior personnel in the Department that deal with HIV/Aids. As stated by these organisations, the recommended HIV/Aids policies will accomplish very little in the absence of basic Prison management. Overcrowding has adversely affected Prison conditions to the point that they are inhumane and unconstitutional and anyone who visits a Prison or otherwise knows about the situation, has the right to be outraged. However, the demand for action must be correctly directed, as the Department does not determine the size of the Prison population.

It has been said earlier in this Chapter that the transmission of HIV poses a major challenge for the Department because prisoners do not remain incarcerated and therefore conditions affecting them will flow into the society at large. The Commission will now quote from the submission of Mr Saloojee, which cannot be faulted in any way and which clearly puts the problem of the Department in context:

“There are approximately 188 000 Prisoners incarcerated in South African Prisons at this time. However, this does not mean that 188 000 criminals are locked away, isolated from the public, and unable to impact on the

lives of those in the general community. Over 40% of Prisoners are incarcerated for two years or less; only two percent are serving life sentences. On average, more than 50 000 people are released from South Africa's Prisons and jails each month. During 2004, nearly 400 000 former Prisoners returned to the community. If their illnesses or infections are not properly treated whilst in Prison, the Prisoners will return with these to their communities and may constitute a health risk. The greatest concern should not be directed at the risk of HIV transmission inside of Prison, but a potential impact of former Prisoners living with HIV outside of Prison. As heard before, the prevention of HIV transmission in Prison has more to do with improving Prison conditions in general by specifically addressing HIV. One cannot ignore, as has been submitted to the Commission, that overcrowding, corruption and gangs are the primary culprits behind sexual violence in Prisons and that this environment is horrifying even without the risk of HIV infection. Security and the provision of safe custody therefore should be a priority for the Department. No society would accept that Prison is necessarily a brutal environment. If a Prison is intrinsically and inevitably violent then the necessary course of action is to change the institution. Therefore policy to address HIV transmission in the Prison cannot be effective without immediate and urgent Prison reforms.

It has been argued that the prevailing causes or reasons for transmission of HIV in the Prison environment are high-risk sexual activity, sexual assault and contaminated needles or other cutting instruments. In the context of determining HIV transmission, the difference between sexual activity in Prison and in the general population is significant. Three (3) aspects of sexual activity inside the Prison make it a higher risk for transmission. These are: anal intercourse, rape and sexually transmitted infections (STIs).

Anal intercourse and sexual assault often result in tearing, which creates a high risk of HIV transmission. In addition, a common characteristic of a Prisoner's

background is the history of STI. The risk of transmission and acquisition of HIV is greater amongst individuals with an STI. The probability of transmission of HIV from anal intercourse is much higher for the receptive partner than the insertive partner because the acceptance of the semen into the rectum allows for prolonged contact with mucus membranes. Unprotected receptive anal intercourse carries the highest probability of infection, at 0,5% to 3%. In comparison, the probability of infection for a man participating in unprotected intercourse with a woman living with HIV, is 0,033% to 0,1%. Comparisons of transmission probabilities between sexual behaviour sometimes yield conflicting results; yet one maxim remains true throughout research to date:

“It is clear that unprotected anal intercourse has the highest potential for transmitting the virus.”

The submission submitted to the Commission very much corresponds with the evidence heard by the Commission:

“Of particular interest was the interviewees’ explanation of sex as a currency in Prison.”

If a person is poor and does not have any money, he will not be able to buy influence or protection within the Prison gang system. His only option is to agree to be the passive partner of another prisoner with power or money in order to obtain his protection and influence.

The *Mail and Guardian* carried the story of a fifteen (15) year old boy who:

“for protection in the lethal environment of the Prison gang network eventually became the ‘tronkmaat’ (sex slave) of a bigger, stronger gang member”.

The submission corresponds with the testimonies of other witnesses on the same topic, namely, that Prisoners, particularly first time offenders, are at the greatest risk of being designated as “women” or “wyfies”. It is common knowledge that in these “marriages”, the man essentially owns the “woman”, whose sole purpose is to submit to sex and provide material comforts or basic necessities, such as food or blankets.²⁸ This is also very much illustrated by the evidence of Karp and that of Kenneth Busakwe, who testified about the sexual exploitations they experienced.

The Aids Law Project and the TAC also again brought to the Commission’s attention that gangs, corruption and overcrowding increased the potential for sexual violence and victimisation in the Prison environment, precisely because Prison warders participate in the buying and selling of sex slaves and augment their income with such sales. Warders also have immense power because they can refuse to report the complaint made to them and can control a prisoner’s access to psychological and medical Service. The cases of the Pretoria sexual victims clearly illustrated how vulnerable and dependent prisoners are on warders for access to psychological and medical attention. The conduct of the warders that dealt with Karp’s case clearly demonstrated an indifference to sexual assault and the trauma victims suffer.

It cannot be ignored, however, that overcrowding leads to high-risk behaviour and that the increasing scarcity of simple items, such as blankets and shoes, result in them being used as commodities that can be exchanged for sexual favours. In their submission, the Aids Law Project highlighted that prisoners complained to them that in some cells there are fewer beds than there are Prisoners. It is therefore not surprising that sharing a bed with another prisoner will lead to sexual exploitation in exchange for the privilege of having a bed to

²⁸ Also see the Chapter on Gangs, discussing the different roles of men, particularly those belonging to the 28 gang.

sleep in. The only other option for some prisoners is to sleep in the showers or toilets since sometimes even floor space is not available.

It has been submitted to the Commission that the Department does not know the real HIV/Aids prevalence rate in Prisons. In its submission, the Aids Law Project together with the TAC, informed the Commission about the Westville report, which presented the results of a study conducted on the nature and extent of HIV prevalence at Westville Medium 'B' Prison, a maximum security Prison in KwaZulu-Natal. It was stated that from January – April 2001, a team of researchers led by Heard, in conjunction with the Medical Research Council (MRC), collected urine samples from two hundred and seventy one (271) prisoners for anonymous, unlinked HIV tests. The samples were connected to a survey questionnaire, which included questions on age, race, income, education and criminal activity, as well as high-risk behaviour both prior to and during incarceration.

In addition to this data collected from the prisoners, a series of interviews were conducted with Prison management staff as well as Department officials, relevant NGO's and academics.

9.1 Department's Response to the Westville Research

In order to understand the Department's response submitted to the Commission, it is necessary to quote, in full, from the submission of Mr Saloojee:²⁹

“Prior to commencing the research, the Department of Correctional Services (DCS) required the study co-ordinator to sign a contract agreeing not to release the results without prior approval from DCS. During the latter half of 2001, with the assistance of funding from the Ford Foundation, the findings of the study were compiled in a report entitled

²⁹ See exhibit 'JJ' at page 22.

“HIV/AIDS at WMB: An Analysis of Prevalence and Policy. The research team was invited to present the findings at a research workshop, attended by the DCS National Commissioner, Linda Mti, and approximately 30 other high level DCS officials in Pretoria on 14 May 2002.

The following week, Judge Fagan referred to the findings of the Westville report in his presentation to the Parliamentary Portfolio Committee for Correctional Services. When newspapers ran headlines with the Judge’s estimate that HIV prevalence could be as high as 60% in Prisons, DCS immediately distanced itself from the estimated figure and the Judge was called to report back to the committee to provide further explanation. On the same day that a copy of the Westville report was given to committee chairman, Mr Ntshikiwane Mashimbye, the primary author received a fax from Commissioner Mti prohibiting release of the report into the public domain until seven “concerns” were resolved. The following week, on 28 May 2002, Judge Fagan apologized to the portfolio committee, explaining that his 60% HIV prevalence statistic was “a guesstimate, which was not intended to be taken as a scientific fact.”³⁰

In a press conference later that day, Commissioner Mti said the report from the Westville study was confidential and that the Department was seriously questioning much of its content. “The Judge found himself vulnerable to an unscrupulous NGO with a particular agenda (to obtain more funding). Let us forgive him,” Commissioner Mti said.³¹ A few days earlier, DCS Communications Director, Luzuko Jacobs, released an official statement, which criticized the Judge for disclosing such information and also told the press that there had never been a prevalence survey conducted in Prisons.³²

³⁰ South African Press Association: 28 May 2002.

³¹ South African Press Association: 28 May 2002.

³² BuaNews: 24 May 2002.

The researchers of the Westville study wrote a detailed response to the seven concerns presented in Commissioner Mti's fax, but received no further communication from the Commissioner or the Department regarding publication of the findings. The research team also requested an opportunity to present, and defend, the findings of the report to the parliamentary committee but this request was refused. ANC MP and chairman, Mr Mashimbye, explained that the report was intended for the Commissioner and thus presentation to the committee would be "inappropriate".

A few weeks after the Commissioner specifically prohibited the release of the report, Special Assignment aired an expose of corruption at the Grootvlei Prison in Bloemfontein. Less than a week later, Commissioner Mti then declared a three-month moratorium on all Prison research. The last directive received from the Commissioner regarding the Westville report was a command to remove any and all reference to the possibility of future research, particularly any statements about the need for a study of a selection of several Prisons across the country. Almost two years later, the findings of the Westville report, the only study ever conducted on HIV prevalence in a South African Prison, remains under embargo by DCS. Any and all publications that draw from the data must be first submitted to DCS for review. The actual report is considered the property of DCS and cannot be released into the public domain without DCS approval."

In comparison to the statistics submitted by the researchers of the Durban/Westville Prison, the Aids Law Project and TAC also cited the statistics kept by the Department of Correctional Services.

9.2 Department's Aids Statistics

The Department of Correctional Services includes statistics on HIV/Aids in the Prisons annual report. However, these statistics only reflect on the reported cases from the Health Service at each Prison and are not considered reliable. The Department statistics underestimate the extent of HIV infection because reporting is inconsistent and often Aids related deaths are recorded only as TB or pneumonia. According to the Department's 1999 annual report, there were 2 600 registered HIV positive cases, one hundred and thirty six (136) Prisoners with Aids and 2 897 new cases of TB as of 31 December 1999.

This translates into an HIV prevalence rate of 1,6% and an Aids prevalence of 0,08%. It is clear that the Department's statistics have underestimated HIV prevalence in South African Prisons.

9.3 Lesbian and Gay Equality Project Presentation

The Commission heard the evidence of Mr Evert Knoesen, who made submissions on behalf of the Lesbian and Gay Equality Project (hereinafter referred to as the "Equality Project"). It is a non-profit, non-governmental organisation that works towards achieving full legal and social equality for lesbian, gay, bi-sexual, transgender and transsexual people in South Africa. Mr Knoesen submitted that part of the aim of the organisation is to affirm that lesbian and gay rights are human rights, which does not mean claiming new or special rights. What it means, in their view, is to demand that everyone, regardless of sexual orientation, is guaranteed the fullest enjoyment of their civil, political, social, economic and cultural rights.

The Lesbian and Gay Equality Project also submitted an expert opinion to the Commission that was received after the oral hearings were finished. A qualified psychologist working at UNISA's Centre for Applied Psychology, Mr Juan A. Nel,

drafted this opinion. Mr Nel is a qualified expert in Clinical and Research Psychology and he obtained his qualifications at the University of Pretoria.

Considering that he is a member of many different organisations and societies,³³ it is clear that Mr Nel is capable and competent to give an opinion regarding how gay, lesbian and transsexual people are to be treated. He could also proffer an opinion regarding the treatment of such people within the Prison system. He used the case of Karp as a backdrop to the recommendations he made:

“that Prison warders and managers need to understand that even though they do not necessarily agree with the homosexual lifestyle or unconventional gender presentations, that they have a duty and a responsibility as custodians of the state to afford LGBTI persons fair, equal and proper treatment within Correctional facilities; it’s been conceded that Correctional staff have their own values concerning certain issues regarding sexual orientations. However, they ought to be accurately informed of stereotypes and provided with the necessary training opportunities to develop skills in working with people whose values differ from theirs. A Prison culture respectful of diversity should also be encouraged amongst inmates.”

It is his view that sexual behaviour commonly occurs in a Prison environment, be it voluntarily or involuntarily. South Africa is obliged to subscribe to the rights contained in the Sexual Health Charter and is therefore obliged to ensure that the sexual rights of all persons, including those in Correctional facilities, are

³³ In his submission he stated his experiences as follows, namely: that for nine (9) years he has been an activist and “out gay psychologist” conducting voluntary work in several organisations and structures in South Africa. Mr Nel has played a leadership role in the UNISA Sexual Orientation Forum. He was the Chairperson from 1997 until 1998, the Gauteng Coalition for Gay and Lesbian Equality Chairperson in 1997, Pretoria Gay and Lesbian Forum Chairperson in 1998 and 1999 and Gay and Lesbian Organisation – Pretoria (GLO-P), now named OUTLGBT, Chairperson from 1997 until 2000 and a Board Member since 2001.

respected, protected and fulfilled. Mr Nel is of the opinion that sexual education through information, skills building and values clarification will enable prisoners to make choices about their sexuality and to take charge of their sexual lives. Respect for bodily integrity (security in, and control over, one's body) and consensual sexual relations are rights that those in the custody of the state must be guaranteed.³⁴

Furthermore, he considers, as an urgent priority, that policy makers and service providers within Correctional Services should enhance their understanding and awareness of the plight of sexual victims. Similarly, he argues that preventative measures for all should be prioritised, such as providing protection to effeminate male Prisoners, irrespective of their sexual orientation, as research indicates that they are at greater risk of sexual abuse and victimisation. Once more, his view

³⁴ More recently the Office of the Inspecting Judge also argued that if sexual activity inside the Prison cannot be policed then “there is a need to control/regulate sex and proper steps must be taken towards a progressive realisation of a controlled sexual climate”- See “Prison Sex Okay”, <http://iol.funnel.co.za> accessed on 22 March 2005. Since this Chapter deals with sexual abuse, the Commission will refrain from commenting on conjugal rights, since it falls within the realm of rights of Prisoners and will only be relevant to the discussion if it is suggested that conjugal rights will deter or combat sexual violence in Prison. In order to come to such a conclusion, empirical research would be required, which was not put before the Commission.

Also see “Prisoners have no right to have sex, says Balfour’ – *The Mercury*, 31 March 2005.

On a comparative note see D v Zyl Smit and Frieden Dünkel “ImPrisonment Today and Tomorrow” where the authors state the following regarding such spousal visits in other countries on page 837:

“In Russia there is a long tradition of such visits. In Spain the 1979 Prison Act determined that special apartments must be provided for Prisoners who are not yet entitled to furloughs, to enable them to spend time with their spouse (or cohabiter) and children. In Denmark, the Netherlands, Sweden and Switzerland several Prisons also have similar facilities for visits by family members, over weekends for example. The same is true in India and many Latin American countries. As a result of increasing the number of longer visits that allow for heterosexual contact the incidence of violent sexual crime in Spanish Prisons has been significantly reduced. It should be emphasized that the concern here is not only with allowing sexual contact, but also with creating the opportunity for interpersonal contacts, which are consonant with human dignity and that encourage constructive relationships between Prisoners and persons close to them”

underlines the fact that useful and good-looking men and women are most at risk of sexual abuse while “out” gay males are prime victims of harassment and hate speech. The prevention of repeated victimisation and perpetration of abuse against these individuals should receive priority with the policy makers.

Furthermore, the in-service education and training of healthcare professionals, namely medical practitioners, nurses, social workers and psychologists within Correctional Services will ensure that the health needs of LGBTI Prisoners are also addressed. At the very least, training sessions should be scheduled to introduce these guidelines for psychotherapy with lesbian, gay and bisexual clients and the GBIGDA standards of care for transsexuals to the healthcare professionals. It is his view that this kind of sensitisation and education of medical professionals can be dealt with in workshops and by introducing them to lesbian and gay problems.

Like many others, he understands that the low number of psychologists in the Department obviously limits the amount of psychological help that can be given to victims of sexual abuse. At the end of this Chapter, the Commission will consider the views of Mr Nel on behalf of the Equality Project.

10. DUTY OF PRISON OFFICIALS TO PROTECT PRISONERS AND TO CONTROL THE SPREAD OF AIDS AND OTHER INFECTIOUS DISEASES

It has been said throughout this Chapter that Prison officials have a duty to protect prisoners, including those who have different sexual orientations, from victimisation and sexual violence in Prisons. So when Prison officials ignore prisoners’ cries for protection, there is very little that can be done for them, except protection offered by the Courts. The Commission thought it would be wise, under the circumstances, to look at the situation of sexual violence in

Prisons elsewhere, particularly in the United States, since there are no examples from South Africa.

It is apparent that when officials in the United States do not render the necessary protection, prisoners who are being victimised turn to the judiciary. They claim protection, particularly under the eighth amendment, which prohibits cruel and unusual punishment.

The Supreme Court of the United States, in *Farmer v Brennan*,³⁵ held that Prison officials have a duty to protect inmates from sexual assault at the hands of other prisoners. In response, the Massachusetts State Department of Correction then enacted reforms intended to decrease Prison rape.³⁶ In line with this duty of care, a landmark decision was handed down in the United States in *Estelle v Gamble*.³⁷ The Supreme Court of the United States recognised that certain Prison conditions might violate the Eighth Amendment, particularly when Prisons do not provide adequate medical care to prisoners. This adequate medical care in the South African context should be seen in the light of medical care post sexual violence and rapes in Prison. In the same decision, the Court established that the constitutional standard of care required Prison officials to care for the medical needs of America's incarcerated prisoners, including taking reasonable steps to control and prevent the spread of HIV and Aids. In *Helling v McKinn*³⁸, the Supreme Court reaffirmed the Prison officials' Eighth Amendment duty to protect inmates from the spread of serious communicable diseases. This case is important because it deals with the issue that if officials fail in their duty to render the necessary medical care and protection to prisoners, they would then be contributing to the spread of HIV and Aids.

³⁵ 511 US 825 (1994).

³⁶ See Charles M. Senate, "Prison Systems enacted reforms to stop inmate rape", Boston Globe, 9 November 1994 at page 37 (discussing State Prison Official's reactive measures taken in response to Boston Globe's Prison Rape Articles.)

³⁷ 429 US 97 (1976).

³⁸ 509 US 25 (1993).

The case of *Farmer* is of particular importance, since the facts are so similar to the issues that were dealt with in the matter of Karp. Farmer, a transsexual inmate, was allegedly raped by a fellow prisoner and claimed that the Prison officials failed in their duty to protect him. It was demonstrated that there was deliberate indifference in placing Farmer in the general population of the Maximum Security Prison for males. Farmer alleged that the officials knew that the Prison had violent inmates with histories of inmate assaults and that Farmer was particularly vulnerable to an attack because of being a transsexual. Importantly, the case focused on the duty of officials, where it is made known to them that someone has a particular appearance and where it is likely that someone might attract the attention of the other male inmates that they should try to minimise the risk of that inmate being sexually assaulted. Also of importance was that the Courts found that the Prison officials deliberately acted indifferently to the prisoner's safety by utilising open dormitories or barrack style cells that inevitably heighten the risk of violent assaults. It has been suggested that isolating prisoners, who are obvious victims, is a better way of dealing with this problem.

This brings the Commission to another point, which was discussed earlier, that awaiting trial detainees do not enjoy the same rights as sentenced prisoners. In fact, awaiting trial detainees, as Dr Van der Bergh has emphasised, have no rights to claim under the current dispensation. As said earlier, it is only awaiting trial prisoners who retain their right to be presumed innocent and, if we look comparatively at the situation, then it appears that, even in the United States, the Courts have held that pre-trial detainees are entitled to a higher level of protection than the amount of protection afforded to convicted Prisoners under the Eighth Amendment.³⁹

³⁹ See *Inmates of Suffolk County Jail v Eisenstadt*, 360 F. Supp. 676, 686 (D.Mass.1973).

11. FINDINGS

It is clear from the discussion in this Chapter that sexual violence is rife in South African Prisons and that something drastic should be done to address the challenges that this poses for the Department. It is also evident, from the evidence of Karp and the other victims that testified before the Commission, that there are severe shortcomings in the system, particularly relating to the treatment meted out to awaiting trial prisoners.

Besides all the specific incidents that relate to Karp and the others, there are also some general findings that the Commission can make, namely, that Heads of Prison clearly use, and abuse, confinement in isolation as punishment.⁴⁰

The Department has also failed sexual victims in not implementing its own policies that relate to the assistance that should be rendered to them as well as the psychological service that should be available.

The conduct of the Head of Prison, Mr Baloyi, also showed that he abused his power in the manner in which he dealt with the Karp matter and is clearly not competent to run a Prison like Pretoria.

It is evident from the testimony, as well as the experiences of the different individuals, that it is not the Department's policies that are at fault but that the implementation of the policies leaves much to be desired. It is imperative that systems are put in place to deal with the shortcomings in communicating these policies and, furthermore, that procedures are designed to implement those policies and proper monitoring mechanisms are activated.

⁴⁰ See Chapter on Treatment of Prisoners for more details on segregation and solitary confinement.

It has also been found that some of the Department's actions, in certain respects, show a disregard for the rights of unsentenced prisoners because it appears that the Department is not sensitive to court orders and decisions. Considering the lack of Service for unsentenced prisoners that are raped, particularly counselling Service, the Department is ignoring the decision of the Supreme Court of Appeals⁴¹ where the court held that unsentenced prisoners may not be subject to a privilege system that places them in a worse position than sentenced prisoners, particularly if *"there is a substantial part of the Prison population that spends a lengthy period of time waiting for their trials to commence or be finalised"*.⁴²

The Commission is fully mindful of the fact that other factors also have an impact on the awaiting trial Prison population. The relatively new bail laws, which limit the circumstances under which an accused person can be released on bail, certainly contribute to the high number of accused persons languishing in the awaiting trial section of our Prisons. Furthermore, the renewed minimum sentence legislation also impacts negatively in that many prisoners who have been convicted in the regional courts on serious charges have to wait extraordinarily long periods for High Court dates before they are sentenced. All such unsentenced prisoners during this waiting period retain the status of awaiting trial prisoners and, accordingly, cannot claim any rights that protect and guarantee their safety and well being because the Department does not offer equal rights to all.

It is further found that certain prisoners are prone to sexual assault the moment they enter a correctional facility, either due to their age, their particular looks, sexual orientation or other characteristics that mark them as candidates for abuse. These characteristics include a small physique, physical weakness, being a first offender, possessing feminine characteristics such as long hair or a high

⁴¹ *Minister of Correctional Services and Others v Kwakwa* 2002 (4) SA 455 (SCA).

⁴² *Op cit* at 719 I.

voice, lack of aggression, shy, intellectual, not street smart or having been convicted of a sexual offence against a minor.

The Department should therefore be alive to the fact that all the aforementioned characteristics make these prisoners potential targets and should offer protection to them. The importance of profiling at the admission stage, in order to be proactive in combating potential abuse, will be discussed later in the recommendations.

It is clear from all the evidence heard, not only in the case of Karp, but also the evidence of sexual violence at the Grootvlei and Pretoria Prisons as well as public statements that Correctional Services officials are well aware of the fact that sexual violence contributes to the incidence of HIV/Aids in Prisons. As early as 2002, the then Minister of Correctional Services, Mr Ben Skosana, responded in a statement that the following factors contribute to HIV/Aids in Prison:

- Consensual sex.
- Male on male rape.
- The prevailing culture of violence in Prisons (including sexual violence).
- Overcrowding in Prisons.

The matter of Karp demonstrated that the correctional authorities failed in their duties towards vulnerable inmates. They also failed to respond and act appropriately to complaints of sexual abuse, which results in the necessary physical evidence in cases of rape and other sexual assaults not being adequately collected and preserved. This lack of proper action impacts on the proper investigation of rape and sexual assault cases and ultimately defeats the possibility of any successful criminal prosecution of sexual crimes committed in Prison.

The Department can no longer ignore the fact that it has an important role to play in the prevention of sexual violence and sexual abuses in Prison and that it has to put measures in place to combat the high occurrence of such abuses. Ultimately, the Department also has a duty to prevent the spread of Aids and, in order to fulfill this duty, it has to combat sexual violence in Prison.

While in outside society it is accepted that rape is by far one of the most degrading experiences that any person can suffer, the reaction of the very same society to Prison rape is very different. Such reaction ranges from denial to disgust and even, in some instances, to merciless disregard of the trauma suffered. The attitude appears to be that Prison rape is part and parcel of the punishment that the inmate justly deserves.

Irrespective of these views, it is ultimately still the duty of the Department to uphold the norms of our Constitution and therefore, in the light of the frequency of the sexual assaults behind bars, the Department has to do far more to protect inmates from such violent assaults.

It can also not be ignored that the number of HIV infected prisoners is escalating and that incoming prisoners face the grim and real prospect of contracting HIV from other inmates unless they are sufficiently protected by those whose duty it is uphold their rights. Being violently raped and infected with a fatal disease is a cruel and unusual punishment that is disproportionate to any sentence that a prisoner has to face. Being sentenced to imprisonment should not result in an unwritten death sentence. The Constitutional Court in *S v Makwanyane*⁴³ declared the imposition of the death penalty as unconstitutional and that decision should be respected. However, if the Department keeps on ignoring the fact that sexual abuse is rife in our Prisons and that there is an extreme likelihood that prisoners who are exposed to violent unprotected sex will

⁴³ 1995 (3) SA 391 (CC).

in all likelihood contract Aids, then it is effectively, by omission, imposing a death sentence on vulnerable prisoners.

12. RECOMMENDATIONS

12.1 Karp

The Commission considers it appropriate to deal separately with the persons Karp implicated since the recommendations regarding those implicated will be specifically linked to incidents of misconduct that occurred at the Pretoria Prison and which are not, in every instance, related to the general discussion of sexual violence in Prisons. Accordingly, the recommendations dealing with the specific transgressions of the Correctional Services members in abusing Karp are set out hereafter in section 13, headed "Specific Misconduct Recommendations". The Commission's general recommendations regarding sexual violence in Prisons are set out below.

12.2 Sexual Violence in Prisons

12.2.1 In the light of the findings, it is essential that members of the Department be sensitised in dealing with rape survivors and giving assistance to rape victims.

The Commission therefore recommends that a group of Correctional Services members be nominated in each Prison to receive the necessary training to act as rape counsellors. Such training would be necessary in order properly to counsel the prisoners who have suffered the trauma of being raped. The availability of such trained personnel will make a positive contribution towards protecting the psychological well being of such

victims. Furthermore, prisoners will also be encouraged to come forward to report such crimes, which will in some measure have an impact on decreasing the high rate of rape at the Prisons.

12.2.2 It needs to be accepted that it is extremely likely that members of the Department will at some time during their careers, be exposed to prisoners of different sexual orientations and will need to accommodate those prisoners within the Prison premises and treat them all with the necessary dignity and respect as anticipated in our Constitution. To ensure a general sensitivity of all members to these situations, the Commission recommends that all newly recruited Correctional Services members, during their initial training towards qualifying as fully fledged members, be made aware of the enormous diversity of prisoners that will at some time be entrusted into their care. This training will also, no doubt, positively take care of the general homophobia that currently exists amongst most members of the Department.

It is recommended that the curriculum of the aspirant Correctional Services members include chapters/modules such as:

- (a) diversity,
- (b) sexual orientation,
- (c) sexual practices,
- (d) homophobia, and
- (e) cultural differences.

12.2.3 It is recommended that upon admission to the Prison, the Department ensure that procedures are put in place to profile each and every prisoner entering the correctional facility. Such profiling will take into account all the distinct features of the Prisoner relating

to appearance, evidence of femininity, age and any similar indications that should indicate to the officer that such inmate is a vulnerable potential target for sexual abuse. The prisoner should, as far as possible, not be placed in the same environment as extremely violent prisoners with histories of assault.

Accordingly, it is recommended that the Department's admission criteria be re-examined and amended where necessary.

12.2.4 Newly arrived, first time offenders are clearly the most vulnerable group because they are ignorant about certain existing Prison practices and hence easily fall into the trap of becoming a sexual object. The institution also overwhelms them, since the warders, who are the ones who should inform them about the gangs and the discipline system in Prison, do not properly orientate them towards Prison life. The availability of such information will go a long way to protect the prisoners. They would be aware of the fact that when goods are offered to them they would be put in a position where they are in debt to the provider and that the debt would then be claimed at a particular point as, in most instances, a demand for sex.

It is therefore recommended that all first time offenders, when admitted to Prison, be put together in a cell for the first few days on their own. There should be no sentenced prisoners either as a monitor or a cleaner, as is currently the practice. This will enable the Department of Correctional Services personnel to orientate the prisoners and inform them about the existing gang activities and any other practices in Prison that could lead to sexual and other abuses. Once they are informed of this kind of behaviour, they would be able to minimise the risk and they should be able to then

guard against such behaviour or recognise patterns and eminent dangers.

Such protection would be much better than the current situation where, in the view of the Commission, prisoners themselves arrange and control such orientation which, in fact, then leads to the gangs exerting and abusing their power over first time offenders. In some instances, such orientation is done by the monitor of the cell, which defeats the purpose of ensuring protection for the arriving first offender.

12.2.5 It is recommended that warders be educated regarding the different kinds of sexual preferences that exist amongst prisoners. Such education would be crucial in dealing with their attitude towards sexual victims in Prisons. Lack of education has been shown in that warders have little or no empathy or sympathy towards sexual victims. It is envisaged that such sexual education will also address the homophobia that exists amongst warders. The Commission is alive to the fact that this homophobia may to be reduced once all the new recruits are trained.

12.2.6 It is also recommended that when a prisoner commits a sexual offence, the offender, in addition to the appropriate discipline applied in accordance with the disciplinary system of the Department, or the laying of a criminal charge, be assigned to specific rehabilitation programmes. These programmes will directly address the question of sexually offending behaviour as well as any other auxiliary factor and issues that indirectly feed into the offender's sexual behaviour. Accordingly, it is recommended that the Department design rehabilitation programmes that are

specifically and exclusively aimed at sexual offenders inside and outside Prison.

- 12.2.7 It is recommended that more psychologists be appointed to address the Department's lack of counselling and trauma Service. Psychologists fulfill a major role in addressing the victimisation and trauma sexual victims suffer and it is clear from the evidence before the Commission that there are far too few psychologists in each Prison to deal with the needs of awaiting and sentenced prisoners.
- 12.2.8 It is also recommended that the policy designed for sexual victims apply not only to sentenced prisoners but also to awaiting trial prisoners, who are as in much need of such Service as their sentenced counterparts.
- 12.2.9 It is recommended that proper complaint mechanisms and channels be put in place to encourage rape and sexual survivors to come forward and report the offences committed.
- 12.2.10 It is further recommended that the current system that exists to investigate criminal matters within the Prison by the South African Police Service be stopped. These investigations leave much to be desired since the police constantly interview, consult and take statements inside the Prison with the assistance of the Prison authorities, under circumstances where members of the Department are implicated in offences being investigated.

It is recommended that when prisoners lay criminal complaints, they are moved to the Police Station where the interviewing of the complainant will take place. This procedure will ensure that the investigation will then be done independently at the Police Station

and without the “assistance” of members of the Department. Such recommendation will indeed lead to better and far more reliable information being received from the complainant regarding the offences committed inside the Prison. Prisoners laying charges will be in a position to request protection, if it is required, and to lay charges without fear of reprisal from the Departmental officials.

- 12.2.11 It is recommended that in cases of sexual offenders, the release of the prisoner either on parole or correctional supervision be considered only after assessing information gathered from a variety of sources, including psychological, psychiatric and pre-sentence reports, behavioural observations and victim impact statements.
- 12.2.12 It is recommended that a long-term policy for awaiting trial detainees be drafted as soon as possible since the absence of such policy has a huge impact on the lack of Service rendered to awaiting trial detainees and, more specifically, the lack of support Service rendered to those in this section of the Prison who have suffered abuse.
- 12.2.13 It is recommended that better liaison procedures be set up between the Department of Correctional Services and the Department of Health in order to orientate and inform medical personnel of all the existing policies in each of these Departments. Alternatively, that doctors working for the Department of Correctional Services are seconded to the Department in order to discipline those who are working for the Department of Correctional Services who disregard the policies of the Department and who put it in disrepute.
- 12.2.14 It is recommended that a new system for distributing the Department’s policies be designed. Without being prescriptive, it is

necessary, at an operational level, that such a system has a method of ensuring that each and every member acknowledges having received or being aware of any policies applicable to him or her and that such acknowledgement is in writing.

It is suggested that in order to disseminate effectively all the information of all the policies as soon as possible, the Department arrange a series of workshops where these policies will be made known to the members and where they can come to terms with what is expected of them.

- 12.2.15 It is recommended that sexually abused prisoners not be put in solitary confinement nor segregated detention but rather be kept under observation in the Prison hospital. Furthermore, that if the victim cannot be accommodated in the Prison hospital, consideration be given to detaining the alleged perpetrators in single cells until the disciplinary matter is finalised.
- 12.2.16 It is recommended that cameras connected to closed circuit television be installed in all communal cells in order to monitor the activities between prisoners at all times. Such monitoring would be in the interests of the Department and the safety of all the prisoners who are detained.
- 12.2.17 It is recommended that the movement of juveniles in the Prison, as stipulated by the Commission in its Fifth Interim Report, be followed in order to combat sexual abuses of young prisoners under the age of twenty one (21) years.
- 12.2.18 It is recommended that all prisoners, upon admission, including juvenile and awaiting trial prisoners, be informed of their rights,

including that they are entitled to be separated, that they are entitled to certain counselling Service etc. The Department is expected to inform them fully of their rights in the form of either a booklet or a compendium of rights of prisoners. Having due regard to the Constitution, it is recommended that such a booklet be drafted in all eleven (11) official languages.

It has also come to the Commission's attention that there are still some prisoners who are illiterate and unaware of their rights. It is recommended that in such cases, the *onus* should be on the admission's office to inform illiterate prisoners in person of their rights and only then to hand them a booklet or compendium of rights.

13. SPECIFIC MISCONDUCT RECOMMENDATIONS

As stated in the main report, the Commission considered it appropriate to deal separately with the persons Karp implicated since the recommendations regarding those implicated will be specifically linked to incidents of misconduct that occurred at the Pretoria Prison. Many of these misconduct incidents are not in every instance related to the general discussion of sexual violence in Prisons.

The evidence of Karp has been discussed in this Chapter and it should be clear from this that he made a positive impression on the Commission. At all times Karp appeared to be confident, despite the witness having graphically to describe intimate and personal details of the harrowing experiences. Furthermore, most of Karp's testimony was substantiated with either documentary or other evidence.

By contrast, the implicated parties, who had no difficulty in subjecting Karp to the rigours of cross-examination, decided to hide behind a shield of silence by not

taking the witness stand. Although the Commission is fully aware of their constitutional right and choice not to testify, they most certainly cannot exercise such choice in the face of strong and incriminating evidence and expect to escape the consequences of their decisions. They elected not to testify under circumstances that required them to at least speak up in the face of direct accusations. They were given ample opportunity to come forward and give their version of what happened and be questioned, yet they elected to be silent. Despite there being a strong *prima facie* case against those implicated, not an ounce of evidence was presented by them to counter the accusations. Given the specific accusations against them, the Commission has to draw an adverse inference from their silence. It would be reasonable to say that those implicated did not testify because they were trying to hide behind their silence.

Despite Karp's traumatisation, Karp was still able to give the Commission a coherent and detailed account of what he was subjected to at the hands of the warders at Pretoria Local Prison. The Chief Psychologist, Dr Van der Bergh, also agreed that Karp would continue to suffer for a long time and would definitely need psychological counselling to deal with the trauma.

Ultimately, in dealing with the specific incidents perpetrated, it is the finding of the Commission that Karp was a truthful and forthright witness who presented his evidence in a satisfactory manner and that there was no evidence to rebut anything that he said.

The Commission therefore makes the following findings and recommendations against the implicated parties:

13.1 Mr Baloyi

By not paying any heed to the policies of the Department, Mr Baloyi demonstrated clearly that he is not competent to manage a Prison as big as

Pretoria Local Prison. This lack of competence may be explained by Mr Baloyi's alleged lack of training as to the duties of a Head of Prison⁴⁴ but clearly does not justify or excuse the misconduct he committed.

Clearly, when one assumes a particular position of authority, it is your own responsibility to fulfill all the daily duties that come with the position – one of which would be to make decisions in terms of section 79 of the Act as to who should or should not be detained in terms of the provision and particularly, and most importantly, not to abuse the provision as a method of punishing Prisoners.⁴⁵

In dealing with the matter of Karp, it was clear that Mr Baloyi never applied his mind as to Karp's detention in a single cell. In fact, during cross-examination, he responded by saying if someone escapes then they are sent to isolation. This indicates that there was no application of the mind and certainly no reasons given when such a drastic decision was taken. Clearly, as can be seen from the outcome of his decision, Mr Baloyi abused the provisions of section 79 by using it as a form of punishment. Mr Baloyi also abused his powers in ordering that mechanical restraints be used on the prisoner.⁴⁶ His conduct was definitely not in accordance with Departmental policies.

The Commission accordingly recommends that Mr Baloyi be charged with:

- (a) Contravention of Column A, clause 2.1, in that he was grossly negligent in execution of his duties by ordering that Karp be placed in the isolation cell;

⁴⁴ Mr Baloyi, in his own words, said that he had not received any training for the position as Head of the Prison and had never attended a course on what heads of Prison do. Mr Baloyi's abuse of the provision is dealt with in detail in the Chapter on Treatment of Prisoners.

⁴⁶ Mr Baloyi ordered that the prisoner Karp also be put in leg irons when he was arrested for his escape. The record shows that Karp could not pose a security risk after being put in segregation and that the only reason for such an order was to further "punish" him.

- (b) Contravention of Column A, clause 2.1, in that he was grossly negligent in the execution of his duties by ordering mechanical restraints when this was not authorised by Departmental policies or any other regulation.
- (c) Contravention of Column A, clause 2.1, in that he failed to keep proper record of prisoners sent to segregation, or kept proper data as required by legislation and the Department's policies.⁴⁷

13.2 Mr Nxumalo

The Commission finds, in the light of the evidence presented by Karp, that Mr Nxumalo was indeed under the influence of alcohol on the day that he ordered the prisoner, Karp, to perform oral sex on him.

Mr Nxumalo, like many of the others, decided not to testify at all despite the *prima facie* case against him being presented to the Commission. The testimony of Karp becomes therefore conclusive evidence given the specific circumstances.

Accordingly, with regard to Mr Nxumalo, the Commission recommends that:

- (a) He be charged with contravention of Column A, clause 5.5 of the Disciplinary Code in that he committed an act of sexual harassment by compelling a prisoner to have oral sex with him and that by doing so he injured the sexual dignity of the prisoner, Karp;
- (b) He be charged in terms of the Disciplinary Code of contravening Column A, clause 6.4 in that he permitted a prisoner or any other person subject to community corrections to take alcohol or prohibited drugs and had that in their possession.

⁴⁷ See Pretoria transcript pages 5621 and 5622 and Exhibit 'NNN5'.

Should it be shown that Mr Nxumalo was not on duty on the day in question, then, it is the view of the Commission, that he should not escape discipline. If that is the case, it is our opinion that, by being under the influence of alcohol, he breached the security arrangements and that he then should be charged in the alternative with contravening Column A, clause 5.10, breach of the internal security arrangements.

- (c) He be criminally charged with an act of indecent assault, alternatively *crimen injuria* by forcing the prisoner, Karp, to perform oral sex on him.
- (d) He also be charged criminally with contravening section 119 of the Correctional Services Act No. 111 of 1998, in that he supplied intoxicating liquor to prisoners whereas the Act provides that no person may supply prisoners with any intoxicating liquor. In this particular instance, this will take care of the fact that he was not on duty should the documentation prove that he was not on duty.

13.3 Mr Shilaaz

Regarding Mr Shilaaz, it is clear that he committed an act of *crimen injuria* and the Commission therefore recommends that:

- (a) He be charged criminally with an act of *crimen injuria* in that he insulted the prisoner by saying certain things to him, which indeed affected and impaired his dignity. The insults that were leveled at Karp were homophobic insults, which infringed upon his dignity.
- (b) He be charged in terms of the Disciplinary Code with a transgression of Column A, clause 5.5 in that he impaired the sexual dignity of the prisoner by stating certain insults, which were homophobic.

13.4 Mr Kramer

The Commission's findings are also that Karp was confident regarding what Mr Kramer said. Karp was in fact so confident that a charge was laid against him. The words spoken that insulted him were "*you're a pig, you're a rubbish.*" Even considered separately, the words seem to be insulting in nature. Added to this was the repeated discrimination of saying "*you look bad moffie*", words clearly intended to degrade Karp and to impair his dignity.

As the prosecution service has already decided not to proceed with any criminal charges, the Commission will only deal with the internal transgressions committed by Mr Kramer. In this regard, it is recommended that Mr Kramer be charged:

- (a) In terms of the Departmental Disciplinary Code, contravening Column A, clause 5.11 in that he used improper language.
- (b) In terms of the Departmental Disciplinary Code, contravening Column A, clause 5.13 in that he willfully and intentionally discriminated against Karp on the basis of Karp's sexuality, which is outlawed by the Constitution.

13.5 Mr Gerber

Karp's evidence was also clear with regard to Mr Gerber insulting Karp by saying the words "*aren't you ashamed of mixing with kaffirs*" because Karp had befriended a black prisoner, Ms Shelley Ndlovu.

It is recommended that Mr Gerber be charged:

- (a) in terms of the Departmental Disciplinary Code, contravening Column B, clause 5.11, the use of improper language to another person or alternatively,
- (b) contravening column B, clause 5.16, that he used words that discriminated on the basis of race, gender and sexuality.

13.6 Mr Moswanganyi

The evidence of Karp is also accepted regarding his implication of Mr Moswanganyi and his actions. It is recommended that Mr Moswanganyi be charged:

- (a) In terms of the Departmental Disciplinary Code, contravening Column B, clause 5.11, the use of improper language to another person, alternatively;
- (b) Contravening Column B, clause 5.16, that he discriminated against another on the basis of race, gender, disability and sexuality.

13.7 Mr Cloete

As Mr Cloete also used derogatory terms and insulting words against Karp, the Commission recommends that:

- (a) He be charged in terms of the Departmental Disciplinary Code, with contravening Column B, clause 5.11, in that he used improper language to another person, alternatively;
- (b) Contravention of Column B, clause 5.16, in that he discriminated against Karp on the basis of race, gender, disability and sexuality.

13.8 Mr Pahla

It is clear from the evidence before this Commission that Mr Pahla violated Karp in that he forcefully raped him.

As was stated earlier in this Chapter, the Commission is mindful of the fact that the common law offence of rape has still not been extended by legislation in South Africa to cover such sexual assaults; as such conduct is clearly an act of rape.

The Commission, however, cannot go beyond the boundaries of the law despite the fact that the common law is not in tune with gender equality.

The Commission therefore recommends that Mr Pahla be charged with:

- (a) A charge of indecent assault. This is, however, a recommendation and does not detract from the fact that the right to institute prosecution lies with the National Director of Public Prosecutions (NDPP). Given the circumstances, it is recommended that the docket be sent to the NDPP, together with this Chapter of the Commission report and the Commission transcript in order to put the NDPP in a position to make a decision.

13.9 Dr Khumari

The evidence against Dr Khumari was astounding. The Commission was shocked to hear that a medical practitioner could be so insensitive and reckless regarding the emotional plight of a patient. Dr Khumari failed in not properly investigating or adequately assisting a patient in desperate need of help.

The Commission recommends that:

- (a) A transcript of Dr Khumari's evidence, along with the relevant documentation, be sent to the Health Profession's Council for investigation;
- (b) The Department review Dr Khumari's contract in the light of his own admission that he mismanaged the patient, Karp.

13.10 Mr Wilkins

The Commission's findings are that Mr Wilkins was ordered to deal with the matter of Karp. Although Mr Wilkins' conduct, in some respects, clearly does not correspond to that of a prudent Correctional Services member, the Commission is of the opinion that it would be regrettable if he alone were to face any disciplinary action since many of his actions were born of instructions from his superiors.

The Commission would, however, like to recommend in general that matters like sexual violence and sexual transgressions against prisoners are given higher priority in the Department and that all involved personnel deal with them with empathy and sympathy.

It is clear from the evidence of the Chief Psychologist, Dr Van der Bergh, that the assistance rendered to Karp by Mr Wilkins and others fell short of what should have been done for a sexual victim. Given the lapse of time and the hierarchy of the different role players, it will serve no purpose to pursue any disciplinary action against him alone. The Commission therefore does not recommend that any action be taken against Mr Wilkins. However, he should be better trained in the psychological trauma sexual victims suffer in order to be of better assistance to these victims in future.

CHAPTER 9

PAROLE

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CHAPTER 9

PAROLE

1. INTRODUCTION

The Commission consistently received complaints from prisoners and occasionally from members of Correctional Services about the Department's parole policy, the conversion of terms of imprisonment to correctional supervision, the remission of sentences and transfer of prisoners from one prison to another. This particular Chapter will deal with parole since the Commission has been able to establish that there are problematic areas because of mismanagement and/or corruption, which, in the Commission's view, the Department needs to attend to.

Department officials seem to be exercising unfettered discretion in respect of a number of issues, including parole and transfer, notwithstanding the fact that the Appellate Division has previously stipulated that a Government official may not exercise such discretion. The discretion allowed is to be exercised according to rules of reason and justice¹ and is limited to the extent of the provisions of the enabling statute. In this case, it would also include compliance with the provisions of the Constitution of the Republic of South Africa. Officials are clearly exercising

¹ See *Ismail and Another v Durban City Council* 1973 (2) SA 362 (N) at 371 H – 372 B cited with approval in *Goldberg and Others v Minister of Prisons* 1979 (1) SA 14 (A.D.) at 18 C-F; *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) at 173 H-I; *Union of Teachers' Associations v Minister of Education & Culture* 1993 (2) SA 828 (C) at 836 A-C; *West.Bank v Laurie Fossati Plant Hire (Under Jud. Man.)* 1974 (4) 607 (E.C.D.) at 610 B-D and *Stanfield v Minister of Correctional Services and Others* 2004 (4) SA 43 (CPD) at para. [100].

this unfettered discretion because there are no checks and balances in place to ensure that in exercising their discretion, they act within the parameters of the Law and the Constitution.

This state of affairs encourages corruption because the affected prisoners, as a result of their unfortunate position, cannot challenge actions the members take. If prisoners seek to challenge such actions, they would have to part with substantial sums of money to move High Court applications, when a provision could instead be made in the Departmental Regulations or the Correctional Services Act to ensure that they do have some form of domestic remedy.

In some cases, the only way prisoners can ensure that they get what they are entitled to is to curry favour with Departmental officials or even to bribe them to ensure that they are allowed to enjoy the privileges or rights that they are entitled to. These are, however, the duties that members are supposed to perform without any financial gain. Prisoners in every prison we have investigated complained about this issue.

2. PAROLE BOARDS

Parole Boards form one of the most important components in the Criminal Justice System chain. The chain involves the following processes: the police, who are part of the Department of Safety and Security, arrest an offender, who is tried and convicted by courts, which form part of the Department of Justice. The offender is incarcerated in a prison, which forms part of the Department of Correctional Services. Parole Boards, therefore, come into play after a Judge or a Magistrate has sentenced a person to imprisonment.

The task of the members of the Parole Board is to decide whether the person should be released before serving the full sentence that the judicial official who

presided over the matter imposed. Needless to say, that decision is one of the most important decisions that could be made in respect of any offender in the Department of Correctional Services. It is also a role that effectively gives the Executive power to interfere with an order of another arm of the Government; namely, the Judiciary, and such actions are permissible in terms of the Constitution.²

The risk factors involved in releasing a person on parole, or correctional supervision, are similar to the risk of releasing offenders on bail and our Courts have highlighted these in a number of judgments. The releasing of prisoners on parole is a very important decision if one considers the rate of recidivism,³ which follows after the release of the offenders on parole,⁴ and the seriousness of the crimes that people who have been released on parole or correctional supervision sometimes commit.⁵

To minimise these inherent risks, it is of vital importance that officials appointed to positions on Parole Boards have integrity and dedication towards their duties.

² See *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at page 521: “The lack of control of courts over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the executive action may be interpreted as an infringement of the independence of the Judiciary cf Blom-Cooper and Morris, *The Penalty for Murder: A Myth Exploded* (1996) CRIM LR at 707, 716). There are also other tensions, such as between sentencing objectives and public resources ... courts should also refrain from attempts overtly or covertly to usurp the functions of the executive by imposing sentences that would otherwise have been inappropriate.” (own emphasis). Also see *S v Smith* 1996 (1) SACR 250 (E) and *S v Botha* unreported Case number 318.03 (SCA) delivered 28 May 2004 at para. 25.

³ See A Dissel and S Ellis, Reform and Stasis: Transformation in SA Prisons. Critique Internationale No.16, July 2002 at page 5.

⁴ According to Lukas Muntingh it is estimated that in South Africa, between 85% - 94% of released offenders will re-offend and go back to prison. (*Tackling Recidivism: Track Two* (2002); Vol. 11 No. 2 at page 2). Also the following articles by Amanda Dissel: “Track Two” (2002) Vol. 11 No 2 at pages 1-8; *Tracking Transformation in South African Prisons* and Lukas Muntingh (2001) “Imprisonment Issues in South Africa: After Prison the case of Offender reintegration”. Monograph 52: pages 1-6.

⁵ See *Carmichael v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (or 2001 (10) BCLR 995 (CC) and *Minister of Safety and Security and Another v Carmichael* 2004 (2) BCLR 133 (SCA) where a problem was encountered after a person had been released on bail.

They should also have the necessary insight to strike the balance between the competing interests of protecting the public on the one hand and on the other of ensuring that prisoners who qualify for parole are not to be detained for longer than is necessary.

In this section of the Chapter, the focus will first be on the Parole Boards and the problems the Commission observed with respect to them. At the time of the Commission's sitting, a number of matters brought before the Commission had already been before the Parole Boards and the prisoners had been released or were about to be released. In this regard, the Commission has selected two (2) exemplary cases to demonstrate a particular problem.

The cases involved are:

- Mr Mahopi's release⁶ at Pretoria Management Area, and,
- Mr Daniel Hlongwane's application for parole.

In considering these matters, it will be appropriate to consider the legal provisions applicable at the time of the release of the prisoners concerned.

The release of prisoners on parole was governed by the provisions of the Correctional Services Act No. 8 of 1959 ("the 1959 Act"), the Departmental guidelines and the Regulations. Chapter 7 of the new Correctional Services Act No. 111 of 1998 ("the Act") introduced new provisions governing the release of prisoners on parole within the Department.

At the time of drafting this report, the new parole provisions in the Act had just come into operation. As a result, the Department was still using the old provisions (the 1959 Act) in deciding matters of parole brought before it, which was the

⁶ See the Commission's Tenth Interim Report dated 30 January 2003.

subject matter of the prisoners' complaints.⁷ It needs to be stated however, that as far as the Commission is concerned, there was no cogent explanation as to why there was such a delay in bringing these new parole provisions into operation.⁸

The provisions of the Acts governing parole will also be dealt with in more detail later in this report.

2.1 Pretoria Central Prison: Mr Thabo Mohapi

Mr Thabo Mohapi, Prisoner No. 93272451, was convicted and sentenced on four (4) counts of theft to an effective prison term of fourteen (14) years. The Randburg, Frankfort and Bethlehem Magistrates' Courts imposed the sentences in respect of all the abovementioned counts, which were committed during the periods April 1993 to March 1996. Mr Mohapi commenced serving his sentence on 13 December 1996. In addition, during 1996, whilst in prison, the Pretoria Magistrate's Court convicted and sentenced him for being in possession of dagga. He was sentenced to six (6) months' imprisonment, which was suspended for five (5) years. He was incarcerated at various prisons, amongst others, Kroonstad Prison, Leeuwkop Prison, Pretoria Central Prison and Harrismith Prison. It was a known fact at the Pretoria Central Prison that Mr Mohapi was the brother (or relative) of the then National Commissioner of Correctional Services, Dr Kulekani Sithole.

During one of the visits into the prison by the then Area Manager of the Pretoria Management Area, Mr Monama, Mr Mohapi raised the question of his parole with Mr Monama. At the time Mr Mohapi was incarcerated at Pretoria Central Prison. Mr Monama subsequently raised the issue of Mr Mohapi's parole with the Parole Board. During August 1999, the then Provincial Commissioner of Gauteng, Mr

⁷ The provisions of Chapter VII of the Act came into operation on 1 October 2004.

⁸ See also the concerns expressed by the Supreme Court of Appeal in *S v Bull and Another; S v Chavulla and Others* 2001 (2) SACR 681 (SCA) at page 702.

Nxumalo, raised the issue of Mr Mohapi's parole with the Area Manager once again.

On the 6 September 1999, Mr Nxumalo visited the Pretoria Management Area to enquire about the parole hearing of the prisoner, Mr Mohapi. Mrs Mashele, the Chairperson of the Parole Board, at the request of the Provincial Commissioner, then completed the last page of the profile in which she made a recommendation for prisoner, Mr Mohapi, to be released on parole. The circumstances surrounding the writing of the recommendation were dealt with in the interim report. Mr Nxumalo then proceeded to approve the release of this prisoner on parole on the 3 December 1999. This effectively meant that the prisoner would be on parole for a period of five (5) years, ten (10) months and one (1) day. It was unusual, in terms of the Department's directives at the time, for a prisoner, except for prisoners serving life sentences, to be released on parole for such a long time.

The problems and irregularities surrounding this prisoner's release are another manifestation of the problems of granting parole in the Department.⁹

2.2 Atteridgeville Prison: Daniel Hlongwane

The matter of Mr Daniel Hlongwane is one of those classical cases that show the problems with the parole system as the Department of Correctional Services has applied it.

The case is typical within the old parole system. It is imperative to deal with such issues even though they relate to the old parole system because most of the prisoners currently incarcerated will still be dealt with in terms of the old parole

⁹ For more details on this matter, refer to the Commission's Tenth Interim Report dated 30 January 2003.

system as applied by the Department. For the problems to be understood, it is appropriate to deal with the facts of the matter briefly.

Mr Daniel Hlongwane is an adult male born on 11 November 1976. As at the 5 July 2003, he was twenty six (26) years old. On 4 June 2003, the Pretoria Magistrate's Court sentenced him to twelve (12) months imprisonment for common assault. According to Mr Hlongwane's prison record, the warrant type was in terms on Section 276(A)(3) of the Criminal Procedure Act and at the time he appeared before the Commission in Pretoria, he was an "A" group prisoner.¹⁰

Notwithstanding the fact that the nature of the common assault is not described anywhere in the file, the offence was referred to in the prison records as "aggressive". Furthermore, it was apparent that according to the prison record it was classified as "assault B/B". This particular classification will be referred to later in this report.

According to his record, the various dates for his release were reflected as follows:

Maximum	2004/06/03
Sentence Exp. Date	2004/06/03
$\frac{1}{2}$ Sentence Time	2003/12/03
$\frac{1}{3}$ Sentence Time	2003/10/03
$\frac{2}{3}$ Sentence Time	2004/02/03
$\frac{3}{4}$ Sentence Time	2004/03/03
Conversion	2003/09/03 $\frac{1}{4}$
Consideration Date	2003/12/03
Prof Submission Date	2003/10/03
Final Consideration	2004/06/03.

¹⁰ An "A group" status is given to, amongst others, well behaved prisoners.

On 3 September 2002, Mr M.M. Masiela of Community Corrections prepared a report that supported Mr Hlongwane being placed under correctional supervision.

On 24 November 2003, Mr Hlongwane appeared before the Parole Board and the following comments are reflected on his file:

“Further profile recommended for 2004/03/03. Behaviour and adaptation is positive. He is currently allocated as a vegetable producer. Address is monitorable. No complaint.

Signed – 03/11/24.”

Furthermore, on 24 November 2003 it was recommended that a further profile be submitted on 3 March 2004.

According to the evidence before the Commission, this effectively meant that he was to appear before the Parole Board once again on 3 March 2004.

However, for an inexplicable reason, notwithstanding that he was to appear before the Parole Board on 3 March 2004, he appeared before the Parole Board on 12 February 2004. At the said hearing, the following comments were recorded in his file:

“He is serving one year for aggressive crime. His behaviour and adaptation is stable and co-operative. His address is monitorable. He is further encouraged to attend programmes at Community Corrections. Recommended for placement on parole 2004-03-03. No complaint.

Signed 04/02/12.”

Mr Hlongwane was charged with, amongst other things, intimidation in contravention of section 1(1)(a) of Act 72 of 1982, alternatively, in contravention of section 1(1)(b) of Act 72 of 1982, assault alternatively, pointing a firearm.

Notwithstanding these charges, he was eventually found guilty of a competent verdict of assault and was sentenced as follows:

“Three (3) years’ imprisonment of which two (2) years be suspended for a period of five (5) years on condition that he was not convicted of an offence of which assault forms an ingredient during the period of suspension.”

This effectively meant that he was serving an effective sentence of one (1) year’s imprisonment.

The Commission heard the matter of Mr Hlongwane in March 2004 at which time he had served about 75% of his sentence. Because of the problems with the parole system at Atteridgeville, Mr Hlongwane, who had been arrested for nothing more than a common assault, served a great portion of his sentence and was only released when the members of the Atteridgeville Management area realized that the Commission was interested in the Hlongwane matter. As a result, he was released on 3 March 2004.

It is also apparent from his records that Mr Hlongwane had no previous convictions nor did he have any pending charges against him. In actual fact, he had reported a matter as a complainant against another prisoner. Instead of him being regarded as a complainant, it was reflected in his records that there was a pending case, which, according to the officials at the prison, led to the decision not to release him. They treated him in the same manner as an accused or suspect with a pending further charge instead of protecting him as a witness in the criminal justice system.

Furthermore, it was also apparent that even though the nature of the assault was not clarified in the prison file, according to Departmental policy assault is regarded as an “aggressive crime” regardless of the real conduct of the

perpetrator. Thus he was immediately classified as a prisoner who had committed one of the serious crimes and who should be treated stringently when parole applications are considered. This was done notwithstanding that assault, in the legal sense, may not necessarily involve physical violence.

According to Burchell¹¹ assault is defined as:-

“Assault consists in unlawfully and intentionally:

- (1) applying force to the person of another, or*
- (2) inspiring a belief in that other person that force is immediately to be applied to him or her.”*

Snyman¹² defines assault as:

“The unlawfully and intentionally:

- (a) applying force directly or indirectly, to the person of another, or*
- (b) threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends and has the power to carry out the threat.”*

When the fact that assault does not necessarily imply physical violence was raised with the official at Atteridgeville Prison, he conceded that the definition of assault as an aggressive crime might not be appropriate. It would seem that the Department misdirected officials during the classification of crimes. Alternatively, if that is not the case, then the officials failed to appreciate the finer legal points that need to be considered in the classification of crimes when they applied their discretion. In other words, before the prisoner is subjected to stringent parole conditions, the Parole Board needs to know the nature of the crime or the facts of the assault.

¹¹ See *Principles of Criminal Law* 3rd Edition (2005) at page 680.

¹² *Criminal Law* 4th Edition (2002) at page 430.

It is clear from perusing the file that Mr Hlongwane was a candidate to be released on parole as soon as possible. According to the record, he was gainfully employed at the prison as a “vegetable producer”. Furthermore, he had an address outside prison, which was that of his next-of-kin being his mother, Mrs Sara Hlongwane, who lived at Soshanguve. Accordingly, except for Departmental maladministration, there was no reason why he could not be released on parole sooner.

According to the records, he was a medium security prisoner, or “B” group prisoner, with effect from 4 June 2003. With effect from 4 September 2003, he was classified as a group “A” prisoner.

In terms of the calculations referred to above, as at 3 February 2004, he would have served two-thirds of his sentence and as at the 3 March 2004, he would have served three-quarters of his sentence. Notwithstanding the positive report prepared by Mr Maisela of Community Corrections on 3 September 2002, on 24 November 2003, Ms N.N. Kula, the Chairperson of the Parole Board, did not grant Mr Hlongwane parole or place him under correctional supervision but recommended that a further profile be submitted. There was no explanation as to why Mr Hlongwane could not be considered for parole immediately and be released and why state resources were wasted with a further parole hearing, when in fact he was a clear candidate for parole and qualified to be released.

It is clear that on 12 February 2004, the Parole Board recommended him for placement on parole on 3 March 2004, after he had served three-quarters of his sentence and after the Commission had shown an interest in his case.

The case of Mr Hlongwane is not unique but one of many that have become common within the Department and that to a large extent contribute to the

problem of overcrowding. The contribution to overcrowding is made in the sense that people are kept in prison for longer periods than is necessary.

According to Mr Wilkins, who appeared before the Commission, given the length of his sentence and the date when he was incarcerated, Mr Hlongwane should have appeared before the Parole Board on 3 October 2003. Instead, he only saw the Parole Board for the first time on 24 November 2003. Mr G. Sithole, who was the Secretary of the Parole Board at the time, could not prepare Mr Hlongwane's profile timeously because there was no Chairman of the Parole Board. However, on being closely questioned by the Commission, he conceded that the absence of a chairman has nothing to do with the preparation of profiles since he could have prepared the profiles timeously and then waited for the Chairman of the Board to be appointed. According to the evidence before the Commission, this profile was only completed on or about 17 November 2003 in preparation for the Parole Board sitting on 24 November 2003. He also conceded that he did not prepare any profile for the sitting, which was supposed to take place on 3 October 2003. Even if there was no Chairman of the Parole Board prior to 3 October 2003, as Ms Kula was only appointed on 3 October 2003, this profile could have been prepared and filed until such time as an appointment was made and then the matter could have been considered timeously. Accordingly, there was clearly negligence or incompetence on the part of Mr Sithole in dealing with this matter.

According to Mr Hlongwane, when he appeared before the Parole Board on 24 November 2003 he spent only three (3) minutes at the hearing. He was then asked whether he had other charges against him and when he indicated that he had no charges but was in fact a complainant, he was told to go and get the information that he was a complainant from the court. This then delayed his further consideration until January 2004, when he obtained a copy of the letter from the court, which was submitted to the Commission. On being further questioned by the Commission, Mr Sithole conceded that he should have

obtained this information himself as an official of the Department of Correctional Services and that he could have done so with very little effort. As it transpired, it took Mr Hlongwane, a mere prisoner without official authority, a number of trips to the court before he could obtain this information. Clearly, there was sheer incompetence in the manner in which officials dealt with this prisoner and a general disregard of the rights of prisoners when they apply for parole. It is a problem that is encountered all over the country where prisoners are simply shunted from pillar to post by Departmental officials instead of receiving assistance from these officials with the processes for obtaining parole.

Ms M.M. Kula, who was the then acting Chairperson of the Parole Board, testified and also indicated that she had believed that Mr Hlongwane had a further charge when in fact this was not the case. This once again indicates the manner with which officials deal with information that is before them when considering a prisoner for parole.

According to Mr Wilkins, when a prisoner is considered for placement on parole, the following factors should, amongst others, be taken into account if he/she is a suitable candidate for such placement:

- (a) the rehabilitational level of the inmate;
- (b) whether he/she has atoned for the transgressions committed;
- (c) whether the objectives of the retributory element of punishment have been reached; and
- (d) whether the inmate is a suitable candidate for placement on parole. This refers to the supportive systems and structures to ensure the smooth integration back into society.

He went on to testify in the case under discussion but said nothing positive or negative pertaining to the level of rehabilitation. In fact, the evidence was that Hlongwane was not referred to any programmes at Atteridgeville Prison at the

time. Accordingly, this particular aspect could not have been considered. Furthermore, it is clear that the prognosis of the inmate who has come as a first offender should have been regarded as good and he should have been given all the support possible to correct his mistake in society. The lenient sentence by the High Court should also have been seen as an indication that the inmate is not a threat to society and that by serving half of his sentence he would have demonstrated enough of the required objective of retribution. Furthermore, his support system is strong and consequently he could have been released earlier from prison.

Whilst one should be alive to the concerns of the community about people being given parole who have not been rehabilitated, it is clear that some members of the Parole Boards, either through incompetence, malice or prejudice, are not giving parole to deserving prisoners. There is absolutely no reason why, in the Commission's view, Mr Hlongwane should have served the full twelve (12) month period for the offence for which he was convicted. There was no evidence to show that he was a danger to society nor were there any sentencing comments by the Judge in the file indicating he was such a danger. Despite this, the officials at Atteridgeville Prison considered all of the above to be unimportant and indicated that they were basing their decision on the fact that he had committed "an aggressive crime" as they understood the policy. The fallacy of this argument has already been dealt with in the sense that it ignores the fact that not every assault includes force but could include a threat of violence, which impacts on a victim's mental tranquillity rather than physical safety.

Accordingly, this case underscores the Commission's view that, because of the discretionary nature of parole decisions, such decisions should be left with people who are properly trained to exercise discretion "judiciously" and not "arbitrarily and capriciously".

Whilst it is appreciated that a prisoner does not have a right to parole, it is clear that the decision to refuse or grant parole should meet the requirements of fairness as enshrined in our Constitution.

After taking into consideration all of the abovementioned factors, it is the Commission's view, which Mr Wilkins shares, that the prisoner Mr Hlongwane should have been released on parole after serving half of his sentence, namely, on 3 December 2003. There is evidence to support such an opinion, namely:

- (a) he was a first offender,
- (b) he had a good support system,
- (c) there were no rehabilitation programme reports; and
- (d) he had adapted to prison properly.

All of these factors support his release on parole.

Although there are Department of Correctional Services guidelines as to when people should be released, the Act does not specify the minimum period that must be served by such a prisoner. In the circumstances, there is no basis for not applying discretion as a Parole Board and therefore not releasing a person after they have served half their sentence, as long as it is applied judiciously. The Departmental regulations are merely guidelines and the Act would be supreme to the manner in which one applies oneself in giving parole. This is one aspect that is missed by Departmental officials in their consideration of parole. Even deserving cases like that of Mr Hlongwane are treated in the manner the Department recommends in its guidelines and the Act is ignored.¹³

¹³ The guidelines of policy pertaining to release of sentenced offenders 1/8/B – Penalization factors: applicable in Parole Board and delegated officials signed by Director Offender Policy, F.J. Venter dated 23 April 1998. (Annexure 'C' to Pretoria Exhibit "CCC").

3. LEGAL POSITION

The release of prisoners on parole, at the material or relevant time, was governed by the provisions of the Correctional Services Act No. 8 of 1959 (“the 1959 Act”), the various Departmental guidelines and the Prison Regulations. Some of the Regulations are commonly referred to as the “B-Orders”.

Section 31 of the 1959 Act provides that every correctional official the Department employs and who is in charge of a prisoner shall cause every prisoner who has been sentenced by any court to undergo that sentence in the manner directed in the warrant by the court; or if the sentence has been commuted by the State President as set out in the order of the Minister of Correctional Services, which records the State President’s commutal in the manner the State President directs.

Having said that, however, the 1959 Act, in terms of section 65, provides for an exception on how prisoners are to be released on parole before they serve their full sentences as directed in the warrant or the order of the State President referred to above.

Section 65 provides as follows:

- “(1) A prisoner shall be released upon the expiry of the term of imprisonment imposed upon him;*
- (2) A prisoner may, in accordance with the provision of this section after the report submitted by the Parole Board in terms of section 63 has been studied, be placed on parole before the expiration of his term of imprisonment if he accepts the conditions of such placement ...*

- (4) a) *A prisoner serving a determinate sentence or any of the sentences contemplated in sub-paragraphs (ii) and (iii) of paragraph (b) shall not be considered for placement on parole until he has served half of his term of imprisonment; Provided that the date on which consideration may be given to whether a prisoner may be placed on parole, may be brought forward by the number of credits earned by the prisoner.” (Own emphasis)*

Section 63, which is referred to in section 65(2), sets out the powers, functions and duties of the Parole Board. Section 63 provides:

- “(1) *A parole board shall, in respect of each prisoner under its jurisdiction serving an indeterminate sentence or a sentence of imprisonment in excess of six months or in respect of whom a special report is required by the Minister or the Commissioner having regard to the nature of the offence and any remarks made by the court in question at the time of the imposition of sentence if made available to the Department, and at the times and under the circumstances determined by the Commissioner or when otherwise required by the Minister or the Commissioner-*
- (a) *submit a report to the Commissioner or to the Minister, as the case may be, with regard, inter alia, to the conduct, adaptation, training, aptitude, industry and physical and mental state of such prisoner and the possibility of his relapse into crime;*
- (b) *together with the report on each prisoner submitted in terms of paragraph (a), make recommendations to the Commissioner regarding-*

- (i) *the placement of such prisoner under correctional supervision by virtue of a sentence contemplated in section 276(1)(i) or 287(4)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), or by virtue of the conversion of such prisoner's sentence into correctional supervision under section 276A(3)(e)(ii) or 287(4)(b) of the said Act and the period for which and the conditions on which such prisoner may be so subjected to correctional supervision; Provided that for the purposes of such recommendations a prisoner's date of release contemplated in section 276A(3)(a)(ii) of the Criminal Procedure Act, 1977, shall be deemed to be the earliest date on which a prisoner may, in terms of this Act, be considered for placement on parole or the date on which the prisoner may be released upon the expiration of his sentence, whichever occurs first; or*
 - (ii) *the placement of such prisoner on parole in terms of section 65 or on daily parole in terms of section 92A and the period for which, the supervision under which and the conditions on which such prisoners should be so placed; and*
 - (c) *exercise such other powers and perform such other functions and duties as may be prescribed by regulation.*
- (2) *A parole board shall in terms of section 286B of the Criminal Procedure Act, 1977, in respect of each prisoner serving an*

indeterminate sentence after having been declared a dangerous person, having regard to the nature of the offence and any remarks made by the court in question at the time of the imposition of sentence if made available to the Department, submit a report to the court, on the date determined by the court, with regard, inter alia, to the conduct, adaptation, training, aptitude, industry and physical and mental state of such prisoner and the possibility of his relapse into crime.”

Section 22A of the 1959 Act prescribes that a prisoner may earn credits to be awarded by the Institutional Committee by observing the rules, which apply in the prison and by actively taking part in the programmes which are aimed at his or her treatment, training and rehabilitation. The one proviso is that a prisoner may not earn credits amounting to more than half of the period of imprisonment which he has served.¹⁴

4. THE PAROLE GUIDELINES

In 1998, the Department compiled guidelines, which were utilized in the Department for the purpose of assisting Parole Boards to ensure that some uniformity existed in deciding on the placement of prisoners on parole. These guidelines are known as the “Penalising factors”, which are contained in the Department’s Minute 1-8-B, dated 23 April 1998. These guidelines set out the “negative” and “positive” factors that need to be taken into account by the Parole

¹⁴ In terms of the ‘credits system’, then, a prisoner, subject to good behaviour, earns credits up to a maximum of 1 day for every 2 days’ imprisonment served by him. The practical effect hereof is that a prisoner becomes eligible for consideration for placement on parole after servicing 1/3 of his sentence. This is the case irrespective of the crime for which a prisoner has been sentenced.

Boards in deciding how to calculate the term of release of a prisoner on parole.¹⁵ Furthermore, the policy directive provided that prisoners who had been sentenced for certain violent crimes (such as murder, or robbery with aggravating circumstances) should serve ¾ of their sentences before being placed on parole.

The directive also provided that prisoners who had escaped should serve eighty per cent (80%) of their sentences before being placed on parole.

In light of the foregoing, one could say the guidelines referred to above, rightly or wrongly expanded the Correctional Services Act No. 8 of 1959 by introducing a system of credits for good behaviour. However, it is clear from the facts of the case mentioned above and other cases that have been before the Commission that the system of credits for good behaviour is not a simple system that is understood well by the members. The members of the Department of Correctional Services seem to be having ongoing problems in interpreting and applying it. This leaves room for poor understanding and misinterpretation of the policy to the detriment of the prisoners who are eligible for parole.

Accordingly, there is the potential for the Department to be embroiled in a number of legal disputes before courts of law regarding the issue of parole as set out in the above policies. This has already happened in that a number of cases have been taken to court.¹⁶

Furthermore the different interpretations given by the Natal High Court¹⁷ and the Cape Provincial Division¹⁸ with regard to these guidelines led to Department

¹⁵ See Leeuwkop Exhibit 'Z7' at pages 121 – 128.

¹⁶ See *S v Segole* (1999) JOL 5349 (W) *Winckler and Others v Minister of Correctional Services* 2001 (1) SACR 532 (c) (per Moosa J); *Combrink and Another v Minister of Correctional Services and Another*, 2001 (3) SA 338 (D) (per Levinshon J) and *Stanfield v Minister of Correctional Services and Others* 2004 (4) SA 43(C) (per van Zyl J).

¹⁷ See *Combrink and Another v Minister of Correctional Services and Another*, 2001 (3) SA 338 (D) (per Levinshon J).

¹⁸ See *Winckler and Others v Minister of Correctional Services* 2001 (1) SACR 532 (C) (per Moosa J);

officials abdicating their responsibilities even further. It might be argued, as Mr. S.J. Wilkins testified, that the judgments created confusion. If they did, then officials used this confusion as a justification for not interpreting the guidelines in favour of the prisoners.

The Commission says it was a justification because it is clear that the legal system operates on the basis that the KwaZulu-Natal judgment is binding in KwaZulu-Natal while the Western Cape judgment is binding in the Western Cape. If the Department wanted to clarify any so-called confusion, the Department should have taken the matter on appeal to obtain a judgement from the Supreme Court of Appeal, which would have given direction on the matter nationally.¹⁹ The Department did not do this.

In any event, the Department should have given a more liberal interpretation of the guidelines or reverted to the old parole rules and the Act to give some direction or leadership on the matter.²⁰ The guidelines were established to regulate parole and not to deny it. In addition, there is an established principle of statutory interpretation, which holds that, where a provision is open to two interpretations, the one which encroaches least on existing rights is to be preferred.²¹

Be that as it may, the Department, in all likelihood, would still be embroiled in a lot of litigation with regard to parole, especially with those prisoners who were sentenced before 1st October 2004 (when the Parole Provisions of Act 111 of 1998 came into operation).

¹⁹ Moreover the Winckler Judgement had been criticised and was not followed in the Eastern Cape, which should have provided even more reason for the Department to follow the Combrinck Judgement (See *Mohammed v Minister of Correctional Services and Others* 2003 (6) S.A. 169 (SE).

²⁰ See Sections 65(4) and 22A of the 1959 Act above.

²¹ See *Avex Air (Pty) Ltd. v Borough of Vryheid* 1973 (1) SA 617 (A) 621 F-G.

It is clear that the courts have taken a view that these parole provisions are not applicable to those prisoners.²² In terms of Section 65 (4) of the 1959 Act, a prisoner would have to serve at least half of the term of imprisonment before being considered for parole. In other words, the Department increased the period which was applicable before prisoners could be considered for parole.

The Department effectively sought to change the provisions of the statute by passing regulations, which were rough-shodding on the rights of prisoners to be considered for parole at an earlier stage.

The procedure for the giving of notice, quorum and sitting of the Parole Board is set out in the Department's B-Orders.²³ The Regulations governing the sitting of the Parole Board stipulates, amongst other things, that the prisoner must receive notice of the sitting of the Parole Board at least seven (7) days before the hearing. The prisoner must be present at all times unless he indicates in writing that he does not intend being present. The quorum of the Parole Board sitting is two (2) members, namely, the Chairperson of the Parole Board and a member of the Institutional Committee. These two members must always be present for the decisions of the Parole Board to be valid. There are other additional members who are members of the Parole Board, namely, a member representing the prison section in which the prisoner is incarcerated and any other interested party. The proceedings of the Parole Board should be minuted and the minutes filed.²⁴

²² See *Combrink and Another v Minister of Correctional Services and Another* 2001 (3) SA 338 (D) and also the case of *Mothibedi Floyd and 4 Others v Minister of Correctional Services and Others* (Witwatersrand Local Division)– Case No. 2004/26166/2004 – Judgment delivered on the 19th November 2004, unreported (per Schwartzman J); See also *Mohammed v Minister of Correctional Services and Others* 2003 (6) SA 169 (SE).

²³ See PSOB (vi)(1) (c)(i)(8) and (9) as well as (ii)(e) and also PSOB vi (1)(b)(ii)(aa). Also PSOB vi(1)(c)(ii)(b).

²⁴ See PSOB vi (1).

According to the evidence before the Commission, the Parole Board failed to give Mr Hlongwane timely notice or to record the proceedings as anticipated in the B-Orders. This is an ongoing problem in the Department.

The parole provisions of the Correctional Services Act No. 111 of 1998 were not promulgated at the time the Hlongwane matter was heard. The provisions of the Parole and Correctional Services Amendment Act No. 87 of 1997 were consented to on the 26 November 1997, with the date of commencement to be proclaimed. However, the State President proclaimed 1 October 2004 as the date of commencement of the Parole Provisions in the 1998 Act.²⁵ Notwithstanding this, the officials seemed to be confused about the applicable provisions as well.

In *S v Segole and Another*²⁶, the Department sought to rely on the 1997 and 1998 provisions of parole, even though they had not yet been promulgated. This is a clear indication of the confusion within the Department as to what parole system should be applied. Although this matter emanated from Gauteng, this confusion permeated the entire Department and led to a lot of uncertainty and ill-advised refusal of parole to deserving prisoners.

The same can be said about the manner in which the Department applies the provisions of medical parole to those deserving it. In this regard see the argument of the Department in the matter of *Stanfield v Department of Correctional Services*.²⁷ The Department in that case sought to rely on the provisions of the 1998 Act to defend the case of medical parole for Mr Stanfield, even though those provisions had not been promulgated. This was a Western Cape matter, which shows that the problem was not confined to one province or Management Area.

²⁵ See *Government Gazette* No. 26808 dated 1 October 2004 – Proclamation No. 45 of 2004.

²⁶ (1999) JOL 5349 (W).

²⁷ 2004 (4) SA 43 (CPD).

5. HLONGWANE'S PAROLE: FINDINGS

Accordingly the finding made was that Mr Sithole was negligent in the manner in which he conducted his duties and in that he failed to pay any regard to the rights of the prisoner or to his duties as a correctional official, in that:

- (a) He failed to set the matter down in October 2003 when he ought to have done so.
- (b) When he received a complaint from the Independent Prison Visitors regarding the incorrect information, he paid no regard to the complaint and there was a clear dereliction of duty.
- (c) He sent Mr Hlongwane away and told him to come back after the matter had been finalised.
- (d) He abdicated his responsibility when he asked Mr Hlongwane to pursue the investigation when he should have done it himself.
- (e) He failed to comply with the Departmental regulations in that he did not notify Mr Hlongwane timeously of the Parole Board hearing nor did he keep minutes of the Board's hearings.

6. PAROLE STATISTICS

The Commission also obtained statistics from the various Management Areas regarding parole. The statistics provided by the different Management Areas suggest that there is confusion around the parole system or, alternatively, inadequate statistics are being compiled with regard to parole. There certainly

are inconsistencies in the information given and huge discrepancies in the percentage of prisoners who are granted parole in the different areas.

In several of the Management Areas one finds that the number of people granted parole is significantly higher than in others, as reflected in the table below.

Percentage of People Considered for and Granted Parole

Area	1999	2000	2001	2002	2003
Durban	83%	94%	96%	96%	99%
Pietermaritzburg	69%	67%	68%	59%	56%
St Albans	52%	53%	47%	50%	48%
Pollsmoor	Pollsmoor was not able to provide statistics of the number of offenders the Parole Board considered.				
Grootvlei	Grootvlei indicated that it did not have statistics to work from but estimated that about 99% of offenders were granted parole.				
Leeuwkop	62%	60%	59%	55%	53%
Pretoria	42%	42%	41%	39%	43%
Ncome	100%	100%	100%	97%	86%
Johannesburg	46%	54%	46%	60%	47%

With regard to Durban, one finds that a very low number of people are rejected. In fact, the information provided to us stated that most of the people rejected are

those with incomplete documents, such as support system or social worker's reports.

The information from Pollsmoor casts some doubt on the statistics because it states that the vast majority of offenders are considered more than once for possible placement during their sentence period. As an example, the information indicates that a prisoner sentenced to eight (8) years for rape or murder must serve three quarters of his sentence but must appear before the Parole Board after a third of his sentence. Thus, according to this information, it is not uncommon for one offender to appear before the Parole Board four (4) or five (5) times before a positive recommendation for placement is made.

Some Management Areas, such as Grootvlei, Pollsmoor, Pretoria and Johannesburg, state that prisoners do not generally apply for parole. Other Management Areas provide statistics for this category, while others offer fairly low figures. In those Management Areas where statistics were not provided for in this category, it was said that no-one applied. This is perhaps explained in the information provided by the Johannesburg Management Area, which states that people do not generally apply for parole because inmates are automatically considered for parole after having completed a certain portion of their sentences. However, the information states that there are a "very small minority" of cases where inmates, their families or legal representatives approach the Parole Board and ask for an "early" parole. Durban also stated that attorneys make most of the applications.

Furthermore, the response to the Commission's request for statistics from Grootvlei states that according to policy all offenders must appear before the Parole Board and that if an offender indicates that he does not want to appear, the Parole Board will handle the profile in his absence. The information from Pietermaritzburg contains a fairly significant number of people – ranging from 100 to 120 in the 1999 to 2003 period – who did not appear before the Parole Board.

In light of the above, there is a need for a consistent Parole Policy within the Department.

7. THE NEW PAROLE PROVISIONS

The Commission feels that it might be appropriate in this report to deal with the new parole provisions so that recommendations made with regard to Parole Boards will also take into consideration the new provisions. At the time of writing of this report, the new provisions had just come into operation. However, the Commission was informed that the Department was busy making preparations to set up the Parole Boards.

The parole provisions in the 1959 Act have since been amended by the provisions of the Correctional Services Act No. 111 of 1998 (the Act), as mentioned earlier in this report. Prior to the promulgation of the Act, the Department also published the Correctional Services Amendment Act No. 87 of 1997.

7.1 Correctional Supervision and Parole Boards

Section 74 of the Act empowers the Minister of Correctional Services to appoint the Correctional Supervision Board and the Parole Board and also to specify the seat for each Board. Furthermore, he is granted the power to determine and amend the areas of jurisdiction of both Boards.

Section 74 stipulates that:

“(1) The Minister may-

- (a) *name each Correctional Supervision and Parole Board;*
 - (b) *specify the seat for each Board;*
 - (c) *determine and amend the area of jurisdiction of each Board.*
- (2) *The Minister must appoint one or more Correctional Supervision and Parole Boards consisting of -*
- (a) *a chairperson;*
 - (b) *a vice-chairperson;*
 - (c) *and (d) – (Paras. (c) and (d) deleted by Section 28(a) of Act No. 32 of 2001);*
 - (e) *one official of the Department nominated by the Commissioner;*
and
 - (f) *two members of the community.*
- (3) *The Commissioner must designate one of the correctional officials referred to in subsection (2) (e) to act as a secretary for a Board.*
- (4) *If the chairperson is absent from a meeting of the Board, the vice-chairperson must preside at that meeting.*
- (5) *Three members constitute a quorum for a meeting of a Board and must include the chairperson or vice-chairperson; and*
- (6) *Any decision of a Board must be taken by resolution of the majority of the members present at any meeting of that Board and, in the event of equality of votes, the person presiding shall have the casting vote as well as a deliberative vote.*
- (7) (a) *A member of a Board-*
- (i) *holds office for such period and on such conditions as the Minister may determine; and*
 - (ii) *may at any time resign by tendering written notification to the Minister*

- (b) *The Minister may remove a member from office on grounds of misbehaviour, incapacity or incompetence but such action by the Minister does not preclude disciplinary action against officials in the full-time service of the State as provided for in their conditions of service.*
 - (c) *If any member resigns, is removed from office or dies, the Minister may fill the vacancy by appointing a person in accordance with subsection (1) for the unexpired portion of the term of office of the predecessor.*
- 7(A)
- (a) *A Board may co-opt an official nominated by the National Commissioner of the South African Police Service or an official nominated by the Director-General of the Department of Justice, or both such officials, for a meeting of the Board.*
 - (b) *Any such co-opted official may vote at the meeting of the Board.*
- (8) *A member of a Board who is not in the full-time service of the State may receive such remuneration and allowances as the Commissioner may, on the recommendation of the Commission for Administration, determine with the concurrence of the Minister of Finance.”*

Section 74(2) stipulates that the Minister must appoint one or more Correctional Supervision and Parole Boards. The total number of such appointees amounts to five (5).

According to Section 74(3), the correctional official referred to in Section 74(2)(e) is to act as secretary to either the Parole Board or the Correctional Supervision

Board. On reading this provision, Section 74 goes on further to set out the quorum, the manner in which decisions will be taken and the fact that the Minister will appoint members of the Board.

It is also apparent from reading this particular provision that the Parole Board is appointed and thus responsible to the Minister and not to the Commissioner. Whilst this is apparent from the interpretation of the Act, it is the Commission's view that this point needs to be emphasised to the employees of the Department so that they will not interfere with the Boards. In drafting the regulations or the Act to deal with this, it should also be expressly stated to avoid any future misinterpretation of the provisions. There might be a misinterpretation of this aspect because of the provisions of section 74(8). It is apparent, if one considers the problems that have been encountered with the Parole Boards as set out above in this Chapter, that the Parole Boards and Correctional Supervision Boards have been the victims of the abuse of power by members of the Department of Correctional Services.

Accordingly, to restore credibility and respect to these Boards, it would be imperative that their independence be expressly stipulated. To ensure that their independence is not only stipulated on paper but that it is seen to be so, the Minister might even consider delegating the power of overseeing the functions with regard to these Boards to another body like the National Council of Correctional Services or a newly formed Board or Council, or alternatively, to the Office of the Inspecting Judge, who might act as his delegate.

The Office of the Parole Board should preferably be managed and supervised by outside people and should be placed outside the prison system and that particular Management Area. In this regard, consideration should be given to the Parole Boards falling under the jurisdiction of an independent body or the National Council of Correctional Services or the Office of the Inspecting Judge.

In the case of the Office of the Inspecting Judge, a new directorate could be set up with an assistant appointed in terms of section 87(2) of the 1998 Act, who would deal with supervising Parole Boards and ensuring that the Parole Boards work as they are supposed to work in terms of the Act. This will ensure that there are checks and balances in place, as parole seems to be an area prone to corruption and abuse. Accordingly, it is also an area that is likely to bring the Department into disrepute, if it has not already done so.

In the appointment of the members of the Parole Boards, the Office of the Inspecting Judge, or National Council or the new Independent Body will obviously consider those people who are beyond reproach, bias and prejudice and who will do their work without fear, favour or bias.

Having mentioned the fact that the Boards fall within the jurisdiction of the Minister, the Commission is of the view that the payment of the members of the Board should also be left to the Minister to decide rather than the Commissioner. Certain government officials might use the salaries of the members of the Boards to penalise those who might have done something or who have refused to toe the line. Given this, the Commission is of the view that the word “Commissioner” in Section 74(8) should be deleted and replaced with the word “Minister”. This will ensure that it is the Minister who decides the salaries paid to the members of these Boards without any Departmental or other interference.

The Act does not specify the qualifications required for the Chairperson of the Correctional Supervision and Parole Boards as referred to in Section 74(2)(a). The only reference to a legally qualified person was in respect of the official of the Department of Justice in Section 74(2)(d), which has since been amended. This section stated that the official must have a legal background. However, there is now no such a requirement.

The notion of “fairness” is embedded in our Constitution, which has consequently been adopted in all judicial and constitutional bodies that have to consider and decide on the rights of individuals.²⁸ The notion of fairness also invites equity. Occasionally, the Board(s) has to exercise discretion in deciding whether to grant parole or not. The Board might even have to exercise discretion with regard to who needs to be called and what type of evidence needs to be put before it for purposes of making a decision. Thus the decisions will have to be carefully considered and not be unfair or arbitrary or capricious or *mala fide*, as it has become apparent with some of the decisions the current Parole Boards have taken. Having said that, it is clear that to do so, one will need an experienced and legally qualified person to preside over these Parole and Correctional Supervision Boards.

Whenever a prisoner is to appear before the Correctional Supervision or Parole Boards because of cancellation of correctional supervision or parole,²⁹ or because a prisoner was sentenced to life imprisonment and the cancellation of parole as set out above must be considered,³⁰ the prisoner is given an opportunity to file written representations to the Board or to be represented by anybody to appear before the Board.³¹ The only restriction set out as to who can represent the prisoner before the Board is that it should not be a fellow prisoner, a correctional official or an official of the South African Police Service or the Department of Justice and Constitutional Development. Given this, one could say that legal representation may also be allowed in terms of the Act.

It might be appropriate for the Act or the Regulations to specify that the Chairperson should be a legally qualified person. To avoid any future problems, it is the Commission’s view that the Act should be amended to stipulate specifically that the Chairperson should have legal qualifications. If it cannot be done in the

²⁸ See *State vs Zuma and Others* 1995 (4) BCLR 401(CC).

²⁹ See Section 75(2)(a).

³⁰ See Section 75(2)(c).

³¹ See Section 75(3)(a) and (c).

Act or the Regulations, then the guidelines for the Minister need to specify this. However, if it is in the guidelines, the problem is that it will not be binding on whoever is responsible for constituting the Boards.

Given that certain officials in the Department manipulate these systems, as outlined in this report, it is the Commission's view that officials of the Department should not be allowed to hold the office of Chairperson and Vice-Chairperson in the Correctional Supervision and Parole Boards. Although the Act does not clearly prohibit such officials being appointed as Chairperson and Vice-Chairperson, it is the Commission's view that the Act should clearly stipulate that the Chairperson and the Vice-Chairperson should not be appointed from the officials of the Department of Correctional Services.

The issue of cost will, of course, come into consideration as to whether the Department can afford to appoint legally qualified people to chair the Boards set up in the various provinces. However, the costs should not bar consideration of appointing qualified legal practitioners on an ad hoc basis to preside over these boards. It is the view of the Commission that the issue of costs could be taken care of by the appointment of retired Magistrates or even retired Judges to chair the various Parole Boards.³² If costs are an issue, the preference should be given to the former rather than to the latter because the latter might be used in other capacities that will be clearly be set out later in this Chapter.³³

The fact that legal representation may be allowed is an additional reason why the Chairperson should be legally qualified. Inevitably, the legal representatives will raise technical and legal points and it needs a Chairperson who is familiar with legal proceedings to deal with this.

³² The one fact that may deter retired magistrates and judges from being appointed is that there are very few retired black magistrates let alone retired black judges. It is therefore the Commission's view that despite the issue of cost, which may be minimal if such persons are appointed from legally qualified practitioners on an ad hoc basis, practising lawyers should also be included to chair the various boards.

³³ See the section dealing with Review Boards (*infra*).

The problem of not having properly qualified Chairpersons of the Parole Boards was best demonstrated in the problems the Commission encountered at the Durban/Westville Management Area regarding Mr Magubane, which is dealt with later in this report.

7.2 United Kingdom Parole Boards

Chapter 53 of the United Kingdom Criminal Justice Act of 1991 establishes the Parole Board. It is interesting to note that in terms of this Statute, the Parole Board “shall not be regarded as the servant or agent of the Crown” and furthermore that the assets it holds, it holds “on behalf of” the Crown.³⁴

This obviously gives the Parole Board the independence it deserves from the Government of the day. According to the Act, the Board consists of a Chairman and not less than four (4) other members the Secretary of State appoints. The members include, amongst others,

- “(a) a person who holds or has held judicial office;*
- (b) a registered medical practitioner who is a psychiatrist;*
- (c) a person appearing to the Secretary of State to have knowledge and experience of the supervision or after care of discharged prisoners; and*
- (d) a person appearing to the Secretary of State to have made a study of the causes of delinquency or the treatment of offenders.”³⁵*

Whilst there are some similarities between the constitution of the United Kingdom Parole Board and the constitution of the South African Parole Board, it is clear that the shortcomings in the South African Act are that it does not have “a judicial

³⁴ Section 1 (1) of the Act.

³⁵ Section 2 (1) and (2) of the Act.

officer” and “a medical practitioner who is a psychiatrist” as members of the Board.

The Commission views these two aspects as very important, as there is a need to ensure that whilst the Board is independent, appointees are people who can be of assistance because of their expertise. Loading the Board with appointees who may not bring any expertise to the Board may not be helpful or appropriate.³⁶

The Commission appreciates that there is a shortage of medical practitioners, psychiatrists and psychologists in the country and thus we cannot be in a position to staff all Boards with medical or health professionals. However, provision could be made for people who have some relevant medical qualification to be part of the Parole Board or to be appointed on an ad hoc basis.

Having said that, the Commission’s view is that there should be no compromise in getting people who hold judicial office or who have held judicial office to assist in this regard. There are sufficient retired Magistrates who could be part of these Boards.

7.3 Review Boards

Section 76 of the Act stipulates that-

³⁶ For example, Ms Joan van Niekerk, the Director of Childline, KwaZulu-Natal, brought to the notice of the Commission that more information is required in dealing with the assessment of dangerousness and risk when considering the parole of a sentenced sexual offender. Ms van Niekerk is of the view that sexual offenders often present as model prisoners in the prison system and, because of good behaviour, often move rapidly into positions of trust and privilege, which means that Parole Boards receive very positive reports on the behaviour of the offender. In light of what Ms van Niekerk had said, it would be especially prudent and necessary to have a psychologist’s report from someone who specialises in the field of deviant sexual behaviour when the Parole Board forms an opinion on whether the offender still poses a risk to the community.

- (1) *The National Council consists of-*
 - (a) *a judge as chairperson;*
 - (b) *a director or a deputy director of Public Prosecutions;*
 - (c) *a member of the Department;*
 - (d) *a person with special knowledge of the correctional system; and*
 - (e) *two representatives of the public.*
- (2) *The National Council must appoint the members for each meeting of the Correctional Supervision and Parole Review Board.*
- (3) *The majority of the members of the Correctional Supervision and Parole Review Board constitute a quorum for a meeting of the Board.*
- (4) *A decision of a majority of the members of the Correctional Supervision and Parole Review Board present is a decision of the Board and in the event of an equality of votes on any matter, the member presiding at the meeting has both a deliberative and a casting vote.”*

It is apparent from this section that the Review Board will be appointed from the members of the National Council. It is the view of the Commission that the members of the National Council may be inundated with work and may not be in a position to deal with all the matters that might end up reaching them. Given this, consideration should be given to wider delegations and allowing people who are outside the National Council to participate, like retired Judges and/or Directors of Public Prosecutions in respect of the members referred to in Section 76 (1)(a) and (b).

Section 75(8) stipulates that a decision of the Parole Board is final except that the Minister of Correctional Services and the Commissioner may refer the matter to the Correctional Supervision Board and the Parole Review Board for reconsideration, in which case the record of the proceedings before the Parole

Board must be submitted to the Correctional Supervision Board and the Parole Review Board.

Once again, the Commission has difficulty with provisions of Section 75(8) in that the right of review is only given to the Minister and the Commissioner of Correctional Services for the reasons set out below.

Section 33 of the Constitution of the Republic of South Africa (Act No. 108 of 1996) gives everyone the right to administrative action that is “lawful, reasonable and procedurally fair”. It goes further to demand that anyone whose rights have been adversely affected by administrative action has the right to be given “written reasons”.

Prisoners have the common law right of review to take any decision of an organ of State on review.³⁷ Prisoners, like any other person in the Republic of South Africa, also have a constitutional or statutory review right in terms of Promotion of Administrative Justice Act No. 3 of 2000 (PAJA).

In order to bring the provisions of PAJA into the equation and invoke them, a prisoner will have to merely prove that the Parole Board is “an organ of State” as contemplated in Section 239 of the Constitution and Section 1 of PAJA. Section 1 of PAJA simply defines “an organ of State” as that contemplated in Section 239 of the Constitution. The Constitution defines “the organ of State” in Section 239 as follows:

- “(a) *Any Department of State or administration in the national, provincial or local sphere of government; or*
- (b) Any other functionary or institution –*

³⁷ *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Limited and Another* 1988 (3) SA 132 (A) at 152 A-D.

- (i) *exercising a power or performing a function in terms of the Constitution or Provincial Constitution; or*
- (ii) *exercising a power or performing a public function in terms of any legislation, but does not include a court or judicial officer.”*

The Correctional Services Act obviously created the Boards, their powers are manifestly public powers and they perform public functions. The Boards are part of the Department of Correctional Services or it might be argued that they are part of the State, in the sense that they are under the State's direct control. They also serve a function for the State in considering parole and correctional supervision applications by prisoners.

Whichever way one views it, the Parole Board is performing an administrative action, which is subject to review by a High Court in terms of both the common law and PAJA.³⁸

Whilst it might be argued that the intention of the legislature in promulgating the Act was to exclude the prisoners from having the right of review on the refusal of the Parole Board or the Correctional Supervision Board to grant the parole or correctional supervision, the legislature may not have succeeded in achieving that goal because of the provisions of PAJA and the South African Constitution. PAJA and the South African Constitution give any person who is aggrieved by an administrative action the right to take the matter on review. This includes prisoners.

Given this, it might be easier if the same right is recognised in terms of the Correctional Services Act to prevent the possibility of a number of technical points being argued before the Board or court as to whether the prisoner has a

³⁸ See *Directory Advertising Cost Cutters v Minister of Post, Telecommunications and Broadcasting* 1996(3) SA 800 (T) at 807 H-811 B, *Korf v Health Professionals Council of South Africa* 2000 (1) SA 1171 (T) at 1177 E – 1178 D, *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 (3) SA 119 (C) at 132 E – 133 D and *Nextcom v Funde N O* 2000 (4) SA 491 (D) at 503 E – 504 B.

right or not, and in terms of which statute, to review the Board's decision. That might on its own delay the proceedings of the Review Boards or court.

The advantage of incorporating the review procedure in the Correctional Services Act will be that the procedure can be tailored to suit the prisoners given the limited resources they have and the nature of the Department's obligations in terms of the Act. That would be acceptable as long as it is not contrary to the intention and spirit of the Constitution. In other words, it must be acceptable to both the Department and the prisoners who may be aggrieved. In the circumstances, it might be in the Department's interest to give prisoners the right of review and also to set out its own review procedure to the advantage of all the parties, otherwise the review procedure will be in terms of the Supreme Court Act.

In the cases of *Staniland v Minister of Correctional Services* (above) and *Du Plooy v Minister of Correctional Services and 4 Others* (2004) 3 All SA 613 (T), where the prisoners had taken the Department on review for refusing them Medical Parole, the courts, in fact, found that the official had acted not only unreasonably but also unlawfully.³⁹ Given these possibilities, the Department may save time and costs by avoiding being taken on review before the High Court by prisoners aggrieved at the Board's refusal of parole and could ensure that there are checks and balances in place to protect the rights of prisoners. In addition, it could be designed so that it is a cost effective procedure.

³⁹ In *Du Plooy v Minister of Correctional Services and 4 Others* (2004) 3 All SA 613 (T) at page 621 a-b where the Judge also found:

“There is no mention of the provisional commissioner of correctional services, namely the third respondent in the decision-making process. In terms of the delegation within the hierarchy of decision-makers, I find that it was the wrong person who took the decision. The decision was taken by the fourth respondent, the area Commissioner and not the provincial Commissioner, the third respondent, not to release the applicant in terms of section 69(b).”

The issue of prisoners taking the Department to the High Court where there is uncertainty about the provisions of the law, is not a far-fetched idea. Lately, it has been the trend. In a number of management areas the department has been taken to court for failing to give guidance on matters of parole. This tendency has arisen because of, amongst others, the problems, which have been highlighted in this report regarding the department's interpretation of the parole provisions.

Accordingly, it might be appropriate at this stage to turn to look into the situation with regard to the various High Court applications in this country, which have been moved by prisoners.

8. HIGH COURT APPLICATIONS

The flood of applications prisoners have made to our courts is evidence of the lack of adequate remedies or procedures in the Regulations or the Act for prisoners to protect their rights to parole and the other rights they are entitled to.

There is a great deal of confusion among correctional officials about parole because the Department has consistently chopped and changed its directives.

Members of the various parole boards are therefore sometimes not exactly sure of the applicable directives. Similarly, a number of prisoners are also uncertain about the criteria used to grant parole.

As a result of this confusion, various prisoners have instituted a number of court cases against the Department regarding parole. This sudden surge in applications for parole to the High Court is not only affecting the Department of Correctional Services but also clogging the Motion Court rolls in the different divisions of the High Court in South Africa.

The said clogging of the rolls has, amongst other things, led to the Johannesburg High Court creating an additional Motion Court, which sits on a daily basis to deal with matters of parole and other matters which emanate from the Department of Correctional Services. During the period July 2004 to January 2005, the Motion Court applications increased to forty seven (47) matters. In this regard, refer to annexure “A” to this Chapter, wherein the State Attorney for Johannesburg has explained the problems they are encountering with regard to the various applications emanating from the Department of Correctional Services.

The Commission has noted from the information received from the State Attorney that there has been a downward trend lately with these applications in the Johannesburg High Court. On making inquiries, the Commission was informed that during or about 15th October 2005, a meeting to try and resolve the problem of the sudden influx of applications for parole in the Johannesburg High Court was held between Judge K. Satchwell and the senior officials of the department stationed at Johannesburg, Leeuwkop, Boksburg and Krugersdorp Management Areas. This meeting may have contributed to the downward trend in the Parole or Review Applications

Although there is a downward trend in Parole Applications at the Johannesburg High Court, the new applications are now to review the decisions or lack thereof of the Parole Boards. Furthermore, this problem of applications has not only been confined to the Johannesburg High Court. The Pretoria and Durban High Courts have also observed an upsurge in applicants, who are, inter alia, seeking to have the decisions of the parole boards reviewed and set aside because of the confusion in the Department with regard to parole.

At the Pretoria High Court, the situation became so chaotic that the Registrar issued a directive or letter⁴⁰ to the Department setting out interim procedures

⁴⁰ A copy of the letter is annexed to this Chapter, marked “A”

relating to the applications being received from prisoners in the Pretoria Management Area. A prisoner⁴¹ subsequently challenged the validity of this letter in an urgent *ex parte* application. The seriousness with which the High Court viewed this application can be seen from the fact that a full bench was assembled to deal with the matter.⁴²

This stream of applications has also resulted in a potentially serious security risk at the country's High Courts, as numerous prisoners have to be transported on a daily basis to court when the applications are heard. This also causes further staffing problems, as numerous warders are now required to accompany the prisoners to court. The full impact of these applications is fully discussed in the Full Bench decision and the following extreme example is referred to in the judgement delivered by Hartzenberg ADJP, where he points out

"During April this year there was an instance where in one abortive application 41 prisoners were transported from Kutuma Sinthumule prison, more than 400 kilometres from court in five vehicles guarded by 25 warders. The entourage left the prison at 4:00 am and must have arrived back very late in the evening. The matter was not on the roll and there was no service on the State."⁴³

Given this, the Department's failure to act in accordance with the law has clearly created a crisis. As a result, there is an urgent need for the authorities to intervene to ensure that the parole provisions of the Act are implemented correctly and legally and that the Department puts in place orderly and streamlined procedures for prisoners to have access to the courts without affecting their smooth functioning.

⁴¹ Thamsanqa Fortune Thukwane.

⁴² The Judges who sat as a Full Bench were, Hartzenberg ADJP, De Villiers J and Van Oosten J.

⁴³ See *ex parte* application T.F. Thukwane vs Minister of Correctional Services, Pretoria High Court, Case No. 15301/05 (Unreported).

9. CONCLUDING REMARKS

The abovementioned case of Hlongwane is a classical case, which shows how the Department has failed to implement the parole provisions correctly. Similarly, the case of Mr Mohapi indicates how favouritism works when it comes to applications for parole within the Department.

However, the abovementioned problems and the ongoing confusion with regard to the Department's directives, has led to a situation where prisoners have resorted to seeking remedies from the High Court as they are not getting much help from the Parole Boards.

There was also evidence before the Commission that in some of the management areas, the grinding of the wheels of the Parole Boards had come to a virtual standstill because of the uncertainty regarding the applicable parole legal framework. These are situations which should be avoided in any correctional environment.

The directive which was the guideline of policy pertaining to the release of certain offenders No. 1/8/B-“Penalisation Factors: Applicable in Parole Board and delegated officials” was signed by the Director of Offender Policy, F J Venter.⁴⁴ The aforesaid directive came into operation on the 23rd April 1998.

Since 23rd April 1998, the various Parole Boards have been using the aforesaid directive as though it was ‘cast in stone’, rather than using same as a guideline, which was to assist them in interpreting, rightly or wrongly, the 1959 Act.

It is clear from all of the abovementioned cases that the departmental officials were no longer using this as a guideline but they were using it as a replacement of the Act. This created a situation, which could never have been anticipated by

⁴⁴ See Annexure ‘C’ to Pretoria Exhibit ‘CCC’.

the legislature when it enacted the 1959 Act. Secondly, the Departmental guidelines or regulations can never override the provisions of the Act.

The aforesaid directive was only repealed by the Department on the 27th June 2005, by an order of the Department bearing ref. No. 1/8/1 given under the signature of E. J. Kriek, Director: Pre-release Resettlement of the Department.⁴⁵ The Department has got to be commended for the aforesaid directive as it relieved the congestion and problems which had engulfed the various management areas because of the abovementioned 1998 directive.

Having said that, the Commission will have to mention that it was surprised by the fact that it took the Department approximately five (5) years to attend to a simple issue of resolving the parole guidelines, which were imposed by its officials and ensuring that prisoners are released timeously.

One of the first cases, which challenged the aforesaid directives besides the different complaints, which were raised by the various prisoners, both to the Department and to other bodies, which deal with issues of parole, including the Office of the Inspecting Judge, regarding the unfairness thereof, was heard by the High Court on 15th August 2000. Judgment was delivered on 25th August 2000.⁴⁶

The aforesaid Judgment was followed by the various complaints from different prisoners to the Department, the Office of the Inspecting Judge, South African Prisoners' Organisation for Human Rights⁴⁷ and this particular Commission about the manner in which their applications for parole had been affected by the

⁴⁵ See Head Office Exhibit 'U'.

⁴⁶ See *Combrink and Another v Minister of Correctional Services and Another* 2001 (3) SA 338 (D). On 27 March 2002 another Judgement, in *Mohammed v Minister of Correctional Services* (above) confirmed the views espoused in the Combrinck judgement regarding the Policy Directive.

⁴⁷ See the evidence of Mr Golden Miles Bhudu, Johannesburg Transcript, Volumes 39, pages 3 219-3 221.

Department's guidelines, which had already been declared unfair by abovementioned court. A number of challenges were also instituted by the prisoners in the High Courts around the country to no avail.

It is this approach to the issue of parole, which the Commission found to be an indication of the Department's clear disregard of prisoners' rights and the general state of the management of the Department being re-active instead of being pro-active. This also points to a level of incompetence, in that, the issue, which contributed to, amongst others, overcrowding in prisons and the clogging of the different Motion Court rolls could have been attended to at a very early stage.

Accordingly, it is the Commission's view that even the High Court applications referred to in this chapter, are of the Department's own making in that it failed to act in accordance with the law as already discussed above.

Whilst it might be argued that there are new parole provisions in the 1998 Act, it is important to ensure that the Department acts with regard to the law in respect of all those prisoners who were sentenced prior to the new parole provisions coming into operation. Accordingly, it is the last letter of the law in respect of those prisoners, which should be guiding the Department, namely section 65 of the 1959 Correctional Services Act, as amended.

10. MEDICAL PAROLE

While the Commission was dealing with the issue of parole, it also became apparent that a second issue, namely medical parole, is also problematic for the Department.

In dealing with this particular aspect, it might be appropriate to refer to the provisions of the Constitution with regard to the rights of arrested and detained persons. Section 35 (2)(e) of the Constitution, states that:

- “(2) Everyone who is detained, including every sentenced prisoner, has the right-*
- (e) to conditions of detention that are consistent with human dignity, including at least exercise and provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.” (Own emphasis)*

In addition to stating these rights of a detained and accused person, it is appropriate to also consider what the Constitution says with regard to rights to health care, food, water and social security. Section 27 of the Constitution states that:

- “(1) Everyone has the right to have access to:*
- (a) Health care services, including reproductive health care;*
- (b) Sufficient food and water; and*
- (c) Social Security, including if they are unable to support themselves and their dependants, appropriate social assistance;*
- (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights;*
- (3) No one may be refused emergency medical treatment.”*

Section 69 of the Correctional Services Act No. 8 of 1959 deals with medical parole and provides as follows:

“Placement on parole on medical grounds

A prisoner serving any sentence in a prison-

- (a) who suffers from a dangerous, infectious or contagious disease; or*
- (b) whose placement on parole is expedient on the grounds of his physical condition or, in the case of a woman, her advanced pregnancy, may at any time, on the recommendation of the medical officer, be placed on parole by the Commissioner: provided that a prisoner sentenced to imprisonment for life shall not be placed on parole without the consent of the Minister.”*

The corresponding provision in the Correctional Services Act No. 111 of 1998 is section 79. In this section, the following is provided for parole on medical grounds:

“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.”
(Own emphasis)

The context within which the failure to release people on medical parole is assessed is in terms of the rights and obligations of the State in respect of people who are detained and, in particular, their right to medical care. If the State cannot provide adequate medical care, the best thing it can do under the circumstances

is to consider releasing terminally ill prisoners on medical parole so that the family can look after them.

Section 10 of the Constitution recognises that “everyone has inherent dignity and the right to have their dignity respected and protected”. Accordingly, in considering the release of an inmate on medical parole, it is imperative that the right of an individual to die in a “dignified and humane way” should take precedence when the Department’s officials consider such applications.⁴⁸ However, it seems that this is not the main consideration of the Department’s officials in dealing with the issue of medical parole.

At the Commission’s hearings on the Bloemfontein and Johannesburg Management Areas, the problem of medical parole became even more profound. The impression that the Commission was given is that either the Department does not have a clear policy on medical parole or, if there is a clear policy, the members of the Department who are supposed to implement the policy do not have proper guidelines as to how the policy is to be implemented. If there are clear guidelines as to how the policy is to be implemented, officials are simply disregarding these policies and guidelines, or alternatively, they seem to think that even though a person may be at a stage where he or she should be given medical parole, he or she should continue to be punished by refusing to give him or her medical parole.

In respect of the Johannesburg Management Area, there was evidence that some of the prisoners already on their deathbed with chronic diseases have never been given an opportunity to die a decent death. They are refused parole and some of the deaths were most undignified and humiliating for those who had to observe what was happening. They died without dignity and with clear disregard of their basic human rights by the members of the Department of Correctional Services.

⁴⁸ See *Stanfield’s case supra* (note 17) – paragraph 15.

A terminally ill man who could not even walk to the visitation room, died in front of his family in a wheelchair.⁴⁹ Obviously, everybody could see that the prisoner could not even walk and that he had a terminal disease. To the Department officials in charge of parole, that should have been the very reason seriously to consider the medical evidence presented and place the matter before the Parole Board for consideration.

The Department's argument, which was presented before the Commission at the hearings, is of course that sometimes it happens that people who are on their deathbeds do not have family or if they do have families, the members of their families are not prepared to take them at that advanced stage of their illness. This cannot be correct with regard to all the prisoners who have died natural deaths in prison.⁵⁰ Furthermore, consideration could be given to the sick prisoner being transferred to a Hospice for him or her to die a dignified death.

It might be appropriate, at this stage, to consider the Department's approach to the issue of Medical Parole.

10.1 Department's Approach

10.1.1 The Stanfield Case

The attitude of the Department with regard to medical parole was clearly expressed in the matter of *Stanfield v Minister of Correctional Services*.⁵¹

In that case, notwithstanding the fact that various medical practitioners had recommended that Stanfield should be released on medical parole, the Departmental officials opposed the release of Mr Stanfield on flimsy grounds,

⁴⁹ See the evidence of Mr Cloete at Johannesburg.

⁵⁰ See section dealing with General Parole above.

⁵¹ See (note 17) *supra*.

which the court found to have no basis. They even took the matter on appeal after the court had made the order. There could be no better illustration of the disregard of Departmental policies as was shown in the Stanfield matter.

Secondly, it was clear in the Stanfield matter that the Department sought to rely on regulations that were not in operation. The fact that the 1998 Act had not yet come into operation caused this confusion because the B-Orders had been drafted as if the 1998 Act were operative. Thus, Department officials used certain requirements that were not part of the 1959 Act to deny people medical parole when in fact those provisions had not come into operation.⁵² The question is how many people, who should have been released on parole, have died in South African prisons when they should have been granted parole on the basis of the 1959 Act?

Thirdly, even if the requirements set out in the 1998 Act were the applicable ones, it was apparent in the Stanfield matter that the application thereof was not done judiciously or with the compassion that ought to be shown to people with chronic illnesses. It is evident that Department officials misconstrued the nature of the discretion conferred upon them in terms of section 69 of the 1959 Correctional Services Act or even, for that matter, section 79 of the 1998 Act. In doing so, they also applied their discretion arbitrarily and capriciously, took irrelevant considerations into account and failed to take into account relevant considerations.

It was clear in the Stanfield case that the Department wanted the person to be “in the final phase of a terminal illness” before he could be released on medical parole. The requirement of terminal illness was in the B-Orders of the Department even though the applicable Act did not have such a requirement. As to why the Department incorporated this requirement, which is in terms of the

⁵² This confusion even found its way into the Annual Report of the Inspecting Judge for the 2002/2003 year. At page 20, there is reference to the provisions of section 79 of Act No.111 of 1998 as the applicable Act.

1998 Act, before this Act came into operation is still a mystery to this Commission.

In the Stanfield case, the Department (amongst others) gave as considerations for refusing parole the fact that the applicant had committed a serious crime and his earlier release would evidently have deleterious effect on the objectives of punishment and on the interests of administration of justice and of the community at large. Furthermore, this would “certainly not be expedient but would rather frustrate the objectives of section 59 of the Act”.

Once again, in considering the views expressed with regard to why the Department refused to give Mr Stanfield parole, the Commission gets the impression that departmental officials have too much or too wide a discretion in deciding what is good for the administration of justice. The Commission is unsure whether this falls within their jurisdiction or whether the officials of the Department are qualified to deal with it.

Section 63(2) of the 1959 Act merely requires the Parole Board to submit a report on, amongst other things, the possibility of the prisoner’s “relapse into crime”. This requirement is applicable to a prisoner with an indeterminate sentence in terms of this section. The Commission is saying this because it is of the view that people are in prison as punishment and not to be punished. Given this, the Department should have nothing to do with the manner in which they should be punished. It is the court that decides upon punishment by either taking away a convicted person’s liberty, imposing a fine or house arrest, directing that they should perform community service or that they should be placed under correctional supervision. The only role the Department has is to say these are the facts. The Commissioner has to decide and if the Commissioner decides not to release the person, then the Department has every resource and power to refer the matter back to court for a decision on whether, at this stage, it would be appropriate to release the person.

It is exactly because of this view that the Commission feels the issue of parole should fall under the chairmanship of legally qualified persons who would, even though the task would be the performance of an executive function, still be applying the law and could make the sorts of decisions expected of lawyers.

Furthermore, in the opinion of the Commission, neither section 79 of the 1998 Act nor section 69 of the 1959 Act requires that a person should be “unable to commit any crime should he be released on parole for medical reasons.” However, this requirement, coupled with punishment and the administration of justice, seems to feature strongly in the manner in which the Department considers parole. The Commission is of the view that the Department should place less emphasis on this and focus more on whether a prisoner is in his final phase of a terminal disease and in doing so, be guided by medical opinion instead of usurping the functions of the medical practitioners.

10.1.2 Stanley Ndlovu Application

Mr Stanley Ndlovu is a prisoner serving a term of imprisonment of fifteen (15) years for robbery at Leeuwkop Prison. He was transferred to Johannesburg Medium B on 29 July 2003.

The Administrative Secretary of the Department of Correctional Services, Johannesburg Medium B, Mr J.C. Messias,⁵³ provided the following information with regard to Mr S. Ndlovu:

- His effective sentence is fifteen (15) years and he was sentenced on 2 June 1997.
- His sentence expiry date is 1 November 2011.
- His date for half of his sentence is 17 August 2004.

⁵³ See letter dated 26 April 2005, Leeukop Exhibit “HH1”.

- He will be placed before the parole board again on 31 October 2005 for further consideration of parole.

On 17 October 2000, whilst at Leeuwkop Prison, he was stabbed and taken to the prison hospital. As a result of being stabbed, Mr Ndlovu was paralysed and suffered the loss of the use of his lower back muscles and lower limbs. Furthermore, he suffered from a problem “urogenic bladder” and could not pass urine normally.

During October 2001, Mr Ndlovu applied for medical parole. Dr P.G. Blaxter prepared a medical report dated 19 October 2002, where he stated that:

“STANLEY NDLOVU

The above was stabbed one year ago and has lower backache, bowel problems and paraesthesias. He can barely stand and has to move his legs with his arms. His disability is permanent and I recommend medical parole.

(sgd.) DR P.G BLAXTER”

It is clear that Dr Blaxter supported the application for medical parole.

There is also a medical report compiled by Dr J.T. Chuene who stated the following:

“He is currently using catheters to relieve himself (urine). There is less chance that he will recover i.e he may not be able to pass urine normally in future.

Faithfully yours

(sgd.) DR J.T CHUENE.

It is clear from Dr Chuene's report that the prisoner was never going to be in a position to pass urine normally in the future. Furthermore, there is also another medical report on the prisoner (Z1258) dated 8 October 2001 in which it is recommended that Mr Ndlovu be released on medical parole. The report states that he has multiple complications and needs treatment.

Mr Ndlovu's application was accompanied by medical reports from the District Surgeon, Dr N. Kabane as well as Dr Blaxter's report. The application for release on medical grounds contained the following information:

“APPLICATION FOR RELEASE ON MEDICAL GROUNDS:

PRISONER STANLEY NDLOVU

REGISTRATION NUMBER 97320413

LEEUEWKOP MEDIUM A PRISON.

HEAD OF PRISON: (sgd) Signature illegible

CHAIRMAN: PAROLE BOARD: R.N Zondani.

AREA MANAGER: CORRECTIONAL SERVICES:

LEEUEWKOP.

1.

3. *Prisoner STANLEY NDLOVU is sentenced as follows:*

Date of Sentence/sentences:

(1) 1997.06.02.

(2) 1998.06.23.

Sentence expiry date: 200.12.01. (sic)

Correctional Supervision Date: --

(Act 276 (1)(i))

Correctional Supervision Date: 2000.03.01.

½ of Sentence: 2000.09.01.

Number of credits earned: 2648
(until)

½ of sentence minus credits: 1997.06.02.

Sentence expiry date minus credits: 2000.08.31.

4. Medical condition of the prisoner:

1.1 Diagnosis: Stabbed at the fourth thoracic spine in September 2002 with resultant paresis and parasthesia of the lower back muscle and lower limbs.

1.2 Prognosis: Very poor prognosis to regain power and sensation over both lower limbs and has multiple complications like hemorrhoids, backache that is intractable and pre-existing asthma and sinusitis.

4.4. Recommended accommodation: Patient to be discharged to the care of his family and possible sheltered employment (secured) on medical parole.

5. Recommendation:

It is recommended that prisoner Stanley Ndlovu be released on medical grounds in accordance with the provision of Article 69 of the Correctional Services Act No. 8 of 1959 and DOB III (3)(d)(xvii) and DOB VI (5)(v) in the care of his family because of the following reasons.

5.1. Patient has multiple problems relating to his health and needs extensive medical care. (Kindly peruse medical file).

6. For your further attention.

(sgd.): DR N KABANE

Date : 2001/10/08...

7. Recommendation/Comments: Head of Prison.

I also concur with the abovementioned recommendations that he may be considered for medical parole.

(sgd.) HEAD OF THE PRISON

Date : 25.10.2001.

8. Recommendation/Comments: Chairman of the Parole Board:

Prisoner's state of health is not good. He is permanently disabled and confined to a wheelchair after being stabbed by

a prisoner (at Maximum). He urinates by means of tubes, he cannot walk or even stand up for that matter. As chairperson of Parole Board I strongly recommend that he be released on medical grounds and that he be monitored by Community Corrections throughout.

(sgd.) CHAIRMAN OF THE PAROLE BOARD

R N ZONDANI - Deputy Director. Date : 14.11.2001.

7. *Recommendation/Comments: Area Manager.*

Not recommended.

(sgd.) AREA MANAGER Date 16.11.01.⁵⁴

It is clear from this report that the Doctor recommended that Mr Ndlovu be released on medical parole. The Head of Prison, as well as the Chairman of the Parole Board, supported the recommendation.

However, Mr Ndlovu was never released because the then Provincial Control Officer in the Provincial Commissioner's Office, Mrs Sharon J. Kunene did not support the recommendation that he be released. Mrs Kunene does not give reasons in the application for why she refused the release of Mr Ndlovu.

In the Commission's view, this shows that the officials of the Department, who are in control of the prisoners' lives, abuse their power in that they ignore the recommendations of medical practitioners and expert opinion without any basis. Officials adopted a similar approach in the Stanfield matter reported on above. Reasons should be given in order to comply with the provisions of section 32 of the Constitution and the Access to Information Act No. 2 of 2000.

The Commission approached Mrs Kunene for an explanation as to why the Stanley Ndlovu application was refused. In her affidavit, she stated that:

⁵⁴ See Application in Leeuwkop file 1/8/3, Exhibit "HH".

“6. Both the doctor and parole board recommended that the inmate should be released on medical grounds, however upon perusal of the doctor’s note and board’s recommendations I realized that their recommendations were solely based on the fact that the inmate was confined to a wheelchair, nothing suggested that the inmate was in the final phase of any terminal disease or condition.”⁵⁵

In her affidavit she also went on to state that she relied on section 79 of the Correctional Services Act of 1998 and she declined the application “based on the abovementioned provisions of the Act.”

Mrs Kunene relied on an incorrect provision of the Act because at the time the said provision had not come into operation. This was the same situation as it was the case in the Staniland matter.

10.1.3 The Du Plooy Application

In *Du Plooy v Minister of Correctional Services and 4 Others* (above), Mr du Plooy, a prisoner, who was terminally ill and serving a sentence of fifteen (15) years at the Pretoria Local Prison for armed robbery, had to apply to the High Court for release on medical parole. Mr du Plooy had been admitted to the prison hospital from the first day of his sentence because of ill-health. According to his doctors, his life expectancy had been reduced to a few months. Four (4) medical practitioners, including a physician who specialised in oncology and the District Surgeon, who worked at the prison hospital, supported his application for parole. Despite this, the Parole Board supported by the Area Manager, refused to release him on parole stating:

⁵⁵

See Sharon Jabulile Kunene’s affidavit – Leeuwkop Exhibit “HH2”.

“Our medical staff will evaluate the prisoner’s condition from time to time and immediately it deteriorates he will be placed before the Parole Board for another consideration. [sic] Presently he does not meet the criteria. Not recommended for placement on medical parole.”

When his lawyers requested to know “the criteria” and the reasons for the refusal, they were neither told the criteria nor given the reasons. It was only in court papers that the Department gave the reasons as:

“... the applicant may be terminally ill, but he is still in a position to walk around unassisted, climb stairs as there are no lifts at the hospital and generally walk around the hospital”.

This was notwithstanding that one of the doctors had furnished an affidavit stating that in his professional opinion Mr du Plooy was “in the last stage of the final stage of the disease and the disease could result in his imminent death at any stage from now to the following two to three months”. He went on to state:

“The applicant is currently dying a painful and protracted death and currently needs to be cared for either in a hospice or at home with regular hospice intervention.”

The court found that Mr du Plooy’s health was deteriorating rapidly and he was in need of humanness, empathy and compassion.

Accordingly the court ordered that:

“The applicant be placed forthwith on parole subject to:

- (a) *him being monitored by the respondents' Department Community Corrections in accordance with the statutes and regulations pertaining to Correctional Services;*
- (b) *his continuing to remain and be under the supervision of Dr J.N Lombard at the Pretoria Academic Hospital;*
- (c) *in the event of him being discharged from hospital then he shall be placed under the care of his wife Mrs Susan du Plooy at their common home at 407 Ruben Flats, 517 Jasmin Street, Silverton, Pretoria."*

There is a dire need for the Department to have a proper and consistent Medical Parole Policy. Prisoners like Messrs Stanfield, Ndlovu and du Plooy, who should have been released on Medical Parole, are kept in prison for no apparent reason. It is clear that Medical Parole is left to the sole discretion of officials who are not medically qualified to make the necessary assessments. Furthermore, they do not accept the advice of medical personnel.

10.2 Judicial Inspectorate

In his report for the year ending on 31 March 2003, the Inspecting Judge, the Honourable Mr Justice J.J. Fagan, indicated that there is a need for the Department to consider making use of the provisions relating to release of terminally ill patients on medical grounds.⁵⁶

In his report for the period ending 31 March 2004, the Inspecting Judge reports that they received nineteen thousand three hundred and twenty nine (19 329) complaints regarding health care problems. Four hundred and ninety five (495)

⁵⁶ The records indicate that eighty eight (88) out of an average of 179 398 prisoners were released on medical grounds. (Page 19 of the Report).

prisoners requested to be released on medical grounds. One hundred and seventeen (117) terminally ill prisoners were released in 2003 on medical grounds nationwide. 1 683 are said to have died of natural causes and three hundred and eighty nine (389) of those were awaiting trial.⁵⁷

It is clear that a very small number of prisoners were released on medical grounds in this two-year period notwithstanding the fact that it has been stated in numerous publications and research papers that there are a number of prisoners who are terminally ill because of the scourge of HIV/Aids in our country. The question then is, if on average only eighty eight (88) up to one hundred and seventeen (117) prisoners are released in one year, where are all the other terminally ill patients? Why are all the other terminally ill patients not being released on medical parole?

Similarly, according to the same report of the Inspecting Judge, the mortality rate amongst the prisoners has increased by 600% over the past seven years. This again clearly points to the fact that the Department is not using medical parole.

10.3 Concluding Remarks

The Commission is in full agreement with the sentiments of Van Zyl J in the Stanfield case⁵⁸ when he stated that:

“It is hence irrelevant what the nature of his conviction and length of his sentence of imprisonment might be. It is equally irrelevant what period of imprisonment he has actually served. The only requirements for release on parole on medical grounds are that the medical officer should

⁵⁷ See pages 15 – 17 of Annual Report 2003/2004. Prisoners and Prisons.

⁵⁸ Supra (note 17).

*recommend it and that issue should be “expedient” having regard to his “physical condition”.*⁵⁹

About the requirement on life expectancy, he said:

*“There is no indication of what a “short”, as opposed to a “not so short”, life expectancy may be. Nor can it be determined when a prisoner is so ill that it would be physically impossible for him to commit a crime. I should imagine that the commission of further crimes would be the last thing on the mind of any prisoner released on parole for medical reasons, particularly when he knows that he has only a few months to live.”*⁶⁰

Accordingly, the Department has misdirected itself in imposing the requirement of whether a prisoner would be able to commit a crime or not in the assessment of medical parole.

In paragraphs 124 to 128 of the judgment, Van Zyl J deals with the right to dignity of sick prisoners in the most compassionate way and this Commission agrees with his views, which can best be summed up in this statement:

*“Even the worst of convicted criminals should be entitled to a humane and dignified death.”*⁶¹

The requirements of section 35 (2)(e) of the Constitution should be paramount. The Department should respect the right to dignity at all times, especially in respect of those prisoners who are terminally ill.

The requirement in section 79 of the 1998 Act that a prisoner be “in the final phase of any terminal disease or condition” before he is released on medical

⁵⁹ *Op cit* at para. 82.

⁶⁰ *Op cit* at para. 110.

⁶¹ See paragraph 127 of the *Stanfield v Minister of Correctional Services* Judgment *supra* (note 19).

parole is bound to create problems in practice. Given this, there is a need to consider amending this particular requirement to be less stringent in order to ensure that terminally ill prisoners have a “humane and dignified death”. The phrase, “in the final phase”, could be deleted from this section to give the doctors and Parole Boards some discretion in this regard.

The cornerstone of our Constitution is the commitment to the restoration of human dignity to all South Africans and to a large extent to avoid the repetition of the injustices of our past. Accordingly, the intention is to create a society based on democratic values, social justice and fundamental human rights. The ill treatment of those who are terminally ill could never be what the founders of our democracy sought to achieve.

Our courts have consistently held that prisoners do not lose their “basic human rights” upon entering the prison doors. They retain all basic human rights, which is not necessarily inconsistent with being a prisoner.⁶²

In a view similar to the position of our Courts, yet expressed in more graphic and colourful language, Krishna Iyer J, in *Charles Sobhraj v Superintendent, Central Jail, Tihar, New Delhi* (1979) 1 SCR 512 (Sup Ct India) at 518-19, said:

“Whenever fundamental rights are flouted or legislative protection ignored, to any prisoner’s prejudice, this Court’s writ will run, breaking through stone walls and iron bars, to right the wrong and restore the rule of law. Then the parrot-cry of discipline will not deter, of security will not scare, of discretion will not dissuade, the judicial process. For if Courts “cave in” when great rights are gouged (out) within the sound-proof, sight-proof

⁶² See *Whittaker v Roos and Bateman* 1912 AD 92; *Goldberg and Others v The Minister of Prisons and Others* 1979 (1) SA 14 (A) at 39C-E; *Mandela v Minister of Prisons* 1983 (1) SA 938 (A); *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 139I-140B; *S v Mankwanya and Another* 1995 (6) BCLR 665 (CC) and also 1995 (3) SA 391 (CC) at page 142-143; and *Strydom v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W).

precincts of prison houses, where, often, dissenters and minorities are caged, Bastilles will be re-enacted Therefore we affirm that imprisonment does not spell farewell to fundamental rights although, by a realistic reappraisal, Courts will refuse to recognize the full panoply of Part III enjoyed by a free citizen.”

Clearly, if the Department properly utilises the correctional supervision and the parole system, particularly medical parole, it could have a tremendous effect on the reduction of overcrowding in prisons. As this report indicates, there are very few prisoners released on medical parole because of the attitude of the Department’s officials towards release of prisoners on this type of parole.

The Department’s refusal to release prisoners on medical parole has been consistent in most management areas.⁶³ Unless the Department revisits its approach to issues of medical parole, there is likely to be an upsurge of applications⁶⁴ to the High Court for release of prisoners on medical grounds and the taxpayer will bear the legal costs.

11 RECOMMENDATIONS

11.1 Parole Generally

1. To avoid interference from employees of the Department, the Minister of Correctional Services should consider amending the Correctional Services Act and regulations to specify that Parole Boards are accountable only to the Minister.

⁶³ See *Du Plooy v Minister of Correctional Services and 4 Others*, above.

⁶⁴ It is clear that there has been an increase in the number of prisoners challenging the Department in the High Court and also attempting to enforce their rights as enshrined in the Constitution.

2. The exclusion of officials of the Department as chairpersons and vice-chairpersons of the parole boards and correctional supervision boards should be expressly incorporated in the Act.
3. The Minister should consider delegating the powers of overseeing the Parole Boards to an Independent Board created for that purpose or to the Office of the Inspecting Judge. In the case of the Office of the Inspecting Judge, an assistant should be appointed in terms of section 87 (2) of the Act to set up a new directorate to oversee paroles.
4. The independence of the Parole Boards and the Correctional Supervision Boards should be enshrined in the Act and Regulations.
5. The Parole Boards and Correctional Supervision Boards should be chaired by legally qualified persons on an ad hoc basis.
6. The area of jurisdiction of the Parole Boards and Correctional Supervision Boards should be demarcated according to the provinces or the various command areas in terms of which the Department of Correctional Services is demarcated;
7. The right of a prisoners to review a decision of the Parole Boards or the Correctional Supervision Boards should be enshrined in the Correctional Services Act 1998 and it is recommended that section 75(8) of the Act be amended to read:

“(8) (i) A decision of the Board is final, unless the prisoner wants to exercise his right to review the proceedings in which case the record of the proceedings before the Board will be prepared and submitted to the Correctional Supervision or Parole Review Board;

(ii) *A Board shall forthwith inform the prisoner whose parole has been denied that he may inspect and make a copy of the record of the proceedings and that such application for review should be lodged within 14 days of the decision of the Parole Board.”*

8. Payment of the members of the Boards should fall under the Minister and not the Commissioner of Correctional Services. In this regard an amendment should be made to Section 74(8) of the Act.
9. The appointment of members of the Parole Review Boards and the Correctional Supervision Review Boards should not be limited to members of the National Council of Correctional Services. Consideration should be given to the appointment of retired Judges and other retired legal practitioners on an ad hoc basis.
10. Section 79 of the 1998 Act should be amended to have a less restrictive threshold for terminally ill prisoners to be released on medical parole.
11. In the light of the above, it is the Commission’s view that the policy of the Department dealing with the classification of crimes for parole purposes should be reviewed.
12. It is recommended that the parole policies of the Department be amended, more specifically the section classifying assault *per se* as an aggressive offence. More information should be placed before the Board before it decides that the crime was an aggressive crime.

13. Chairpersons of the Boards should give reasons, especially if they are refusing parole, so as to comply with the Constitution and the Promotion of Access to Justice Act.
14. The Department should make a concerted effort to explain the Parole Provision to the inmates. This should include preparing a booklet for the inmates and their families explaining parole. In particular explaining:
 - (a) The legal provisions;
 - (b) The underlying rationale of the system;
 - (c) The manner in which parole operates in practice;
 - (d) How parole affects each individual;
 - (e) The responsibilities of each prisoner released on parole; and
 - (f) How to deal with problems which may affect your parole.

11.2 The Matter of Mr Hlongwane

The Commission recommends that Mr Sithole should never be appointed to any position within the Parole Boards or any position of responsibility within the parole system.

11.3 The Stanley Ndlovu Matter

1. Mrs S. Kunene should be subjected to counselling or training so that she can understand the provisions of the Act and the incorrectness of her reasons for refusing the parole of Mr Ndlovu. She should also be apprised of the consequences of her unlawful refusal of parole.

2. Mr Stanley Ndlovu's application for parole should be referred to the Parole Board immediately.

ANNEXURE “A”

Annexure To Parole Chapter

STATE ATTORNEY’S REPORT,

JOHANNESBURG

OFFICE OF THE STATE ATTORNEY JOHANNESBURG

REPORT TO THE JALI COMMISSION

INTRODUCTION

We were requested to provide the Commission with a report regarding applications by prisoners brought in the Witwatersrand Local Division.

SPECIALISATION

In May 2003 our office embarked on a specialisation exercise. A component was, inter alia, established to deal with matters relating to the Department of Correctional Services.

STATISTICS: NEW MATTERS

In 2003 the average number of new applications received per month was 3.

2003

May	June	July	Aug	Sept	Oct	Nov	Dec
0	4	1	4	3	4	2	1

In the period January 2004 to June 2004 this increased to an average of 6 per month.

2004

Jan	Feb	March	April	May	June
5	3	8	4	8	5

The numbers increased dramatically from July 2004. The average for the period July 2004 to January 2005 was 47.

2004/5

July	Aug	Sept	Oct	Nov	Dec	Jan
13	20	25	75	98	24	71

REASON FOR THE UPWARD TREND

This increase is ascribed to uncertainty by prisoners regarding the applicable parole system. The new parole system in terms of Act 111 of 1998 was effective as at 1 October 2004. Prisoners sought declaratory orders in this regard. They also sought orders that they be considered by the Parole Board.

PROJECT

In December 2004 I was appointed to act as head of the office. I was confronted with severe criticism by judges in the division who were frustrated by our apparent inability to deal with the flood of applications by prisoners.

The situation was assessed and in January 2005 I implemented a project to deal with the crisis.

This included the appointment of a senior attorney as project manager with definition of his role and that of the team assisting him. A dedicated panel of junior counsel was also identified to assist. Channels of communication were addressed with the Department of Correctional Services.

The aim of the project was to clear the backlog of matters that had accumulated as expeditiously as possible and to ensure that any new matters received were finalised without delay.

Certain monitoring tools were introduced such as a separate register indicating, inter alia, the nature of the application, a separate diary for the set down of matters and various check lists.

STATISTICS: TYPES OF APPLICATIONS

Prior to December 2004 there was no system in place to assess the trends in the various types of applications received.

	Ordinary Parole	Reviews	Medical Parole	Misc	Remissions	Correc Superv
Dec	25	5	1	5	1	
Jan	5	12	4	3	2	1
Feb	6	5	2	10		
Mar	8	8	2	12		
Apr	4	3	2	8	1	1
May	2	1	2	2		
June	2	1	1			
Jul	1		1	1		
Aug	3	2	3	8		
Sep	2		2	1		
TOTAL	58	37	20	50	4	2

Ordinary Parole matters are those matters where prisoners seek orders that they be considered by the Parole Board. Reviews relate to decisions by the Parole Board. Miscellaneous matters include applications relating to single cells, transfers, dietary requirements, access to computers and compassionate leave.

STATISTICS: MOTION ROLL

I am furnished with the following statistic regarding the numbers of matters on the court roll per month. Regrettably, the information does not distinguish the various types of matters on the roll for the period. This information is presently being

compiled. I trust however, that the statistic relating to the types of new matters may be some indicator.

There is a sharp decline in the number of matters on the roll. In December 2004 when I assessed the situation, there were approximately 60 matters on the roll *per week*.

2005

Month	Number
January	13
February	51
March	61
April	41
May	71
June	17

AUDIT

A comprehensive audit of all files is required by the end of December 2005. A complete spread sheet of all matters will be compiled and will be available at the end of January 2005. There is an obvious variance in the numbers of new matters receipted by the office and those categorised and entered in the separate register. This variance is attributed to the fact that subsequent applications by the same prisoner were dealt with on the existing file. This will be rectified with the audit.

CONCLUSION

We record a downward trend in relation to new matters from February 2005.

Feb	Mar	Apr	May	Jun	Jul	Aug	Sep
20	26	20	14	8	9	19	6

W DA SILVA
ACTING STATE ATTORNEY
JOHANNESBURG
14 OCTOBER 2005

CHAPTER 10

CONVERSION OF SENTENCES

CHAPTER 10

CONVERSION OF SENTENCES

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CHAPTER 10

CONVERSION OF SENTENCE

1. INTRODUCTION

The conversion of sentences from imprisonment to correctional supervision is an issue that has caused a great deal of dissatisfaction amongst inmates. Many prisoners have complained to the Commission about irregular conversions of sentence, the failure of members of the Department to convert their sentences when prisoners are of the opinion that they are entitled to such conversion and the lack of consistency in the way members apply the rules and regulations relating to conversion of sentences.

The main concern of the Commission is that there is a strong belief amongst the aggrieved prisoners that members convert sentences in accordance with some favour or advantage and not on the basis of fairness and in accordance with the provisions of the regulations that govern such conversions. Although this Commission has not found any convincing evidence to substantiate this claim of payment for the conversion of sentences, it has found sufficient evidence to support the fact that numerous problems exist in the manner in which Departmental officials apply the provisions relating to the conversion of sentences.

As the granting of conversion of sentence or parole profoundly affects prisoners and can mean the difference between continued incarceration and freedom, it is not surprising that these were some of the major issues that occupied the Commission's investigations. The abuses of the conversion procedures highlighted later in this Chapter relate only to one particular Management Area. However, the Commission received numerous complaints with regard to conversion of sentences in almost all of the Management Areas

it investigated as well as from many Management Areas that fell outside the Commission's mandate.¹ As the potential liberty of prisoners was at stake in these matters, the Commission, within the constraints of its resources, attempted to listen to and deal with all complaints received, irrespective of the Management Area from which the complaints emanated. The Commission referred all complaints that were outside the prisons it investigated, which the Office of the Inspecting Judge could deal with, to the Office of the Inspecting Judge.

In this Chapter, the Commission intends examining the concept of correctional supervision as it relates to sentenced prisoners and will motivate for the Department to utilise correctional supervision as a means of addressing the issue of overcrowding in our prisons. The Commission is of the opinion that a proactive Departmental policy that uses the procedures the Legislature provides to convert sentences to ones of correctional supervision will steadily reduce the prison population in our country.

The Commission will also examine abuses of the system uncovered during its investigations and will highlight two such cases.² The first case is that of Mr Marimuthu, which involved allegations of corrupt behaviour by senior members of the Department of Correctional Services and the Department of Justice as well as a Deputy Mayor. The second case deals with the conduct and rulings of Mr Magubane, the Chairperson of the Parole Board, who completely abused his discretionary power and position by motivating in his report that a sentence be converted in circumstances where conversion was clearly not justified. As Chairperson, he also made an unnecessary and irresponsible statement that a sexual offence was not a "serious offence", causing outrage in the community. It will also be clearly shown that Mr Mugubane lacked the skills and expertise to hold the position of Chairperson and in this regard the Commission will recommend that the Department

¹ See St Albans Management Area.

² Both these cases arose from the Durban-Westville Management Area.

ensures that all officials holding such positions have the necessary expertise and integrity.

Despite the Commission's view that the Department needs to be motivated to apply the conversion of sentences more rigorously, the Commission is sensitive to the pain and trauma suffered by victims of crime and will also motivate for the recognition of the rights of the victim and the victim's family when applications for correctional supervision are brought before the Court.

2. CORRECTIONAL SUPERVISION

Correctional supervision is described in Section 1 of the Criminal Procedure Act³ as a community based form of punishment. This means that it is a form of punishment that is executed within the community where the offender would normally work and learn. The term "Correctional Supervision" is therefore a collective term for describing various measures that may be included in such punishment.

The following are various forms of correctional supervision that a court can impose:

- 2.1 A fine or term of imprisonment can be imposed in terms of Section 276 (1)(h) of the Criminal Procedure Act. This may not be done without a report by a probation or correctional officer and it may not exceed three years.⁴ This form is usually referred as the standard form for correctional supervision.
- 2.2 Correctional supervision can be imposed as a condition to a suspended sentence for the postponement of sentencing.
- 2.3 Imprisonment may be linked to a correctional supervision.

³ Act No. 51 of 1977.

⁴ See Section 276A(1) of the Criminal Procedure Act.

2.4 When the Commissioner of Correctional Services is of the opinion that a prisoner is a suitable candidate for correctional supervision,⁵ he may apply to the Court, which initially imposed the imprisonment, to reconsider that sentence and to consider imposing correctional supervision in lieu of the remaining term of imprisonment.⁶

As stated earlier, the area of correctional supervision being dealt with in this Chapter is its application to sentenced prisoners. Accordingly, it is Section 276A(3) of the Criminal Procedure Act referred to above, which is aimed at those prisoners who have rehabilitated themselves, that will be the focus of the Commission's attention in its motivation for the Department to resort to the provisions more frequently.

Our Constitution affirms the democratic values of human dignity, equality and freedom. Of all these values, freedom remains the most cherished by all citizens. Many South Africans lost their lives in the fight for freedom and many will not hesitate to pay the ultimate price in the defence of that freedom. Prisoners on the other hand, by their own actions, have been compelled to surrender most facets of this fundamental right. Many, to their credit, having realised the error of their ways, strive tirelessly to rehabilitate themselves to escape the confines of prison in order once again to become part of our free South African society. Such rehabilitated prisoners who qualify to have their sentences converted to correctional supervision should not languish in prison for longer than is necessary. The Department's arbitrary and unreasonable refusal to apply for the conversion of these prisoners' sentences is a serious violation of the prisoners' human rights.

It has been repeatedly stated that overcrowding is the most important and difficult challenge facing the Department of Correctional Services.⁷ Despite this, and considering the rising number of prisoners over the years, coupled

⁵ *Leeb* 1993 (1) SACR (T) 315.

⁶ See section 276A(3).

⁷ See Chapter on Overcrowding for more details

with the fact that our prisons are ill equipped and under resourced to deal with such volumes, the Department remains reluctant to attempt to address the problem of overcrowding by aggressively applying for the sentences of prisoners who qualify to be converted to correctional supervision, a reluctance the Commission finds difficult to understand.

The Legislature has had the foresight of enacting a section that gives the Commissioner or his delegate the discretion, in appropriate cases that justify such action, to apply to the sentencing court to convert a sentence into correctional supervision. One would therefore have expected the Department to be pro-active and to start aggressively using section 276A(3) of the Criminal Procedure Act to reduce the prison population by allowing such prisoners to serve the rest of their sentences in the community.

Our courts in the *De Lange* case,⁸ have decided that the discretion to apply for the conversion of a sentence to correctional supervision lies solely with the Commissioner and accordingly a sentenced prisoner has no right to force the Commissioner to make the application for such prisoner in terms of section 276A(3) of the Criminal Procedure Act. This case highlights one of the shortcomings of the Act, namely, that a prisoner, who has fulfilled his duties inside prison and is of the opinion that he is rehabilitated, is left with no recourse or remedy but to lodge an application for his release all by himself in terms of section 276A(3), if the Commissioner does support such an application and recommend that correctional supervision be granted.

⁸ *De Lange v Provincial Commissioner of Correctional Services*, Eastern Cape 1 2002 (2) SACR 185 (SE). In this matter, the court held that proceedings in terms of section 276A(3) of the Criminal Procedure Act (allowing the Commissioner of Correctional Services to approach a court to convert sanction of imprisonment into correctional supervision) is *sui generis* and not “an application” as envisaged by the Uniform Rules of the courts. Therefore the Commissioner was not bound in this particular matter by Rule 41(1) of the Uniform Rules in withdrawing the matter once it was instituted in terms of section 276A(3).

The Commission is also of the view that non-governmental organisations can play a vital role in ensuring that prison numbers are kept to the minimum in assisting prisoners to approach the Commissioner to apply for conversion of sentence in terms of section 276A(3). In this regard, it is appropriate to refer to the matter of *Ex Parte-Department of Correctional Services in re S v Katsi*⁹ in which a successful application was done through the endeavours of a non-governmental organisation. An interesting aspect of this case that the Department should highlight and take note of is that Satchwell J is of the view that the legislation that charged the court with the duty to reconsider sentence required the court to go back to the drawing board and to start from scratch in dealing with the matter of sentence. The case of *S v Cloete*¹⁰ also has some relevance on this point, where Levy AJ (as he then was) stated that the circumstances of the crime are of far less importance at the time of application for conversion of sentence than they were at the trial.¹¹

The Commission remains firmly of the view that properly managed and applied the applications for the conversion of sentences to correctional supervision will result in a steady reduction of the prison population in our country. Rehabilitated prisoners who qualify for correctional supervision should not continue to be incarcerated at enormous expense to the South African taxpayer and the Commission sees no reason why the Commissioner should not apply his discretion with greater resolve and vigour by applying for the conversion of sentences across the board for all qualifying prisoners.

The abuses of the conversion procedures, dealt with hereafter, should not detract from all the positive aspects of correctional supervision. The Marimuthu case, in particular, was clearly unusual and distinguishable on the basis that not only was the normal procedure not followed but also because Mr Marimuthu was given preferential treatment in that he was never re-admitted to prison after his unsuccessful appeal.

⁹ 2002 (1) SACR 497 (T).

¹⁰ 1995 (1) SACR 367 (W) at 369.

¹¹ However, also see *Elliott* 1996 (2) SACR 531 (E) where Melunsky J propounded a different opinion.

3. THE MARIMUTHU MATTER

3.1 Background

The background facts of this matter, which can be gleaned from the answer the Minister of Correctional Services at the time, Mr Ben Skosana, gave in response to a question in Parliament¹² and from the opening address of the Commission's evidence leader, can be briefly summed up as follows:

- 3.1.1 In 1992, Mr Marimuthu was sentenced to four (4) years imprisonment, one (1) year of which was suspended, for the crime of dealing in 3 390 mandrax tablets;
- 3.1.2 Mr Marimuthu appealed on some technical point, the details of which are not of relevance, and he was released on bail;
- 3.1.3. Mr Marimuthu's matter was later re-enrolled for hearing before the Magistrate for a further hearing and he was again sentenced to the same term of imprisonment;
- 3.1.4. He appealed once more and that appeal was dismissed on 7 October 1997 with an order that, if his Application for Leave to Appeal to the Appellate Division was denied, then he would have to hand himself over to the prison authorities as soon as that decision was made known.
- 3.1.5. On 10 November 1997 his Application for Leave to Appeal was refused but instead of then being behind bars from 11 November onwards, he appeared in court on 2 December 1997 before Magistrate Maharaj at

¹² See Exhibit 'YYYY9' for the detailed answer of Parliamentary question 479.

the Durban Magistrate's Court, who then granted him bail on the basis that he could make a petition to the State President.¹³

3.1.6 On 22 January an application was brought before Magistrate Smit in terms of which Mr Marimuthu was then granted correctional supervision.

3.2 Commission's Investigations

When the Commission investigated the matter it soon became clear that all was not what it seemed and that sinister and extraordinary manoeuvrings had taken place behind the scenes by some of those implicated to ensure that Mr Marimuthu escaped incarceration.

From documents and the evidence of witnesses before the Commission,¹⁴ it appeared that on 4 December 1997 a meeting was held at the Offices of the then Deputy Mayor of Durban, Mr Ngwenya, where the members of the community as well as the Area Manager of the Durban-Westville Management Area, Mr I.S. Zulu, were present to discuss Mr Marimuthu's situation. Who initiated the meeting and why it had to be held in the office of the Deputy Mayor is not clear but it was apparently at this meeting that a decision was taken that some mechanism should be activated to ensure that Mr Marimuthu was granted correctional supervision.

After this meeting, some Correctional Services members sprang into action and in a surprisingly short space of time ensured that Mr Marimuthu was brought to court before Magistrate Smit on 22 January 1998, even though his

¹³ Although not mentioned in the answer of the Minister to Parliament, it is clear from documents that surfaced during the Commission's investigation that Magistrate Maharaj remanded the matter to 30 January 1998. A copy of the proceedings of 2 December 1997 was handed in to the Commission and from that record it appears that the matter was remanded by Mr Maharaj to 30 January 1998 in order to give Mr Marimuthu the opportunity to seek legal advice concerning the dismissal of the Appeal or a possible pardon by the State President. Mr Marimuthu was then warned to appear in Court on 30 January 1998.

¹⁴ This can also be seen from the earlier answer of the Minister to Parliament.

actual case had at that time been postponed until 30 January 1998. At the hearing of 22 January 1998, two (2) members of the Department, one, Mr M. Govender, being the investigation official and the other, Mr Bongani Mbatha, of Community Corrections, handed in documentation and gave evidence that culminated in Magistrate Smit's decision that Mr Marimuthu's sentence of imprisonment should be converted to one of correctional supervision.

It was common cause throughout the hearings that Mr Marimuthu was at no stage, after the finalisation of his appeal, ever admitted to prison.¹⁵

It was argued by the evidence leader that the order was improperly granted, as Mr Marimuthu had not served the minimum term of imprisonment before such an order could be made. He pointed out that Mr Marimuthu was supposed to serve at least one sixth of his sentence, which would have been six (6) months of imprisonment. Accordingly, the question of correctional supervision could only have been effectively considered after that period of imprisonment had elapsed.¹⁶

3.3 Conduct of Members of the Department

- **Mr I.S. Zulu**

Mr I.S. Zulu, the Area Manager, inexplicably played a pivotal role in the entire process of keeping Mr Marimuthu out of prison.

His zealotness was clearly evident when he requested the Chairperson of the Parole Board, Mr Magubane, on 10 December 1997 to advise him on the case. A letter of Attorneys Selvam Nadar and Associates, which was handed

¹⁵ Although it had initially been alleged that Mr Marimuthu had never served a single day in prison, it appears, as far as could be established, that he had served three (3) days during his initial sentence.

¹⁶ The evidence leader had further stated that the Anti-Corruption Unit of the Department was distressed about the developments in this matter and persisted in their recommendation that Mr Marimuthu should return to prison.

in and which is filed in the records of the Department, supported this instruction.¹⁷ A note in Mr Zulu's handwriting reveals the following:

"Chairperson/Parole Board Mr Magubane, please advise me regarding this matter".

Another note in the file, again in Mr Zulu's handwriting, states:

"Mr M. Govender please investigate the validity of the allegations, consult with the Parole Board and Mrs Khan at Community Corrections, make further reports to my office".

At the bottom of the same letter is a note to the Transport Controller, once more in Mr Zulu's handwriting, which reads:

"Transport to utilise objective; you can confirm with me or Mr Shezi".

It appears that Mr Zulu was taking a daily interest in the matter as he signed these last two notes on 11 December 1997 with the earlier instruction to the Chairperson of the Parole Board on 10 December 1997.

- **Mr Mervyn Govender**

The role of Mr Govender, the investigator who conducted the investigation that formed the basis of the application to Court to convert the sentence of Mr Marimuthu into correctional supervision, also needs to be commented on, as his investigation was inadequate in many respects. Although he seems to have responded with alacrity to the instruction Mr Zulu gave him and completed his investigation and submitted the different reports to Magistrate Smit, he never at any stage seriously dealt with the policy of the Department of Correctional Services pertaining to the referral of offenders to a Court for an

¹⁷ Department File 1/13/1., Exhibit "YYYY6".

application for conversion of sentence. Furthermore, without having the direct comments of either the Chairperson of the Parole Board or of the institutional committee, Mr Govender recommended on 14 January 1998 that the case of Mr Marimuthu be referred back to the court *a quo* for a correctional supervision application.

Mr Govender's investigation was clearly not a thorough one.

- **Mr B. E. Mbatha**

Mr B.E. Mbatha of Community Corrections also appears not to have applied his mind to the policies of the Department. He made the following comments:

*“Taking into consideration Mr Marimuthu’s social standings contribution to society it will serve no purpose to send him to prison except increase the number in the over populated prison. If Mr Marimuthu were to be imprisoned +/- 47 families will be left destitute, and an alternative sentence is recommended”.*¹⁸

Although these two officials appear to have been merely following the orders of Mr Zulu, they did not conduct themselves in the manner one would have expected from correctional services members dealing with such an important matter.

- **Other Members**

Despite the views of the members mentioned, it appears from other documentation presented to the Commission¹⁹ that at least some of the members involved remained focused and remembered that the situation of Mr Marimuthu had to be considered in terms of the policies of the Department.

¹⁸ See Exhibit “YYYY6”.

¹⁹ Exhibit “YYYY27” which contains Mr Magubane’s affidavit.

The Chairperson of the Parole Board, Mr Magubane, unlike in his handling of the matter to be dealt with hereinafter, was clearly not willing to make a recommendation for the referral of Mr Marimuthu to the Court *a quo* in terms of Section 276A(3) of the Criminal Procedure Act No. 51 of 1977, due to the fact that Mr Marimuthu had not served a period of imprisonment in the prison. The Secretary of the Parole Board, Mr J.N. Botha, also shared his opinion²⁰.

Mrs Khan, the social worker at Community Corrections, also submitted a report to the area manager in which she strongly advised against Mr Marimuthu being referred to court for the conversion of his sentence. Correctly, she pointed out that such referral would set a precedent.

It is disconcerting to note that not only did Mr Zulu ignore these dissenting opinions and approve Mr Marimuthu's referral to the Court for a conversion of sentence but he went as far as to instruct the investigating officer, Mr Govender, and the Head Community Corrections, Mr B.E. Mbatha, to consult with the Magistrate in order to finalise the matter.

The implicated parties argued that the standing B-Orders provide for cases like that of Mr Marimuthu, where the sentence can be converted to correctional supervision if there are unusual circumstances that require the matter to be referred to the court *a quo* for a reconsideration of the sentence. Looking at the B-Orders, the Commission agrees with the view of Mr Wilkin²¹ that only the following instances should be considered as unusual:

- Advanced state of pregnancy.
- Diseases diagnosed as terminal.
- Advanced age with related poor physical conditions.

The argument of unusual circumstances existing in Mr Marimuthu's case has no merit.

²⁰ Also Exhibit "YYYY27".

²¹ Exhibit "YYYY27".

3.4 Findings

The Commission has no intention of judging or questioning the proceedings before Magistrate Smit on 22 January 1998²² but it is clear that very little regard was paid in those proceedings to the question of whether Mr Marimuthu had been rehabilitated through the previous sentence.

The Commission also sees very little purpose in dealing any further with the minimal role the junior members of the Department played. Even though some of his actions might appear to be suspect, Mr Govender clearly acted under the orders of his superior, Mr I.S. Zulu. The same applies to Mr Mbatha.

The driving force behind the whole initiative was Mr I.S. Zulu, the Area Manager, who actively assisted in getting the matter to court and getting Mr Marimuthu released under correctional supervision. It is not clear why Mr Zulu decided to ignore the view of the Parole Board and the Institutional Committee and why these bodies were not requested to provide reports, as one would expect them to do in terms of their directives. Mr Zulu's attitude throughout the proceedings was that he deemed it fit to appoint an official other than the Parole Board/Institutional Committee to approach the court *a quo* with a verbal application for the imposition of an alternative sentence on Mr Marimuthu. The Department's officials are guided by the B-Orders. Mr Zulu could not show the Commission any regulation that empowered him to act in the manner in which he did.

It is clear that unacceptable efforts were made to ensure that Mr Marimuthu did not spend a day behind bars and the suspicion remains that there is a strong likelihood that money changed hands somewhere in this matter. This version seems very probable if one looks at the speed with which this matter was handled, where even the Parole Board's recommendations against

²² The Chief Magistrate of Durban previously investigated these proceedings and accordingly the Commission will rather confine its inquiries to the circumstances under which the Department of Correctional Services dealt with Mr Marimuthu.

correctional supervision were ignored. The Commission, however, cannot come to a conclusive finding that any corrupt activity took place to successfully ensure that Mr Marimuthu did not re-enter the prison. It is clear, however, that members of the Department, in particular Mr I.S. Zulu, ignored policy directives.

Why Mr Zulu, as a senior manager of the Department, should have been so involved in this matter remains a mystery. He seems to have displayed an interest in the matter that went far beyond the call of his duties as the Area Manager.

Although no evidence emerged of this, his unhealthy interest in the matter at best seems to indicate poor judgement on his part but at worst raises suspicions of corrupt conduct. No responsible senior member of the Department should so actively pursue activities that are contrary to clear Departmental policies.

His actions in assisting a prisoner of means only added to the negative perception that rich and influential people, unlike the ordinary person on the street, receive special treatment and privileges from the Department. It also reinforces the perception amongst prisoners that the conversion of sentences is only granted in payment of some favour or advantage and not on the basis of fairness and in terms of the regulations that govern such conversions.

4. THE MAGUBANE MATTER

4.1 Background

To show the inconsistencies in the handling of conversion matters, the Commission finds it necessary to focus also on the matter of Mr Bongani Magubane, the former Chairperson of the Parole Board of the Durban/Westville Management Area. This matter indicates the Chairperson of

the Parole Board's abuse of discretion in dealing with the conversion of sentences.

During February 2002, Mr Magubane, in his capacity as the Chairman of the Parole Board in charge of the Westville Management Area and other nearby Management Areas, had recommended the conversion of a six (6) year sentence of a prisoner who had been convicted of a sexual offence on his minor daughter to correctional supervision. This prisoner was sentenced in 1999 for having sexually assaulted his five (5) year-old daughter over a four (4) year period. Whilst in prison, the prisoner had applied for his sentence to be converted from direct imprisonment to one of correctional supervision.

Mr Magubane, without obtaining the vital information necessary for purposes of processing the application, inter alia, a psychologist's report regarding the mental state of the prisoner, had recommended that the sentence be converted. He furthermore abused his power by making false declarations in his report regarding how long he had known the prisoner and the prisoner's appearance before the Parole Board. He also ignored both a Magistrate's directive regarding the necessity for the offender to attend a sexual offender's course and a Prosecutor's advice regarding the outcome of the inmate's appeal. He expressed his own views as if they were those of the Board in circumstances where he had never consulted the Board.

Mr Magubane, however, went further and made the astounding comment that the prisoner, who was charged with sexual molestation, had not committed a "serious offence". This irresponsible statement caused an outcry and, as was to be expected, members of the public in the province were up in arms at the Chairperson of the Parole Board's sheer disregard for the victims of sexual violence.

As in the Marimuthu case, it appears that the opinions and reports of the officials of the Department were ignored. In giving evidence before the Commission, Mrs Khadija Bhamjee, a psychologist at Westville Prison, had

testified about the fact that the prisoner had failed to honour three (3) therapy sessions she had arranged for him to attend. The only report attached to the application was that of a social worker and not that of the psychologist. The same social worker was not a credible witness before the Commission.

How Mr Magubane could have arrived at a decision to recommend the conversion of the sentence is inexplicable and, like in the case of Mr I.S. Zulu in the Marimuthu matter, only raises all kinds of suspicions of improper conduct. It was therefore not surprising that after the Magubane matter was heard before the Commission that the National Commissioner acted against Mr Magubane and removed him from his position because he had brought the Department of Correctional Services into disrepute.

4.2 Findings

The Magubane matter illustrates how the discretionary power, which is given to the Chairman of the Parole Boards, can be abused. Given this, care must be exercised in the selection of individuals being appointed as Chairpersons of the Parole Board. They must, at all times, possess the necessary expertise and integrity. It is clearly apparent to the Commission that Mr Magubane had neither the necessary experience, nor the skills and expertise, to chair Parole Boards and consequently to exercise a discretion that has such important consequences on the life of any inmate applying for a conversion of sentence. His experience, educational qualifications and skills, all necessary components for the job, are very limited.²³

The Commission's findings with regard to the Magubane matter are that Mr Magubane failed in the performance of his duties for the following reasons:

²³ He was appointed as a warder and on 1 October 1980, subsequently promoted to senior correctional officer and assistant director. He was appointed Chairperson of the Parole Board in August 1997. He had never undergone any training for such a position.

- 4.2.1 He made a false declaration regarding the prisoner's appearance at the Parole Board.
- 4.2.2 He also made a false declaration regarding the number of years he had known the prisoner.
- 4.2.3 He made irresponsible and unnecessary statements regarding the seriousness of the sexual offences that were committed by the prisoner.
- 4.2.4 He failed to ensure that the prisoner and/or Department of Correctional Services had complied with the Magistrate's order/directives that the prisoner should attend a sexual offender's course before recommending the conversion of the prisoner's sentence to correctional supervision.
- 4.2.5 He pressed ahead with the application for conversion of the prisoner's sentence into correctional supervision notwithstanding the information he had received from the Prosecutor regarding the outcome of the appeal to the High Court and the refusal of the application for leave to appeal to the Supreme Court of Appeal Division.
- 4.2.6 He contravened the provisions of the Correctional Services Act in a number of respects.
- 4.2.7 He expressed his personal views in the report as the views of the members of the Board, who had not been consulted regarding the application for conversion.

5. VICTIMS OF CRIME

Before making recommendations on the matters dealt with in this Chapter, it should again be stressed that the Commission's advocating of the aggressive application of correctional supervision should not be interpreted to mean that the Commission is not sensitive to the pain and trauma of the victims of crimes, who are likely to have many old wounds reopened with the early release of the perpetrators.

In this regard, the Commission has taken note of, and agrees with, the opinion of Kgomo J, in *S v van Rooyen*²⁴ wherein he referred to the void in the provisions of section 276A(3) of the Criminal Procedure Act dealing with correctional supervision. Kgomo J advocates that it should be compulsory for whoever initiates an application for conversion of sentence to serve a copy of such application with the Office of the Registrar of the High Court and on the victim or the victim's family. In doing so, the applicant should provide them with the option to oppose the application

Although the impact of correctional supervision on victims of crime is not strictly within its Terms of Reference, the Commission is of the view that the amendment proposed by Kgomo J is well founded and would certainly address the concerns of victims who have received very little recognition, particularly at the sentencing stage of the proceedings of a criminal trial.²⁵ The amendment of the Correctional Services Act to provide for the rights of victims could be similar to the consultations relating to plea bargaining found in terms of Section 105A of the Criminal Procedure Act²⁶. Such amendment will, at least, ensure that the victim, or the family of the victim, has the opportunity to oppose any release on correctional supervision.

The Commission is mindful of the fact that, on a more practical level, should this section be amended, a duty will have to be placed on The Registrar of the

²⁴ 2000 (1) SACR 372 (NC).

²⁵ The victim does not have a special status or any pecuniary right at the sentencing phase but has to rely on the prosecution service to put all aggravating circumstances before the court.

²⁶ Section 105A of the Criminal Procedure Act, provides that:

“The Prosecutor may enter into agreement contemplated in paragraph A-iii after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the Prosecutor regarding –

- aa. The contents of the agreement; and*
- bb. The inclusion in the agreement relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.”*

Court, the South African Police Service as well as the Director of Public Prosecutions to make a note on the date of sentence of the whereabouts of the victim or the victim's family in order to be in a position to serve such notification in the future.

6. RECOMMENDATIONS

6.1 Correctional Supervision

To address the challenge facing the Department of prison overcrowding, the Commission recommends that the Department should, as soon as possible:

6.1.1 Conduct a survey of all its Management Areas countrywide to establish how many prisoners currently qualify for their sentences to be converted to correctional supervision.

6.1.2 Inform such qualifying prisoners about the provisions of the Criminal Procedure Act that entitle them to approach the Commissioner to request that he consider converting their sentences to one of correctional supervision.

6.1.3 Make application to the relevant courts for the release of all such prisoners on correctional supervision.

6.2 Mr Marimuthu

As Mr I.S. Zulu, as a senior member of the Department, should have been aware of the policies of the Department, the Commission recommends that the Department should charge him in terms of the Disciplinary Code for his actions in flagrantly pursuing the application for Mr Marimuthu's release and flagrant disregard for the Department's clear policy directives.

6.3 Mr Magubane

It is recommended that Mr Magubane not be considered for any placement as a Chairperson of a Parole Board until such time as he has undergone appropriate training, which will make him fit to sit in a position on a Parole Board or Institutional Committee.

6.4 Victims of Crime

To address the sensitivities and give due recognition to the victims of crime, the Commission motivates that serious consideration be given to the amendment of Section 276A(3) of the Criminal Procedure Act to read as follows:

“Sub-sectionA(3) – Where a person has been sentenced by a court of imprisonment for a period –

- (i) not exceeding five (5) years; or*
- (ii) exceeding five (5) years but the date of release in terms of the provisions of the Correctional Services Act, and the Regulations made thereunder is not more than five (5) years in the future.*

The Commissioner may, if he is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the Clerk or Registrar of the Court, as the case may be, to have that person appear before the court a quo in order to reconsider the sentence, provided that the Commissioner has given notice to the complainant of the application that will be lodged, which notice must be advertised in the Government Gazette and in a local newspaper where the crime was committed and which notice must notify the complainant of their right to oppose such an application.”

CHAPTER 11

THE JUDICIAL INSPECTORATE

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THE JUDICIAL INSPECTORATE

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CHAPTER 11

THE JUDICIAL INSPECTORATE

1. INTRODUCTION

The Judicial Inspectorate was set up in terms of the Correctional Services Act, which originally in section 85(2) set out the objects to include the inspection of prisons in order to report on:

- The treatment of prisoners.
- Conditions in prisons.
- Any corrupt or dishonest practices in prisons.

These objects were amended in 2001 to exclude “corrupt or dishonest practices” in prisons. The reasons given for this amendment included that the good relationship between Independent Prison Visitors (IPVs) and prison officials would be compromised and that the Department of Correctional Services already had an Anti-Corruption Unit, which investigates corrupt and dishonest practices in prisons.

This Chapter considers evidence presented to the Commission on the purpose and functioning of the Judicial Inspectorate. The Commission’s findings, including that the amendment to the Act compromised the Department’s capacity to deal effectively with corruption, are also dealt with, as are recommendations in relation to the Inspectorate and, to some extent, the fight against corruption.

2. ESTABLISHMENT OF THE JUDICIAL INSPECTORATE

The Office of the Inspecting Judge is established in terms of section 85 contained in Chapter 9¹ of the Correctional Services Act No. 111 of 1998. The Inspectorate was originally established in June 1998 in terms of an amendment to section 25 of the old Correctional Services Act No. 8 of 1959.

The objects of the Office of the Inspecting Judge are set out in section 85(2) of the Act. These objects are a matter of concern to this Commission and will be dealt with in more detail later in this Chapter.

The President of the Republic of South Africa appoints the Inspecting Judge, who is a Judge of the High Court either in active service or who has been discharged from active service. The Judicial Inspectorate of Prisoners is an independent office under the control of this Inspecting Judge.

The Office of the Inspecting Judge is based in Cape Town and conducts its functions through the various regional offices. These regional offices have Independent Prison Visitors (the "IPVs"), who the Inspecting Judge appoints in terms of Chapter 10 of the Act.² The IPVs visit the various prisons and deal with the "complaints of prisoners".

As at 31 March 2004, there were regional offices in the Eastern Cape, Gauteng, KwaZulu-Natal, Western Cape and one office to cater for the Limpopo, Mpumalanga and the North West Provinces and another to cater for the Northern Cape and Free State Provinces. In total there were two hundred and twenty three (223) IPVs in South Africa from 1 April 2003 to 31 March 2004.³

¹ Chapters 9 and 10 came into operation on 19 February 1999.

² See section 92 for the details relating to the appointment and termination of IPVs.

³ See the Annual report of the Office of the Inspecting Judge for the period 1 April 2003 to 31 March 2004.

The IPV's were distributed between regions or provinces as follows:

Regional Distribution of IPV's

	Region	No
1	Eastern Cape Region	35
2	Gauteng Region	42
3	KwaZulu-Natal Region	37
4	Limpopo, Mpumalanga & North West Region	34
5	Northern Cape & Free State Region	41
6	Western Cape Region	34
	TOTAL	223

3. BACKGROUND

The original section 85(2) of the Correctional Services Act sets out the object of the Judicial Inspectorate as follows:

“The object of the Judicial Inspectorate is to facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prisons and on conditions and any corrupt or dishonest practices in prisons”. (Own emphasis)

According to the evidence of Professor Dirk van Zyl Smit, the drafters⁴ of the Act considered various countries, including England and Western Australia,⁵ which have similar offices, in deciding on the objects of the Judicial Inspectorate. On the basis of these, the drafters decided it would be appropriate for the Office of the Inspecting Judge to have the objects quoted above.⁶

In his evidence on how the drafters decided the objectives of the Office of the Inspecting Judge, Professor van Zyl Smit said there were important differences between the English model, which was the primary model the drafters considered, and decided on the model for South Africa. Firstly, England has only an inspector of prisons and not a Judicial Inspectorate. Professor van Zyl Smit said the idea in South Africa from the beginning was that the office should be filled by a Judge because of the independence and integrity that Judges are recognised to have in South Africa.

Secondly, in the British system there is both an inspector of prisons, who is there to inspect prisons rather than to deal with the complaints of prisoners, and an independent prison ombudsman. Professor van Zyl Smit said that the drafters considered this separation but consciously decided to combine the two functions

⁴ The Commission was advised that the members of the National Advisory Council on Correctional Services, namely Judge Kumbelen, Adv. N Rossouw and Professor D van Zyl Smit were appointed to advise the government on drafting the new Prison Legislation. Professor van Zyl Smit was then called upon to testify in order to clarify and motivate certain provisions in the Correctional Services Act No. 111 of 1998.

⁵ If one is looking for an African precedent, the Malawian Constitution might be of assistance in this regard. The Bill of Rights of the aforesaid Constitution deals with the rights of prisoners. Section 169 of the Malawian Constitution provides that the Inspectorate of Prisons shall be:

“charged with monitoring the conditions, administration and general functioning of penal institutions, taking due account of applicable international standard and also have such powers as shall be required for it to make investigations, and shall have the power to require any person to answer questions relating to such subjects as are relevant to those investigations and thirdly, the power to visit any and all institutions within the Malawi Prison Service without notice and fourthly, exercise such powers as may be prescribed by the Act of Parliament.”

⁶ See the evidence of Professor Dirk van Zyl Smit, which was led in Pretoria on 2 December 2003.

because it would be too expensive for a country like South Africa, which is considerably poorer than Britain, to have separate institutions. Accordingly, the Office of the Inspecting Judge was meant to do both the work of the Inspector of Prisons and the Prisons and Probation Ombudsman for England and Wales.

4. INVESTIGATION OF CORRUPTION

Professor van Zyl Smit went on to testify that the drafters of the legislation had intended that the Judicial Inspectorate would investigate both treatment of prisoners and corruption.⁷ According to Professor van Zyl Smit, the drafters saw a relationship between corruption and the treatment of prisoners, which was why there was specific reference to corruption in the Act, such as in sections 87 and 90.

Professor van Zyl Smit said that after consideration of the various models, the drafters felt that there would be no synergy in the manner in which the treatment of prisoners and corruption were dealt with unless the Office of the Inspecting Judge dealt with both these matters. In particular, the thinking was that the Office of the Inspecting Judge would play a watchdog role in the Department by overseeing the activities of the officials.

Despite the drafters' considerations during the drafting of the Act, these provisions in the Act were amended during 2001 to remove the Office of the Inspecting Judge's function of investigating corruption in prisons.⁸ Following this amendment, the objects of the Judicial Inspectorate have been defined as follows:

⁷ See pages 1 292 -1 293 of Professor van Zyl Smit's evidence.

⁸ See section 31 of the Correctional Services Amendment Act No. 32 of 2001.

“The object of the Judicial Inspectorate is to facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prisons and on conditions in prisons.”⁹ (Own emphasis)

As a result of these amendments, the Office of the Inspecting Judge has functioned and concentrated on the treatment of prisoners and not on investigating corruption.

According to its 2000 Annual Report, the Office of the Inspecting Judge wished to be relieved of its mandate to investigate and report on “corruption or dishonest practices in prisons”. The reasons were:

- That the good relationship between IPVs and prison officials would be compromised and the Inspectorate’s work hampered;
- The Department already has an Anti-Corruption Unit, which investigates corrupt and dishonest practices in prison;
- Allegations of corrupt and dishonest practices in prisons are in any event taken up with the appropriate correctional officials or the South African Police Service or the Office of the Public Protector; and
- The presence of IPVs in prisons has an inhibiting effect on corruption and dishonesty.¹⁰

According to Mr Morris, the Director: Judicial Inspectorate of Prisons in the Office of the Inspecting Judge, the justification for seeking the amendment was the fact that it would have been difficult for the Office to deal with the treatment of prisoners at the same time as investigating corruption within the Department. The difficulty did not lie in resource or other constraints but apparently in the

⁹ See section 85(2) as amended by section 31 of the Correctional Services Amendment Act No. 32 of 2001.

¹⁰ See Annual Report 2000 at pages 18 and 19.

conflicting imperatives of attending to both the treatment of prisoners and investigating corruption.¹¹

In his evidence, Professor van Zyl Smit also made reference to the concern about the rapport between the Office of the Inspecting Judge and the Department being lost if the purpose of the Office included investigating corruption. The professor noted too that it was possible the Department might ignore corruption if the Office of the Inspecting Judge were to be involved in the investigation of corruption.

The Commission found this concern about rapport unusual given that the role of watchdog requires one to do one's work without fear, favour or prejudice.¹² Rapport is the last factor that should be considered in such a role. The concern the Office of the Inspecting Judge has that investigating corruption might affect the good relationship its staff has with the Department is an inappropriate

¹¹ See the evidence of Mr Morris at the Cape Town Commission hearings, pages 622-623 of the transcript, Vol. 7.

¹² See also the views of Professor Saras Jagwanth : “A Review of the Judicial Inspectorate of Prisons of South Africa” – CSPRI (Civil Society Prison Reform Initiative); series no. 4, May 2000 at page 40. “*Responses to the removal of corruption from the Inspectorate’s mandate varied considerably. A prevalent view was that the problem of corruption cannot and should not be ignored by the Office. In support of this contention, it was pointed out that it is often not possible to separate the conditions in prison from underlying issues of corruption and that the Inspectorate still had a role to play in this regard. An example used was the selling of food or shoes by the staff. In addition, many expressed a view that corruption has to be investigated by an outside body, particularly in the light of the limited number of effective internal investigations in the past. It was pointed out that the most obvious and appropriate body to take on this task would be the Inspectorate, as the issue of corruption fell easily within their overall mandate. The response of the Inspectorate was that they had neither the resources nor the skilled staff to investigate corruption. In addition the work would be adversely affected by the inclusion of corruption within their mandate, as they depended on the co-operation of the Department officials and Heads of Prisons for the effective performance of their duties. The limited resources and constraint mandate of the Inspectorate, including its lack of enforcement powers, was also a reason cited for the removal of corruption. It was pointed out by the staff of Department that corruption could best be pursued by a specialised body with greater powers into investigation than the Inspectorate. It was observed that neither the mediation and resolution of the disputes by IPVs, nor the role of the Office in reporting and using publicity to achieve oversight lent itself to the investigation of corruption.*”

emphasis. The Correctional Services Act gives extensive powers to the Judge's Office as well as to the IPVs to access prisons and to do their work without being subordinated to the officials of the Department.¹³

Mr Morris had this to say about the removal of corruption from the objects of the Judicial Inspectorate:

"... from our side why we felt it would be better to remove the function of corruption firstly is because we feared for the safety of our Prison Visitors. I think you've had some first-hand experience of the reaction that you may find in the prison environment if you are seen as the person dealing with corruption. So the Prison Visitors, what they will do and that's the first motivation, the other motivation is simply the view to manage a matter like corruption in Correctional Services seems to be an almost impossible task. We don't have the resources and once again we come back to the argument, that is the responsibility of Correctional Services' management ... They have also established an anti-corruption unit, so we've referred those matters back to them hoping that they will deal with it."¹⁴

It was apparent from the evidence of Mr Morris that the Office of the Inspecting Judge is more concerned about the safety of its staff than about its mandate¹⁵ and yet there was no evidence placed before the Commission to support the contention that the safety of IPVs was seriously compromised to the extent that there was no remedy. There was also no evidence to suggest that the issue of financial resources had been raised with the Department and that it had refused to provide them. In the circumstances, how can it be considered an impossible task?

¹³ Sections 93(2) and 93(3) of the Act that stipulate that IPVs must get access to prisons and that Heads of Prisons must assist them in the performance of their duties.

¹⁴ See Cape Town Transcript, Vol. 7 at pages 622-623.

¹⁵ The Commission is of the view that in order to succeed as a watchdog, the Office needs to be fearless in exercising its task.

Professor van Zyl Smit stated in evidence that he was surprised by the amendment of the Act. He further expressed his views as follows:

“Speaking for myself and leaving aside the Heath decision,¹⁶ I think that it would be ideal to have the Inspecting Judge also having some role to play in at least overseeing the investigation of corruption. Again speaking for myself, I would say, which I have said already, that I think the Department itself has a primary role in combating corruption internally. I do think that the Inspecting Judge had a point when he said to me that it would be wrong if the Department could say, well we just run the Department, somebody else comes and checks whether we are being corrupt or not. I think that the nature of bureaucracy is so, that the crucial thing, not only in this Department, but in the public service in general, are checks and balances within the service itself.”¹⁷

According to Professor van Zyl Smit, sections 87 and 90 of the Act, as amended, could be of assistance in dealing with the issue of corruption. In respect of section 87, the power to appoint assistants may assist the Inspecting Judge to deal with the issue of corruption. While the Professor’s views are respected in this regard, the Inspecting Judge can only appoint staff who can deal with what he is empowered to do in terms of the Act. If the Act does not empower him to investigate corruption, then he cannot seek corruption to investigate. Section 90(1), which deals with the powers of the Inspecting Judge does make reference

¹⁶ The reference to the Heath decision is reference to the Constitutional Court Judgment in the matter of *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC) in which the Constitutional Court held that it may not be appropriate for a Judge to sit as a Chairperson of a Commission of Inquiry in highly sensitised political matters or where he is expected to investigate matters that are not legal matters. The decision was of relevance in the discussion before the Parliamentary Portfolio Committee because the Honourable Chairperson of the Judicial Inspectorate, Judge Fagan had submitted to the Portfolio Committee that one of the reasons for seeking the amendment to remove corruption from his office was as a result of the Constitutional Court decision. (Portfolio Committee meeting of 3 April 2001).

¹⁷ Pretoria transcript, Vol. 16, page 1293.

to the Office of the Inspecting Judge giving a report on, amongst others, “any corrupt or dishonest practices in prisons”. While the Commission agrees with Professor van Zyl Smit that this might be utilised for purposes of investigating corruption, there is, however, no direct power to investigate corruption in terms of the objects of the Act. The Inspecting Judge can only give a report on corruption if he comes across it. He cannot follow up complaints of corruption and *mero motu* investigate it. His role in this regard has been scaled down from the objects in the original Act. It is clear that when section 85(1) was amended, the intention was to remove the power to investigate corruption. In fact, the Inspecting Judge’s view is that his duty is merely to report to either the police or the anti-corruption unit within the Department whenever he has a “whiff” of corruption.¹⁸

Furthermore, section 85(1) gives the Office of the Inspecting Judge the power to “facilitate the inspection” of “prisons.” This imposes two major limitations on the powers of the Inspecting Judge. Firstly, he is expected to facilitate merely the “inspection” and not the “investigation” of prisons. Secondly, the inspection is limited to prisons and thus the Inspecting Judge cannot, for instance, investigate the Department or even Management Areas. He is restricted to individual prisons. Even if one were to accept that the Office of the Inspecting Judge was empowered to investigate corruption in terms of section 90(1),¹⁹ as suggested by Professor van Zyl Smit, the Inspecting Judge is excluded from investigating any aspect of the management structure of the Department.

The concerns raised before Parliament about the “Heath Decision” affecting the Office of the Inspecting Judge’s work of investigating corruption could best be

¹⁸ See Correctional Services Portfolio Committee meeting dated 3 April 2001.

¹⁹ It is interesting to note that this is the very approach or attitude that was taken by some of the members of the Department towards this Commission when it was investigating. There was a continual attempt to say the investigation should be limited to prisons and should not include the Department. It was only when such objectors were referred to the terms of reference that they allowed the Commission to investigate aspects of the Department of Correctional Services. Secondly, even the Chairman of the Portfolio Committee on Correctional Services raised this query with the Commission during the Commission’s presentation to the Portfolio Committee in August 2002.

dealt with by changing the name of the Office to another name, such as “the Inspector of Prisons” and appointing a person who is not a Judge. This office could then have additional powers, including the power to investigate corruption. Furthermore, if this does not address the concern sufficiently, a decision could be taken to disallow a sitting Judge or any Judge for that matter, from holding the office of Ombudsman.

Notwithstanding what has been said above, the Commission is still of the view that the Office of the Inspecting Judge will not be affected by the views expressed by the Court in the Heath decision because its task is to investigate legal issues and there is no risk of failing to uphold the separation of powers, which was the Constitutional Court’s fear about Judges being used in matters involving the Executive.²⁰ If that were not the case, the establishment of this very Commission, which is investigating the Department, would have been challenged as unconstitutional. However, this hasn’t happened because of the subject matter of the Commission or the nature of the investigation this Commission was tasked to undertake.²¹

²⁰ See Heath *supra* (note 14).

²¹ See Heath *supra* (note 14) at paragraphs 34 and 35:

“[34] In dealing with the question of Judges presiding over commissions of inquiry or sanctioning the issuing of search warrants, much may depend on the subject-matter of the commission and the legislation regulating the issue of warrants. In appropriate circumstances judicial officers can no doubt preside over commissions of inquiry without infringing the separation of powers contemplated by our Constitution. The performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions – independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information. The same can be said about the sanctioning of search warrants, where the Judge is required to determine whether grounds exist for the invasion of privacy resulting from searches. 68(1).

[35] The fact that it may be permissible for Judges to perform certain functions other than their judicial functions does not mean that any function can be vested in them by the Legislature. There are limits to what is permissible. Certain functions are so far removed from the judicial function that to permit Judges to perform them would blur the separation that must be maintained between the Judiciary and other branches of government. For instance, under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police. These functions are not

Furthermore, this Commission views the distinction between the treatment of prisoners and corruption as artificial and therefore the basis for effecting the amendment is misconceived. This point was raised with Mr Morris, who conceded during his evidence that the distinction between corruption and the treatment of prisoners may, in a number of cases, be non-existent or if it is there, it is blurred.

The evidence before the Commission points to the fact that since it opened, the Office of the Inspecting Judge has never investigated corruption. Instead of pursuing its mandate to investigate corruption as required by the Act, it sought instead to amend the Act.²²

5. TREATMENT OF PRISONERS

Although the Office of the Inspecting Judge has concentrated only on the treatment of prisoners, particularly overcrowding, evidence points to prisoner dissatisfaction with how they are treated.²³

The evidence before the Commission points to the fact that the staff in the Office of the Inspecting Judge may not be challenging the Department's officials as they ought to do. In particular, the independent visitors have invariably been seen as an extension of the Department and thus have not been effective in dealing with the treatment of prisoners. The cases that exemplify this are the abuse and torture of prisoners at C-Max Prison, which apparently were reported to the IPVs without any success. This approach has affected the image of the Office of the

'appropriate to the central mission of the Judiciary' 69(2). They are functions central to the mission of the Legislature and Executive and must be performed by members of those branches of government. (per Chaskalson P.)

²² See Mr Morris' evidence in Cape Town transcript of 20 November 2002, pages 622, 651 and 652.

²³ See chapter on Treatment of Prisoners for a more detailed report on abuses in our prisons.

Inspecting Judge within the prison population. For example, Mr Strydom, a prisoner at Johannesburg Prison, rightly or wrongly, was one of the most outspoken and critical prisoners of the Office of the Inspecting Judge and the manner in which they did their work. He was of the view that they did not address the main concerns of the prisoners when it came to their treatment by the Department.²⁴ Other prisoners in other Management Areas, rightly or wrongly, expressed similar views.

Furthermore, there was evidence from the Pretoria Management Area and other Management Areas that the boxes installed to enable prisoners to give their complaints to the Office of the Inspecting Judge are placed at inconvenient spots and within the view of prison warders. Thus prisoners putting letters into the Office of the Inspecting Judge's box are visible to the warders and may be subjected to immediate harassment. This complaint of harassment following communication with the IPVs was not limited to the Pretoria Management Area.²⁵

There was also evidence that pointed to the fact that IPVs may not be getting the assistance or co-operation they are entitled to from the Department.²⁶ The reports on this lack of co-operation are shocking and include evidence from some of the IPVs that members of the Department have assaulted them. Indeed, assaults appear to be common, especially in KwaZulu-Natal and the Eastern Cape.

Briefly, the reports are that:

- Mr Thembelani Hlalukana (Eastern Cape Province Regional Co-ordinator) reported the following incidences that his staff members experienced:

²⁴ See Leeuwkop Exhibit "AA" where he refers to the Office of the Inspecting Judge as a "bulldog with rubber teeth".

²⁵ Similar complaints were received at Bloemfontein Management Area.

²⁶ See the memoranda by the Independent Prison Visitors (IPVs) submitted to the Commission, Head Office Exhibit 'Q'.

- Mr A.M. Hlamandana at Flagstaff Prison: Refused access to prison on 30 November 2004.
 - Mr Singaphi at St Albans Prison: Assaulted by a member on 21 September 2004, but member was exonerated of charges in an internal investigation.
 - Mr M.T. Kulati: St Albans Prison: Lack of co-operation and access to prison on 2 April 2004.
- In KwaZulu-Natal, Miss B.P. Shezi was refused access to Pietermaritzburg Prison on 7 October 2004 and a prison member assaulted Mr Q.K.P. Ngobese at Durban/Westville Prison on 14 February 2005. The incident is still under investigation.
 - The Mpumalanga and Limpopo Regional Offices have reported that they have problems with “access to resources” such as telephones and computers, which affects their ability to perform their duties. Sometimes, for instance, IPVs have to wait for between three (3) hours and a whole day to have access to these facilities.²⁷
 - The Gauteng, North West, Northern Cape and Free State Regional Co-ordinators reported that they had not experienced any major problems.

It is clear that unless the status of the Inspecting Judge is enhanced and the powers of his Office increased, the right of prisoners to be detained in conditions consistent with human dignity will not be achieved. The Office of the Inspecting Judge and the IPVs must be respected and their credibility protected by the Department for the system to succeed. In this regard, the Office must be given additional powers to deal with those members who are set on frustrating its officials in performing their work.

Section 93(1) empowers the IPVs to deal only with “complaints of prisoners”. This means that even if IPVs were to observe an irregularity or corruption or mal-

²⁷ See Head Office Exhibit ‘R’.

administration they may not deal with it unless a prisoner complains. It makes the office reactive instead of being pro active. This definitely disempowers a watchdog in the performance of his duties, which could not have been the intention of the Legislature. Furthermore, the Inspecting Judge should be given the means to ensure that the recommendations the IPVs make in the various prisons are carried out if he agrees with them.

Considering sections 85(2) and 90(1), one has to come to the conclusion that the Office of the Inspecting Judge is merely a reporting body vis-à-vis a disciplinary body. Internationally, however, it is accepted that an oversight body has much greater legitimacy if it also has decision-making powers. For example, the Complaints Committee in the Netherlands has the power to make binding judgements on prisoners' complaints.²⁸

Be that as it may, section 90(5) and (6) of the Act gives the Judicial Inspectorate powers to conduct its own investigations and even to sit as a Commission of Inquiry. If that is the case, then it is also empowered to subpoena witnesses to give evidence. Since July 1998 to the date of preparing this report, we were not aware of any incident or any occasion where the powers to sit as a Commission of Inquiry had been used or evidence collected in this manner.²⁹

It is also clear from reading the Act that the drafters anticipated that the Judicial Inspectorate would be an independent entity. This independence would ensure that the Inspectorate is not subject to the whim of the Department. In such an independent capacity, it would act as a watchdog and be capable of ensuring that any wrong officials commit within the Department would be brought to book. In other words, in the Commission's view, the drafters anticipated that the Office of the Inspecting Judge would be a body similar to the Independent Complaints

²⁸ See section 60-68 of the Penitentiary Principles Act, 1999 (Netherlands).

²⁹ The Commission is only aware of one such sitting by Judge Trengove, the first Inspecting Judge, who investigated mass assaults at the Johannesburg Medium B Prison in July 1998. (See Inaugural Annual Report at page 5).

Directorate of the South African Police Service, constituted in terms of Act No. 68 of 1995. The Independent Complaints Directorate Act established a body that is independent and which has acted independently to date.³⁰

6. INSPECTORATE STAFF

Evidence placed before the Commission suggests that the provisions of section 89 of the Act also compromise the anticipated independence of the Office of the Inspecting Judge from the Department of Correctional Services.

The first problem raised was that the appointment of staff has got to be done “in consultation with the Commissioner”.³¹ While this is seen as allowing the Commissioner to veto the appointment of staff, it is anticipated that the Department will say that this is not the case as the Inspecting Judge can appoint staff notwithstanding the views of the Commissioner.³² This would obviously lead to tension within the Department. Given this, section 89 may have to be amended to make it clear that the consultation with the Commissioner is merely to let him know and does not allow him to veto the appointment. This will also assist to enshrine the independence of the Office of the Inspecting Judge and prevent it from being regarded as an extension of the Department.

These provisions should be contrasted with provisions of Section 87(1) where the appointment of staff is to be made “after consultation with the Commissioner”.

³⁰ See J Sarkin (2000): “An evaluation of the role of the Independent Complaints Directorate for the Police, the Inspecting Judge for Prisons, the Legal Aid Board, the Human Rights Commission, the Commission on Gender Equality, the Auditor-General, the Public Protector and the Truth and Reconciliation Commission in developing a human rights culture in South Africa.” (15) SA Public Law 385-425, especially pages 390 to 394 where he discussed the independence of the I.C.D.

³¹ The phrase is not unusual. The Minister in consultation with Parliamentary Committees must appoint even the Executive Director of the I.C.D.

³² The judicial interpretation of “in consultation with” is that the parties have to agree before any action is taken. (See the case of *Rollo and Another v Minister of Town and Country Planning* 1948 (1) A.E.R. 13 dealing with “after consultation”).

Given that in the two abovementioned sections there is firstly a reference to staff appointments “in consultation” with the Commissioner and secondly, a reference to staff appointment “after consultation” with the Commissioner, it is clear that the legislature intended “in” and “after” to mean different processes of appointment.

The intention of the legislature can be gleaned from the provisions of statutes. It is accepted law that when one attempts to assert an intention of the legislature, the words used are to be understood in their “ordinary meaning”, “popular meaning”, “literal meaning”, “plain meaning” or “grammatical meaning”. Furthermore, the words are to be read in the context in which they are used, having regard to other sections of the Act as a whole and other similar legislation.

In the *Oxford English Dictionary* (1998), Second Edition, Volume III, the word “consultation” is defined as follows:

- “The action of consulting or taking counsel together, deliberation, conference...
- A conference in which the parties consult and deliberate; a meeting for deliberation or discussion.”

It seems the most important ingredient of the consultative process is the “getting together” of people for purposes of “conferring with each other.” Such conferring can be oral or in writing.³³

In *Rollo and Another v Minister of Town and Country Planning* 1948 (1) A.E.R. 13, Bucknell L.J., in construing an enactment that allowed the Minister to take certain steps “after consultation with any local authorities who appear to him to

³³ See also *R v Ntemeza* 1955 (1) SA 212 (A) at 218 D-E and *Maqoma v Sebe and Another* 1987 (1) SA 483 (CK).

be concerned”, stated that the meaning of “consultation” in such enactment means that:

“on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice.”

In other words, there must be a two-way process where an opportunity for both parties to present their side of the story is given. This is what is anticipated “after consultation” in this particular context or in this particular statute. However, it is clear that “after consultation” does not mean that there should be an agreement.

Our courts have held that the words “after consultation” with regard to a statute mean that the parties need not agree.³⁴

On the other hand “in consultation” will have the directly opposite effect of “after consultation”, namely, there must be an agreement pursuant upon the consultation. This means the Commissioner can veto the Inspecting Judge’s appointment of staff, which clearly infringes upon the independence of the Office. Even the appointment of special assistants and the determination of their salaries and conditions of service take place only after consultation with the Commissioner. This gives the Commissioner a lot of power in determining the staff complement of the Inspecting Judge’s Office and most certainly compromises the independence of the Office.³⁵

³⁴ See R v Mbete 1954 (4) SA 491 (EDLD) at page 493 E in which *Rollo and Another v Minister of Town and Country Planning* (above) was referred to with approval.

³⁵ See paper by Professor S. Jagwanth *supra* (Note 12) at 37 “Many people who were interviewed held the view that its administrative and financial links with the Department of Correctional Services undermined the independence of the Inspectorate and therefore needed to be revisited. This view was held largely by the staff of the Office of the first Inspecting Judge, although, like members of the Department who were interviewed, the incumbent Judge did not see the link as the problem. He was of the opinion that the independence of the Judge as the Head of the Inspectorate contributed significantly to

This then brings the Commission to the next point, which is the provision of section 89(3). This provision states that the employees of the Office of the Inspecting Judge are deemed to be employees of the Department. The view of staff members is that this particular provision hinders their work and their perceived independence. It is the view of the members that if they were to do anything that may be perceived to embarrass the Department, including reporting on maladministration, this would jeopardise their chances of promotion within the Department.

Given this, serious consideration might have to be given to the amendment of this provision by, for example, making staff employees of the Department of Public Service and Administration. This would ensure that they retain their independence and have equal opportunity to be promoted within the public service in future. It is not clear why the drafters of the Act preferred to give more decision-making power to the Commissioner rather than the Director-General of the Department of Public Service and Administration in this regard. An alternative option would be to retain staff as employees of the Inspectorate but make the Inspectorate wholly independent from the Department.

Finally, it is clear from a review of section 91 of the Act that the Department is responsible for all the expenses of the Office of the Inspecting Judge. It is problematic that the funding for the work of the Office comes from the

making it independent. This view was shared by some of the people who had helped draft the legislation, who pointed out that the decision to appoint a Judge or a retired Judge to head the Inspectorate was largely, due to the esteem in which Judges were held, the credibility they would bring to it and the constitutionally guaranteed independence. Some staff of the Inspectorate and many others, however, believe that its links with the Department of Correctional Services compromises its independence. Although it was acknowledged that funding requests by the Inspectorate had in general been accepted, it was felt that mechanisms needed to be put in place to guard against the possibility of reduced funding.”

Department, particularly when this is in addition to staff appointments being made in consultation with the Commissioner.³⁶

7. INDEPENDENCE

Emanating from the above, it is clear that the question of the appointment of staff, the funding for the Office of the Inspecting Judge, the nature of the consultation that has to be made with regard to the appointment of staff and the general nature of the work of the Office of the Inspecting Judge all call for greater independence of the Office from the Department. It needs to be clear that the Office of the Inspecting Judge is not an extension of the Department.

The one issue, which is of concern to the Commission, is the fact that the Act is drafted in such a manner that the Office of the Inspecting Judge is accountable to the Commissioner of the Department. At the same time, section 3(5) of the Correctional Services Act No. 111 of 1998³⁷ places the entire Department in the hands of the Commissioner. Clearly, the Inspecting Judge is reporting to the very person whom he is expected to investigate and that very person decides on staff appointments and on the finances of the Office of the Inspecting Judge. Thus, the independence of the Office required for it to investigate the Department is not properly protected.

Serious consideration must be given to the Office of the Inspecting Judge doing the appointment “after consultation with the Minister of Correctional Services” and obtaining some form of financial independence.

On the other hand, the independence of the Prisons and Probation Ombudsman for England and Wales is enshrined and protected. This independence is clearly

³⁶ See discussion of “in consultation” and “after consultation” (*supra*).

³⁷ Similarly, section 3(1) of the Correctional Services Act No. 8 of 1959 placed the Department under the control of the Commissioner.

stated in the institution's Mission Statement and Statement of Values. According to a report on this institution, the Mission Statement is as follows:

To provide prisoners and those under community supervision with an accessible, independent and effective means to resolve their complaints and to contribute to a just and humane penal system.

The Statement of Values reads as follows:

- *To be accessible to all who are entitled to make use of the office of the Prisons and Probation Ombudsman and actively to seek removal of any impediment to it.*
- *To be independent and to demonstrate the highest standards of impartiality, objectivity, thoroughness, fairness and accuracy in the investigation, consideration and resolution of complaints.*
- *To be fair in the treatment of all complainants without regard to criminal history, race, ethnicity, gender, disability, sexual orientation, age, religion, or any other irrelevant consideration.*
- *To be effective by ensuring that complaints are dealt with as quickly as possible and that recommendations are well-founded, capable of being implemented and are followed through.*
- *To be constructive in helping the Prison Service and National Probation Service improve their handling of complaints, to eliminate the underlying causes of them and to bring about a just and humane penal system.*
- *To be empowering by creating and maintaining a working environment in which staff are respected, engage in continuous learning, obtain job satisfaction and have equal opportunities for personal and career development.*
- *To be accountable to stakeholders for the fulfilment of our mission statement, our values and aims and objectives.*

- *To be efficient in the management of resources and deliver value for money.*³⁸ (Own emphasis)

It is clear from this Statement of Values that the independence of the Ombudsman is recognised and protected in England and Wales. Such independence was anticipated by the drafters of the Correctional Services Act, according to the evidence presented to the Commission by Professor Van Zyl Smit.

The issue of the independence of the watchdog is not unique to England and Wales. In South Africa, the institutions constituted in terms of Chapter 9 of the Constitution are also independent and are accountable to Parliament. However, the Office of the Inspecting Judge is not one of the Chapter 9 institutions and thus one should look for models from other institutions that are founded by statute. In this regard, the Independent Complaints Directorate, which is the watchdog in the Department of Safety and Security, is the best example to consider for the Office of the Inspecting Judge.

Section 50 of the Independent Complaints Directorate Act gives partial independence to the Independent Complaints Directorate in that it provides that the employment of staff is done “in consultation with the Minister”. It is not consultation with the Commissioner who is also responsible for the Department. However, what is reassuring is that in section 50(2) of this Act, it is stated: “The Directorate shall function independently from the service.” The service referred to is the South African Police Service. Accordingly, that should be the approach that is adopted in dealing with the Office of the Inspecting Judge in the Department.

³⁸ See the Annual Report of the Prisons and Probation Ombudsmen for England and Wales for the period 2003-2004.

Similarly, the Minister of Safety and Security appoints the Executive Director of the Independent Complaints Directorate in consultation with the relevant Parliamentary Committees. This once again reiterates the point that the Commissioner of Safety and Security, who is in charge of the police force, has nothing to do with the watchdog that is supposed to oversee that his department functions within the law. Instead, it is left to the Minister to deal with the watchdog in consultation with the Portfolio Committee in Parliament.

The Commission is of the view that independence is fundamentally important for the proper functioning of the Office of the Inspecting Judge particularly since its task is to guard the Department and ensure that the Department applies its policies and directives in accordance with the law. It is therefore important to look at what scholars have said about the independence of bodies like the Inspectorate.

Corder and Others have stated that independence has two facets:

“In the first place to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of government. Approval by the executive of budgets, or other issues of staffing is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases.”³⁹

It goes without saying then that if the Office of the Inspecting Judge has sole authority with respect to the appointment of staff and the appointment of, for

³⁹ See H. Corder, S. Jagwanth and F. Saltau (1996): *Report on Parliamentary Oversight and Accountability* (June 99). See http://www.pmg.org.za/bills/oversight_and_account.hdm and also *New National Party of South Africa v Government of the Republic of South Africa* 1996 (6) BCLR 489 (CC).

example, special assistants for specialised investigations, that the procedures would be streamlined and would eliminate any unnecessary delay or interference. It would also mean that the Office of the Inspecting Judge is completely independent and thus able to fulfil its function in terms of the Act.

Considering the negative responses from the prisoners during the Commission hearings, it is clear that the full independence of the Office of the Inspecting Judge would most certainly mean that the prisoners as well as the public have more trust and faith in the Office of the Inspecting Judge.

8. CONCLUDING REMARKS

Corruption, maladministration and overcrowding are all challenges facing the Department. While over population of prisons is clearly an issue for the Department, corruption and the treatment of prisoners are similar challenges that ought to receive at least the same prominence and attention given to overcrowding. Corruption, particularly, is a challenge that not only the Department in South Africa faces but is one faced internationally. Furthermore, corruption and maladministration in the South African context are issues not only for the Department but also for government as a whole. In dealing with these challenges, it is the Commission's view that the issue of overcrowding should not overshadow the issues of corruption and maladministration. In light of this, it is the Commission's view that the amendment of the Correctional Services Act to remove the investigation into corruption from the Office of the Inspecting Judge was ill-conceived.

It is clear from the Act that the Office of the Inspecting Judge was supposed to be an independent office, which was originally empowered to investigate the treatment of prisoners, corruption and dishonest practices.⁴⁰

⁴⁰ Refer to the evidence of Professor Dirk van Zyl Smit above.

Whilst the drafters of the Act intended the Office of the Inspecting Judge to investigate corruption and dishonest practices within the prisons, it is clear that the staff in the Office was, and still is, not interested in investigating corruption and dishonest practices. This is supported by the facts, which have been referred to above including, amongst others, that the Office has never investigated corruption and that it sought to amend the Act instead of empowering staff so that they could investigate corruption.

Since this is the situation, referring the investigation of corruption back to the Office of the Inspecting Judge is unlikely to help.

The Office of the Inspecting Judge should, at least, have an obligation to receive complaints on corruption, which can then be passed onto the independent agency (“Prisons Ombudsman”), which will be formed in terms of the recommendations contained in this report.

The view that the Office of the Inspecting Judge should receive complaints is based on the fact that this Office has a big presence on the ground in the form of the Independent Prison Visitors, who are located in the various prisons, as set out above.

This will help ensure that the fight against corruption is conducted on all fronts. Accordingly, the Commission’s recommendations are motivated by the need for all agencies, staff and prisoners to complement one another in the fight against corruption.

In the various Management Areas it has investigated, the Commission has heard evidence of how prisoners’ rights are violated by members who end up not being

disciplined for that misconduct.⁴¹ For as long as the Department continues to allow its members to violate prisoners' rights, it will not achieve the objectives of correction and rehabilitation as set out in the December 2004 White Paper. The establishment of an independent entity or agency will go some way to assisting the Department to meet its goals of correction and rehabilitation.

9. FINDINGS

9.1 The Office of the Inspecting Judge was originally meant to be a body that investigates:

- the treatment of prisoners;
- corruption; and
- dishonest practices.

9.2 The Office of the Inspecting Judge has never, since its inception, investigated corruption. It might even be said that it has shown a reluctance to deal with corruption and dishonest practices.

9.3 The amendment to the Act to remove the investigation of corruption and dishonest practices was ill-conceived as there is a need for an independent body to investigate corruption and dishonest practices in the Department.

9.4 The Office of the Inspecting Judge has been rendered ineffective by the removal of its independence and making it appear as though it is an extension of the Department.

⁴¹ See chapters on Treatment of Prisoners and also Disciplinary Inquiries for more details.

- 9.5 The Independent Prison Visitors have been rendered ineffective and some members of the Department in some Management Areas have treated them with disrespect.
- 9.6 The independence of the Office of the Inspecting Judge is crucial for the purposes of it being able to conduct its work effectively.
- 9.7 The Office of the Inspecting Judge needs to be given more powers to enable it to function effectively and also to execute its mandate.
- 9.8 The independence of the Inspecting Judge should also be shown or protected in the appointment and seconding of staff, including the appropriate terms and conditions of employment.
- 9.9 There is a need for the Government to set up another independent agency to ensure that corruption is investigated and that those who are corrupt are punished. This will also ensure that the rights of prisoners are protected and that members who violate prisoners' rights are punished.

10. RECOMMENDATIONS

Accordingly, the Commission recommends that:

- 10.1 The Correctional Services Act should be amended to provide that the Office of the Inspecting Judge should also deal with complaints of "corruption and maladministration". In this regard, the IPVs should have an obligation to take reports or complaints of corruption from complainants and prisoners for onward transmission to the new corruption-fighting agency or Directorate to be set up in terms of this report. Such

amendment should expressly set out the aims and objectives of the Office of the Inspecting Judge.

- 10.2 The Office of the Inspecting Judge to consider the amendment of the Act to incorporate the appointment of deputies to the Inspecting Judge to deal with specific areas that may need to be investigated.
- 10.3 Section 90(1) of the Act be amended to ensure that the investigations can be conducted in respect of the entire Department by deleting the word “prisons” and substituting it with the words “Department of Correctional Services including various Management Areas and the prisons.”
- 10.4 The Correctional Services Act be amended so that:
 - (a) The independence of the Office of the Inspecting Judge is protected in the Act. The Office should be subject to the Constitution and law so that it can exercise its powers and perform its duties without fear, favour or prejudice. No person or organ of State should interfere with the functioning of the Office of the Inspecting Judge;
 - (b) The Office of the Inspecting Judge is accountable to the Minister of Correctional Services and reports on the activities and the performance of its duties and functions to the Minister at least once a year;
 - (c) The Office of the Inspecting Judge functions independently of the Department and in particular the Commissioner, as he is responsible for the prisons and prisoners;
 - (d) The functions of the Office of the Inspecting Judge are funded by money appropriated by Parliament for that purpose;
 - (e) The Inspecting Judge is the accounting officer for the Office of the Inspecting Judge in terms of the Exchequer Act No 66 of 1975 ;

- (f) The powers of the Office of the Inspecting Judge are increased to include powers of:
 - (i) search and seizure to make its work more effective. (See Regulations 13 and 17 of the Regulations governing the work of the Commission);
 - (ii) enforcing the recommendations of the Office of the Inspecting Judge within the Department. Foreign experiences in this regard should be considered after due consultation with civil society organisations, the Department and the Correctional Services Portfolio Committee;
 - (iii) for the moment the responsibility set out in (ii) above should be entrusted to the Heads of Prison to provide regular feedback on the recommendations made by the IPV's in various prisons.

- (g) Section 87(1) and section 89(1) are amended so that the appointment of staff occurs "after consultation with the Minister" and not "in consultation with the Commissioner".

- (h) Section 89(3) is amended so that the employees of the Office of the Inspecting Judge are deemed to be members of staff of the Department of Public Service and Administration or the Department of Justice, or any other Department other than the Department, to retain their independence from the Department.

10.5 The necessary arrangements be made with regard to budget, accommodation, employment of staff and opening of branch offices to enable the Office of the Inspecting Judge to perform an effective job with regard to the fight against ill-treatment of prisoners in the various prisons in the country.

- 10.6 In order to accord the officials of the Inspecting Judge adequate protection against officials of the Department who frustrate them in the performance of their work, Chapter 16 of the Correctional Services Act No. 111 of 1998 should be amended to include a further section that makes it a criminal offence for members of the Department to interfere, hinder or frustrate the officials of the Inspecting Judge in the performance of their duties. A penalty clause should accompany the criminalisation of this conduct, like all other criminal offences created in terms of Chapter 16 of the Correctional Services Act.
- 10.7 Lastly, the general amendment of the entire Chapter is advised to stress that the fight against corruption is a paramount issue in the Department and the Office of the Inspecting Judge cannot ignore it, notwithstanding its amended mandate. The Office of the Inspecting Judge should give this serious consideration when it is investigating the various prisons, as corruption goes hand in hand with the treatment of prisoners.

CHAPTER 12

PRISON OMBUDSMAN

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CHAPTER 12

PRISON OMBUDSMAN

1. INTRODUCTION

Corruption is a major challenge for the Department. However, it is not a challenge limited to the Department since it is a problem affecting South Africa as a whole, including the private sector and government more broadly. Corruption is also an international problem. It has been stated that corruption may even be one of the main reasons Africa is so deeply in debt and poverty.¹

The Commission is of the view that corruption poses a major threat to the very fabric of a democratic state and should therefore be combated to save our young democracy. The Government's legal framework, in the fight against corruption in the civil service includes, amongst others:

1. The establishing of the Office of the Auditor-General in terms of chapter 9 of the Constitution of the Republic of South Africa;
2. The setting up of the Office of the Public Protector in terms of chapter 9 of the Constitution of the Republic of South Africa;
3. The creation of the Office of the Inspecting Judge in terms of the Correctional Services Act;²

¹ Comments of Adama Dieng, a governance expert for the African Union as reported in the *Business Day* of 14 October 2004 "Corruption Sucking Africa Dry says AU".

² Parliament subsequently took away the Office of the Inspecting Judge's responsibility to fight corruption following an amendment which was proposed by the Office of the Inspecting Judge.

4. The setting up of the Special Operations Division of the National Prosecuting Authority (Scorpions) (National Prosecuting Authority Amendment Act 61 of 2000);
5. The formation of the Special Investigation Unit;
6. The Prevention of Organised Crime Act No. 121 of 1998;
7. The enactment of the Public Finance Management Act No. 1 of 1999, as amended (“the PMFA”);
8. The Prevention and Combating of Corrupt Activities Act No. 12 of 2004;
9. Preferential Procurement Policy Framework Act No. 5 of 2000;
10. State Tender Board Act No. 86 of 1986;
11. State Tender Board, General Conditions and Procedures (ST36);
12. User Manual Directives to the Department in respect of procurement (ST 37);
13. Provisioning Administration Systems Manual (PASM);
14. The Department of Public Service and Administration’s Anti-corruption policy.

All of the above institutions, statutes, regulations and policies are meant, amongst other things, to ensure that the Public Administration is corruption free. It is these endeavours that the Government has entered into that makes its efforts noticeable when it comes to the fight against corruption.

In its daily dealings, the Department must be conscious of the provisions of the abovementioned statutes and also be alive to the powers of the various organisations that fight corruption and act in compliance therewith.

The specific challenge to the Department, however, is that unless corruption is addressed urgently, it has the potential of discrediting whatever transformation initiatives the Department might have planned.

The main thrust of the Department’s anti-corruption strategy should be to encourage the disclosure by employees and prisoners of whatever

transgressions members, prisoners and visitors to the various institutions might have committed. In this regard, it might be appropriate to take into consideration the provisions of the Protected Disclosure Act No. 26 of 2000. Section 3 of the said Act stipulates that no employee may be subjected to any occupational detriment by his or her employer on account or partly on account of having made a protected disclosure.

Section 1 of the said Act then goes on to define what a protected disclosure is.³

While the abovementioned provisions only apply in respect of employees, the Department should seriously consider extending in their regulations (B-Orders), some of the relevant provisions of the Protected Disclosure Act to “expressly apply” to prisoners who are incarcerated in the various institutions belonging to the Department.

2. DEPARTMENT’S ANTI-CORRUPTION UNIT

The Department embarked on an anti-corruption strategy in October 1997, which involved the setting up its own anti-corruption unit. The Commission, however, obtained information that even though there was an anti-corruption unit, it was

³ In Section 1 of the same Act a disclosure is defined as:
“disclosure” means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) That a criminal offence has been committed, is being committed or is likely to be committed;*
- (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;*
- (c) That a miscarriage of justice has occurred, is occurring or is likely to occur;*
- (d) That the health or safety of an individual has been, is being or is likely to be endangered;*
- (e) That the environment has been, is being or is likely to be damaged;*
- (f) Unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or*
- (g) That any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.”*

not receiving the support it was supposed to have received either financially or in terms of human resources. At some stage, the anti-corruption unit had a staff of less than ten (10) people who were expected to investigate corruption in the whole Department, including two hundred and forty three (243) Management Areas, which are spread all over South Africa. Adding to their difficulties was the fact that the members of the anti-corruption unit were junior members of staff and they did not command the respect one would expect such a unit to command if the Department was serious about an anti-corruption drive. One example of this was the way in which staff members treated the investigators into the Marimuthu release at the Durban/Westville Management Area, where investigators were threatened and not given co-operation.⁴

The Department has embarked on a drive to set up a new Anti-Corruption Strategy Plan with a view of fighting corruption internally, which has meant a new recruitment drive and the appointment of people from the outside to deal with corruption. This plan was implemented in August 2003. The said strategy has a three-pronged approach, namely Investigations, Prevention and Social Responsibility. The Department has also restructured the sub-branch of Legal and Special Operations. There is a unit in this branch called “Departmental Investigation Unit”, which a Director heads. The Departmental Investigation Unit has three sub-units, namely Co-ordinator Investigation Unit, Analytical and Prevention Desk and an Integrity Unit. The Investigations sub-unit is supposed to have a staff of twelve (12) investigators at the level of Assistant Directors and two administration support staff. This, then, is the sub-unit that the Department has set up to investigate corruption internally. The Department’s work in this regard is applauded.

However, corruption is a mammoth task and it cannot be left to the Department alone to deal with it. The Department has always had an anti-corruption unit and yet this has not been effective in dealing with the problems. It is the

⁴ See Chapter dealing with Conversion of Sentences for more details.

Commission's view that twelve (12) people will never be able to investigate corruption in the entire Department. Previously the anti-corruption unit of the Department had approximately ten (10) people and it never succeeded in fighting corruption within the Department. As a result, this led to a number of outside agencies being appointed to deal with the issue of corruption.

The Department's anti-corruption strategy cannot be considered in isolation from the Department's capacity and the role that could be played by an independent agency. The Department can retain the Prevention and Social Responsibility components of their three-pronged approach. However, the investigation branch should be given to an outside agency.

Although the Department's anti-corruption strategy is to be commended, it is nevertheless clear that corruption is best dealt with by an agency that is seen to be independent and has no links to the institution being investigated. The absence of this independence raises questions about the impartiality and the independence of the people who are supposed to investigate the corruption, which compromises the investigation and can influence those who are employees of the particular institution. This does not mean that the Department should not have an anti-corruption unit, but the Commission is of the opinion that there should also be an outside agency to look into the issue of corruption.

The Department, as is apparent from this report, lacks the capacity to fight corruption and maladministration. This is based on the history of the Department in the fight against corruption so far, coupled with the corruption discovered by this Commission. For the Department to be able to fight corruption, it must have not only the capacity to do so but also members of staff who are "willing and able" to fight corruption. For members of staff to show their willingness and ability to do so, they must be well trained to fight corruption. Furthermore, they must be willing to be impartial and independent in performing their functions and they must not be influenced by fear, sectionalism or intimidation.

In this report, it is clear that the Department does have problems with capacity when it comes to members who are willing and able to fight corruption. The Department also concedes that there is a lot of intimidation within it, which renders whatever programmes it might have regarding investigations ineffective. Even issues of relative simplicity such as disciplinary inquiries have been ineffectively dealt with. In actual fact, they are an embarrassment to the Department⁵ and the entire management of the Department since no Department can be managed properly without an effective disciplinary system.

The Department's lack of capacity to fight corruption is also apparent in the manner in which it has handled some of the Interim Reports, which have been forwarded to it by this Commission. There was clearly an element of negligence and failure to appreciate the urgency with which some of these issues should have been attended to. The employees who are guilty of misconduct, as long as the provision of time frames in the Disciplinary Code are in place, will always raise the question of adherence to them, that is, the fact that disciplinary inquiries are instituted way beyond the three (3) month period without any just cause.⁶

Whilst dealing with the anti-corruption agency, it is appropriate to bring to the attention of the Department the comments set out in the Chapter dealing with disciplinary inquiries because of their relevance to this question.⁷ An effective disciplinary inquiry is crucial in the fight against corruption. Discipline is the first step towards accountability on the part of staff.

However, even if the Department had the expertise and capacity to manage internal investigations into corruption, an independent agency can also act as a watchdog, monitoring the employees of the Department, including the members

⁵ The Commissioner in his address in Parliament to the Portfolio Committee on 14 April 2003, acknowledged this problem.

⁶ See Departmental Disciplinary Code, Clause 7.4, as per *Government Gazette* No 8 023 dated 30 July 2004.

⁷ There is a need for the disciplinary inquiries to be handled professionally and by independent people who have been properly trained on how to handle them.

of the Department's anti-corruption unit. As the Roman maxim goes: "who guards the guards?" The need, therefore, for an outsider to guard the guards cannot be over-emphasised.

Other Government departments have internal anti-corruption units. But even in these situations, it is found that there are outside agencies involved in overseeing the work of the Department. In the case of the Department, the drafters of the Act originally regarded the Office of the Inspecting Judge to be the appropriate body to oversee the Department. However, it no longer has this function since Parliament deemed it appropriate to amend the Act.⁸

The Commission has also considered the possibility of a recommendation to extend the powers of the Independent Complaints Directorate (ICD) to include the investigation of corruption and maladministration in the Department of Correctional Services. The Commission, however, is not convinced that this would be practically possible in the light of the problems and responsibilities the Independent Complaints Directorate currently faces, coupled with the fact that the institution it is investigating currently falls under a completely different department, that of Safety and Security.

Furthermore, the closure of the South African Police Services Anti-Corruption Unit also had the effect of increasing the ICD's workload. In the circumstances, it would not be practically feasible to entrust the ICD with the responsibility of investigating corruption and maladministration in the Department of Correctional Services.

However, the fight against corruption cannot, for reasons discussed above, be left to the Department. In this regard, it is the Commission's considered view that the fight against corruption and maladministration will have to be taken away from the Department and placed under the jurisdiction of an independent office,

⁸ For more details on this, see the chapter dealing with the Office of the Inspecting Judge.

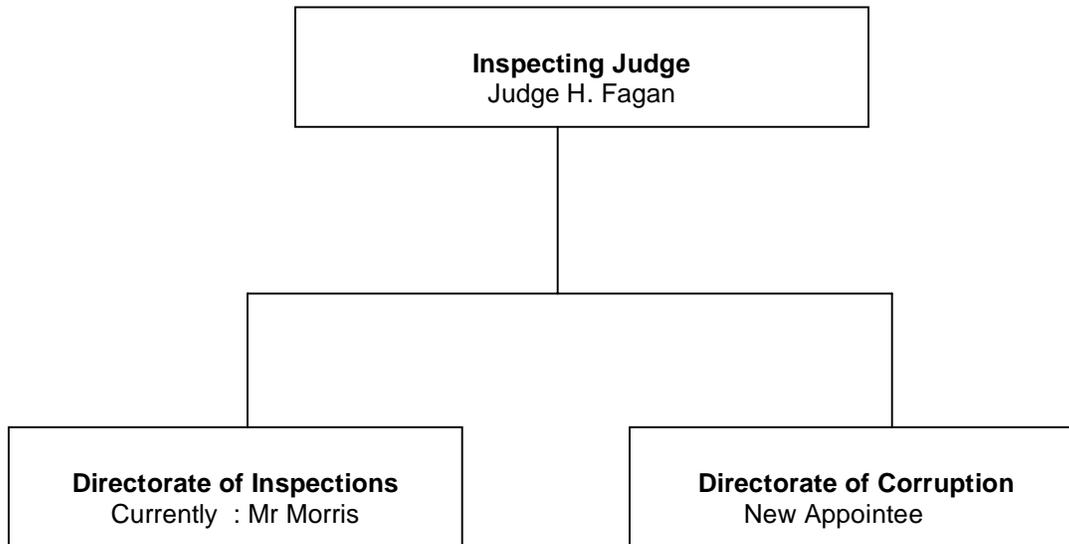
which will be committed to fight corruption and maladministration within the Department. The Commission therefore only in part agrees with the proposals contained in the United Nations Report⁹ focusing on corruption that there should be an autonomous anti-corruption structure. However, the Commission disagrees that this structure should be under the control of the Commissioner of the Department. In terms of section 3(1) of the Act, the Department “is under the control” of the Commissioner. He thus cannot investigate himself.

In the light of the above, it is the Commission’s view that an Office of the “Prisons Ombudsman” or an independent agency with any other name entrusted with a role to investigate corruption should be formed in addition to the Office of the Inspecting Judge. Effectively, a new agency should be formed and, to be effective, such agency should have offices all over the country and not be confined to only one city in order to ensure that there is adequate national access to its offices.

However, if costs are a constraint, then consideration should be given to opening up another directorate within the Office of the Inspecting Judge, with the responsibility of eliminating corruption. Somebody other than the Inspecting Judge could head “this directorate” and he or she could be referred to as an Ombudsman for Prisons who reports to the Inspecting Judge of Prisons. However, this route will mean the amendment of the Act and re-introducing the investigation of corruption as part of the objects of the Inspecting Judge.

The structure could be as follows:

⁹ See United Nations Final Consolidated Report (Focused Assessment of Anti-Corruption capacity within Department of Correctional Services), November 2003 at page 25.



3. OFFICE OF THE INSPECTING JUDGE

In the Chapter dealing with the Office of the Inspecting Judge, the Commission expressed its reservations about the fact that corruption was removed from the duties of the Office of the Inspecting Judge. It is still the Commission's view that the issue of corruption cannot be easily divorced from the treatment of prisoners.¹⁰

In the light of the above, if Parliament decides it is not prepared to amend the Act and empower the Office of the Inspecting Judge to investigate corruption once again, the said Office should at least ensure that it receives and takes complaints on corruption, which can then be passed on to the independent agency, which will be formed in terms of the recommendations contained in this Chapter.

The justification for the Office of the Inspecting Judge receiving complaints is based on the fact that the Office of the Inspecting Judge has a big presence on

¹⁰ See Chapters on Treatment of Prisoners and Sexual Abuse in Prisons that reflect that corruption directly impacts on the treatment of prisoners.

the ground in the form of the Independent Prison Visitors who are located in the various prisons. According to the 2004/2005 Annual Report, the Office of the Inspecting Judge has 221 IPVs.

This will also ensure that the fight against corruption is conducted on all fronts. Accordingly, the Commission's recommendations are motivated by the need for the two (2) offices to complement each other in the fight against corruption.

4. CORRUPTION HOTLINE

The Commission's view is that there might be a need to open a toll-free line to enable the prisoners to report corruption within the Department.

The opening of a toll-free line by the Commission during its investigations has been very successful in that it has been able to receive complaints from all over the country regarding corruption within the Department.

The Commission received a number of complaints on the toll-free line from prisoners incarcerated in the nine (9) Management Areas it investigated and members of the public. Calls were also made from other Management Areas.

The telephone leads from the nine (9) Management Areas, which were all followed up, amounted to approximately 3 799. The leads were made up as follows:

Durban/Westville Management Area	:	804
Pollsmoor Management Area	:	342
Grootvlei Management Area	:	245
Ncome Management Area	:	318
St Albans Management Area	:	315
Pietermaritzburg Management Area	:	528

Johannesburg Management Area	:	639
Pretoria Management Area	:	608

Total		3 799

The leads from the Management Areas that were not investigated were approximately 2 160.¹¹

The toll-free line cost the Commission approximately R45 193,40 over a period of twenty seven (27) months commencing from December 2002 to February 2005. This is an average of R1 673,29 per month.

The Commission is of the view that this money was well spent and a corruption toll-free line should not be regarded as unnecessary or ignored in the fight against corruption. Corruption carries its own costs. Once it is endemic, it has the tendency not only to corrupt officials but also depletes the very revenue one is trying to save and results in the resources of the Department being abused or stolen. This leads to financial and other wastage. An appropriate anti-corruption strategy has the potential to save the Department a lot of money.

5. WITNESS PROTECTION

prisoners are a vulnerable group. On the one hand, they are the very group that is involved in corruption with warders. On the other, they are in a position to blow the whistle on corruption in prisons.¹² However, because of their circumstances,

¹¹ For more details, see Chapter 1 (Appendix B) of this report.

¹² See the Fifth Interim Report dealing with corruption at the Grootvlei Prison, which would never have surfaced before the Commission had it not been for the prisoners being willing to blow the whistle.

it is necessary to protect those who are prepared to blow the whistle on corrupt officials. Without a well thought-out plan on how to protect them, it might be difficult to obtain the co-operation of prisoners. Similarly, the members of the Department who are prepared to co-operate need to be protected because of the extent of intimidation within the Department.

The Setlai incident, which is referred to in this report,¹³ did not help much to instill confidence with the South African public as to the Department's commitment to protect whistle blowers as anticipated in the Protected Disclosures Act No. 26 of 2000.¹⁴

6. SMUGGLING OF CONTRABAND

The Department has a number of rules and regulations to prevent members and visitors smuggling contraband to the various Management Areas. The strategies set out in these rules and regulations take the form of, amongst other things, searching of people and establishing general rules as to how members and prisoners should behave during visitations.

Notwithstanding these rules and regulations, the smuggling of contraband into the prison continues unabated. It is one of the activities that keeps prisoners' imaginative minds active, in that they are constantly plotting new ways to smuggle contraband into the prison for their use and for purposes of economic

¹³ See the Chapter dealing with the Implementation of Interim Reports (Fifth Interim Report).

¹⁴ See "Call for more support for whistle-blowers" – *Business Day*, Thursday 20 October 2005, as follows:
"A number of people who exposed corruption in the workplace have found themselves at risk of losing their jobs, facing charges of insubordination or being isolated. These include former Grootvlei prison head Tatolo Setlai, who exposed corruption at the prison by allowing prisoners to film warders engaging in illicit activities. After the exposure, Setlai was charged with unrelated offences by prison authorities and spent two years on suspension."

activity. The evidence before the Commission is that, besides sex, contraband is one of the biggest trading commodities that is widely used within the prison environment.

The Department's rules and regulations are sufficient for purposes of effectively dealing with the smuggling of contraband into the prisons. However, a committed and dedicated work force, as well as compliant and obedient prisoners, are necessary for such rules and regulations to be effective. The main problem for the Department is the failure of the members to comply with and enforce the various rules and regulations and thus to allow contraband to enter the prisons either intentionally or through gross negligence.

Evidence in abundance has been brought before the Commission showing that most of the smuggling of contraband into the prison is not by members of the public, but in fact by members of Correctional Services, whether the contraband is firearms, drugs or alcohol. It is recommended that the failure to conduct searches should be added to the list of transgressions by members of the Department under Column A of the Departmental Disciplinary Code.

Only transgressions set out under Column A of the Disciplinary Code are dismissible transgressions.

In dealing with this problem, the Commission is of the view that it is important for the Department to consider a number of proposals to counter the scourge of contraband smuggling. The proposals, which will be dealt with below, call for commitment by the Department in their implementation for the fight against corruption to succeed. The proposals will be divided into long and short-term recommendations. Accordingly, they will have to be implemented as such.

7. SECURITY FUNCTIONS

The Department has regulations dealing with the searching of staff, visitors and prisoners. However, notwithstanding these rules and regulations, contraband still enters the prisons.

The problem is the lack of commitment of those members who are supposed to be searching people entering the prison. It has been the Commission's experience that searching is done only to a very limited extent and on an ad hoc basis as and when members feel like searching. In some Management Areas, visitors and their vehicles are sometimes not searched at all. The Commission is of the view that an alternative solution, which will not only deal with the problem of searches and seizures in respect of prisoners, but also deal with the problem of searching of staff and visitors, might have to be considered.

The Department spends a significant amount of time training staff members in how to deal with the rehabilitation of prisoners, safe custody of prisoners, handling of firearms and the various rules and regulations etc. These members are also trained in the more basic functions of looking after prisoners, carrying out security duties or guarding the gates at the various prisons and searching whoever is entering and leaving the prisons. In the Commission's view, this is a waste of resources in that these more basic functions could be done by people who have been trained only to safeguard premises and search people entering and exiting the prisons. This could also be done at a far cheaper rate than the normal rate paid to the average correctional services official and the time spent on training such people would be far less than that spent on correctional officials.

This might even involve considering outsourcing the function of guarding the prisons and searching the employees, prisoners and visitors who are entering the prison premises. The South African Police Services have embarked upon a

similar programme where the guarding of some police stations is left to an outside security company, and thus allows the policemen and women to perform the duties for which they have been trained. Prisons, by their very nature, are high security risk areas. Given this, the appointment of an outside security firm to guard the prisons may create a number of strategic and other problems. The route the South African Police followed in dealing with the guarding of police stations may not therefore be appropriate for the prisons. However, it does not mean that the Department should not consider setting up a totally different unit, which will be similar to the Emergency Support Team.¹⁵ The said Unit could have totally different training, which will be to only deal with the guarding and securing of the prisons.

This is the best solution for the Department because the problem of ensuring that contraband does not enter the prison will be the responsibility of an outside agency and the security unit. The Department officials can then be freed up to concentrate on the Department's core business, namely, the rehabilitation and safe custody of prisoners.

Furthermore, the evidence before the Commission also pointed to the fact that the layout of the various prisons contributes to the smuggling of contraband into them. The main problem with the layouts in some prisons is that the visitation areas are not conducive to thorough searching of visitors who come into the prison, and particularly not able to deal well with the requirements of searching both men and women visitors.

It has also become apparent to the Commission that, where smuggling, between a prisoner and members of the public is occurring, is at the visitation area. The further away this area is from the prisoner's cell, the more difficult smuggling is because the prisoner has to carry the smuggled goods over a greater distance. In

¹⁵ The Unit commonly referred to as "the EST" within the Department is in charge of security but it only gets involved under certain limited conditions. It also consists of ordinary warders.

doing so, even if the prisoner is in the company of a warder who is an accomplice, somebody else is more likely to become aware of the smuggling and deal with it accordingly. Similarly, members of the public might encounter the same difficulties if the searching area is a distance away. It might even call for two (2) or more searching areas; for example, at the gate, at the visitation room and thereafter the prisoner is searched before going back to his or her section. This could be a standard rule and should be strictly enforced in all prisons. This system will ensure that there are effective checks and balances.

8. ELECTRONIC BRACELETS

Consideration should be given in this age of electronics to fit all prisoners, sentenced and awaiting trial, with waterproof electronic tracking bracelets. This device, worn on either the wrist or ankle, cannot be removed by anyone other than a prison official, which would only be done once the prisoner is released. Electronic monitors in and around the various prisons would track the movements of prisoners on a computer. Such a device would be invaluable in tracking any prisoner who managed to outwit the system and escape. Similarly, those prisoners who do not respond to their names when called for court appearances could be traced and hence, even the counting of prisoners would be made easier.

This could be done for the big Management Areas that have high escape problems, such as Durban/Westville, Pollsmoor, Johannesburg, St Albans and Pretoria.

Members could also be fitted with the same type of device when they enter and leave the prison on a daily basis, which should assist in reducing warder involvement in escapes.¹⁶

¹⁶ See Chapter dealing with Prison Security for more details.

9. PHOTOGRAPHS

No photographs are currently taken of prisoners, sentenced or awaiting trial, on entering prison. Only fingerprints are taken. It is essential that a “mug shots” system be implemented immediately so that all prisoners can be positively identified.¹⁷

10. CONCLUDING REMARKS

It is the Commission’s recommendation that a new independent agency similar to the Independent Complaints Directorate of the South African Police Service be set up to look into corruption, maladministration and the general conduct of the members of the Department. This agency will also ensure that the Anti-Corruption proposals set out in this report and which the Department should adopt is enforced.

The Commission accepts that the fight against corruption cannot be confined to any one agency or organisation but it is the duty of every manager and every employee to fight corruption. Although the recommendation is to establish an independent agency, this does not mean that the managers and the people within the Department have no obligation to fight corruption. On the contrary, they are crucial to the successful fight against corruption.

It is for this reason that the Commission feels that the setting up of the unit within the Department with a staff of twelve (12) will usefully complement the setting up of an independent, outside agency to look into corruption. The internal Department can feed the outside agency and vice-versa.

¹⁷ Also refer to Chapter on Prison Security for more details.

If we, as South Africans, want to uphold the hard-won rights protected in our Constitution, then we should be at the forefront of combating corruption and applaud those who fight for clean governance. Ultimately, good, clean governance is in the interest of all.

11. RECOMMENDATIONS

11.1 Anti-Corruption Agency

- a) An independent agency (Prison Ombudsman) similar to the Independent Complaints Directorate of the South African Police Service should be established.
- b) The agency should be mandated to investigate corruption, maladministration and dishonest practices within the Department.
- c) The agency should have a presence in the whole country, that is, offices should be opened in every province to deal with the issue of corruption, maladministration and dishonest practices.

11.2 Toll-free Number

- a) A toll-free number should be opened for purposes of reporting corruption.
- b) The existence of the toll-free number should be conveyed to all prisoners upon their arrival at each institution.
- c) Notices must be put up in the various institutions about the existence of the toll-free number.

- d) The toll-free number should be published nationally for the benefit of the members of the public at large.

11.3 Witness Protection

- a) The Department and/or the agency should set up an appropriate witness protection programme for their witnesses, especially prisoners, and can use the Witness Protection Act to support the protection of ordinary witnesses. This agency might have to develop a policy that will specifically deal with prisoners and how they are going to be incarcerated in the various prisons if they are under witness protection.
- b) A witness protection policy should be developed. Such policy should aim to ensure that the protected disclosure, which is given to employees in terms of the Protected Disclosure Act, should be extended to the prisoners who are incarcerated in the various prisons, insofar as it might be appropriate.

11.4 Inspecting Judge

The reporting to and taking of corruption complaints by the Office of the Inspecting Judge should complement the work of the abovementioned agency.

11.5 Department of Public Service and Administration

The Department should align itself with the recommendations of the Department of Public Service and Administration (DPSA) with regard to the anti-corruption strategy.

11.6 Security Functions

11.6.1 Short-Term:

- (a) The Department should seriously consider the restructuring of the security function at prisons so that a new unit should take full responsibility for guarding and searching members, visitors and all other officials who enter and exit the prisons. This will ensure that if contraband is found inside the prison, then the said security unit could be penalised in terms of penalty clauses incorporated into their contracts of employment for the failure to perform the functions accordingly.
- b) The employees of the aforesaid security unit to be appointed would have to be properly vetted by the necessary authorities to ensure that the unit does have integrity and has complied with the various statutory provisions in terms of which prisons are run.
- c) The separate security unit should only be in charge of searching and guarding the prison premises. The unit should be distinguishable from the correctional services members, who are in charge of safe custody of the prisoners. In this regard, the unit should be distinguishable in terms of uniform, ranks, salary structure and the nature of training, which would be given to them specifically for this task.
- d) The searching of warders, visitors and prisoners should not be limited to searching when warders are entering the prison in the morning or leaving in the afternoon. The searching of prisoners and warders should, in addition to the searching when they enter the prison, also be carried out at random when they are on duty. The searching should be done by

this newly formed security unit within the Department to carry out searches and seizures.

- e) For checks and balances, the searching of visitors should be done at three (3) different points. On visitation days, the prisoners, in addition to the random searches referred to above, should be searched before they return to their sections.
- f) The security unit that would be contracted to deal with the searching of the members, visitors and prisoners entering and exiting the prison should report to the agency, (Prison Ombudsman), which will be formed to fight corruption, which is set out in this report.
- g) The aforesaid Ombudsman should have full responsibility for ensuring that there is a corruption-free prison system in South Africa and thus should take responsibility for searching to ensure that no contraband enters the prison premises. Alternatively, depending on logistical issues, the aforesaid security unit could be the responsibility of the Area Manager of each Management Area until such time as the Office of the Ombudsman has been established.
- h) The Area Manager should ensure that each of the Prison Heads give the security unit unlimited access to the various prisons.
- i) When the security function has been outsourced, the monitoring and scanning equipment should become the responsibility of the security unit.

11.6.2 Long-Term:

- a) The issue of a prison layout, which is conducive to searching and to the fight against the smuggling of contraband into the prison, needs urgent attention and the Department should review all visitation areas in the various prisons to ensure that:
 - (i) The visitation areas are conducive to the searching of visitors, both males and females, whilst maintaining their dignity and privacy;
 - (ii) The monitoring or scanning machines are fully operational.

- b) The Department should give serious consideration to building a visitation area, which will be separate from the main prison, in all prisons the Department plans to build in the future;

- c) With the resources permitting it, consideration should be given by the Department to the renovation of some of the prisons to ensure that the visitation areas are separate from the main prison and are a distance away from the prison;

- d) If the Department, for whatever reason, does not restructure the security function as suggested in this Chapter, then it must seriously consider installing monitoring equipment, like video cameras in strategic positions in all prisons nationally.

CHAPTER 13

OVERCROWDING

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OVERCROWDING

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CHAPTER 13

OVERCROWDING

1. INTRODUCTION

Overcrowding is a major challenge for the Department, which needs to be dealt with effectively. The issue of overcrowding has its own champion in the Inspecting Judge of Prisons, who has dealt with it in detail in various publications and at various fora.¹ Given this, this Commission need not spend much time on the issue, except to note that overcrowding and especially gross overcrowding exacerbates the problem of corruption and maladministration in our prisons.

It is the Commission's view that overcrowding impacts on the Department's resources, which are stretched to the limit, and it affects and impacts on the rehabilitation of the prisoners, the health system and the education system within the prison. Overcrowding also encourages the sexual abuse of inmates by other inmates, which the Department has acknowledged.² At the outset, then, it has to be acknowledged that gross overcrowding leads to the most appalling prison conditions with the loss of basic human rights.

Overcrowding has a ripple effect on a number of levels and the Department needs to address it before it becomes uncontrollable.

¹ The Commission is of the opinion that the Inspecting Judge's Office has done good work in this regard. The Commission is also indebted to his office for providing the Commission with the statistical information.

² Mr Johnson, the Western Cape Correctional Services spokesperson, was quoted as saying that:

"While prison authorities were aware that sexual abuse was taking place in jails, the biggest problem they faced was overcrowding. Our first priority is to reduce prisons numbers so that we can deal effectively with other challenges." (See the Cape Argus, 19 June 2004).

In order to understand the extent of the problem and to put overcrowding in context, the Commission will look at the general statistics in prisons, which begin to indicate the effect of overcrowding on the treatment and dignity of prisoners, as well as the impact on the service delivery in the various Management Areas investigated.

There is no international norm stating what an overcrowded prison is. The Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment gives some form of a guideline as to what an overcrowded prison is.

The European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment has set seven (7) square metres per prisoner as an approximate, desirable guideline for a detention cell.³

In the South African equation, the guidelines that are used are those that, amongst others, consider the square meterage of the cell per prisoner.⁴ Accordingly, when reports are given regarding overcrowding these are the criteria utilised.

2. PRISON POPULATION

In analysing the prison population it is useful to consider the overall South African population for the purposes of comparison.

The total population of South Africa is 44.8 million,⁵ which is made up as follows:

³ See case of *Kalashnikov v Russia* (Application No. 47095/99). Judgment – Strasbourg – 15 July 2002.

⁴ See also the United Nations Standard Minimum Rules for the Treatment of Prisoners.

⁵ See SA 2004-2005: “South Africa at a Glance” (Tenth Anniversary Edition)-Editors Inc. P.

African	35 400 000 (79%)
Whites	4 300 000 (9.6%)
Coloureds	4 000 000 (8.9%)
Asians	1 100 000 (2.5%)

According to the official record for the period February 2002 to August 2004, which is the period during which the Commission was undertaking its investigations, the prison population in South African Prisons was follows⁶:

RSA	UNSENTENCED	SENTENCED	TOTAL
Jan 2002	57 066	120 635	177 701
Feb 2002	56 582	122 523	179 105
Mar 2002	55 481	122 793	178 274
Apr 2002	55 053	124 339	179 392
May 2002	54 347	125 705	180 052
Jun 2002	51 377	126 063	177 440
Jul 2002	50 758	126 862	177 620
Aug 2002	51 667	127 735	179 402
Sep 2002	52 965	128 325	181 290
Oct 2002	53 116	129 377	182 493
Nov 2002	53 105	130 084	183 189
Dec 2002	56 459	128 655	185 114
Jan 2003	57 786	128 894	186 680
Feb 2003	57 858	130 449	188 307
Mar 2003	58 144	131 604	189 748
Apr 2003	58 528	131 652	190 180
May 2003	53 939	132 675	186 614
Jun 2003	52 466	133 282	185 748
Jul 2003	51 177	134 040	185 217
Aug 2003	50 454	135 142	185 596
Sep 2003	51 297	129 655	180 952

⁶ See Inspecting Judge's report on prison statistics presented at the Criminal Justice Conference in December 2004 at Gordons Bay, Cape Town.

Oct 2003	52 151	132 010	184 161
Nov 2003	50 801	131 736	182 537
Dec 2003	55 232	130 400	185 632
Jan 2004	55 877	130 729	186 606
Feb 2004	54 750	132 315	187 065
Mar 2004	53 876	133 764	187 640
Apr 2004	53 880	134 023	187 903
May 2004	51 734	134 799	186 533
Jun 2004	49 373	136 436	185 809
Jul 2004	48 306	136 500	184 806
Aug 2004	49 798	136 941	186 739

According to the official records as of October 2004,⁷ the racial profile of the above prisoners was as follows:

African	146 962 (79.49%)
Coloured	33 457 (19.09%)
White	3 690 (2.00%)
Asian	762 (0.412%)
Total	184 871

The gender profile was 180 813 male prisoners and 4 058 female prisoners.

The total capacity of the aforementioned prisons in the Republic of South Africa is 114 000 prisoners.⁸

According to the figures above and the various reports that have been submitted by the Office of the Inspecting Judge, the overcrowding is predominantly in the awaiting trial section of the various prisons. Furthermore, it is clear that approximately 67% of the awaiting trial prisoners are kept in fifteen (15) prisons

⁷ See Head Office Exhibit 'J'.

⁸ See Inspecting Judge's Annual Report 2004-2005 at page 17.

out of the possible one hundred and fifty three (153) prisons that are designated for unsentenced prisoners. The various statistics also indicate that there are approximately 52 000 awaiting trial prisoners per month in the various facilities within the Department. The overcrowding figures alone, however, do not give a complete picture of the stark horror that unsentenced prisoners must experience. They are confronted on a daily basis with cells that are filthy and unhygienic and with toilets and showers that are not in proper working order because of the extreme pressure placed on sanitation systems by the overcrowded state of the prisons.

The question is then whether there isn't a need to move the awaiting trial prisoners around for purposes of easing the overcrowding within the prisons.

It is also clear from the figures above that South African prisons are overcrowded. However, corrupt members of the Department should not use overcrowding as an excuse for engaging in corrupt activities. The members of the Department who are corrupt would be corrupt whether overcrowding was or was not present within the prisons. Overcrowding merely exacerbates corruption because it is difficult to detect corrupt activities in the prevailing conditions.

A lot has been said about the various factors that have had an impact on overcrowding in our country, including, amongst others, the tougher bail conditions, minimum sentences and the upsurge of crime. However, there is no evidence to support that there is in fact an upsurge of crime.

Furthermore, the Department cannot simply build more prisons to solve the problem of overcrowding, a fact that has been accepted by most criminology scholars. The issue of overcrowding therefore has to be dealt with in a creative manner.

The Department has succeeded in bringing to everyone's attention the fact that the issue of overcrowding is a problem for the entire criminal justice system. In other words, the entire Justice Crime Prevention and Security Cluster has to take responsibility for overcrowding. In the various submissions, which the Department has made, it is clear that the problem of overcrowding is placed mainly at the doors of the prosecution, the courts and the South African Police Service.⁹ However, the Department does not say what its contribution has been to the issue of overcrowding. In one way or another, it has also contributed to the problem, which will be dealt with hereinafter.

In the Commission's view, there are a number of factors that contribute to overcrowding. Some of the factors will be dealt with in this report.

Whilst the new sentencing laws, the new bail laws and other factors have been highlighted as factors contributing to overcrowding, the maladministration¹⁰ within the Department has not been highlighted nor considered as a major contributing factor to overcrowding.

3. OVERCROWDING – MISMANAGEMENT

The issue of overcrowding is, amongst others, also a product of mismanagement according to this Commission. Clearly, had the Department:

- a) applied the Parole provisions correctly and consistently;

⁹ This issue will be dealt with in more detail in the section dealing with Awaiting Trial Prisoners later in this Chapter.

¹⁰ See Chapters dealing with Parole and Treatment of Prisoners in this report

- b) applied the provisions of the Criminal Procedure Act, in terms of which prisoners can be released on Correctional Supervision in terms of section 276 A(3) effectively;¹¹
- c) appointed people who could effectively do a proper scientific and statistical analysis, with projections for the future of the prison population, to assess the impact of increases on existing accommodation and requirements for increased accommodation;
- d) considered the bail and minimum sentence legislation and the impact of that on the prison population;¹²
- e) Implemented the recommendations of some of the agencies that investigated the Department previously;¹³

Then the Department may not have been in this position with regard to the effect that overcrowding has on its functioning. Put differently, if the Department was pro-active in this approach, the problem would not be so severe.

The Department mismanaged the situation in that it failed to foresee that by changing the parole regulations or guidelines¹⁴ there would be an upsurge in the

¹¹ The evidence before the Commission points to the fact that very few prisoners were released by the Commissioner in terms of this section, namely, two hundred and forty one (241) in 2000, one hundred and thirty one (131) in 2001, and one hundred and twenty eight (128) in 2002 in the whole country.

¹² A study by Mr Lukas Muntingh indicates that the length of prison sentences is increasing. While large numbers of prisoners are given short sentences of up to six (6) months (49% in 1999), this figure has reduced over the last decade and a half and more prisoners are now receiving sentences of more than two (2) years (10% of prisoners in 1984, compared with 31% in 1999). (See *Reform and Stasis: Transformation in South African Prisons* by Amanda Dissel and Stephen Ellis. Obtained from www.csvr.org.za/papers/papdse.htm).

¹³ In particular the Management Audit of 2000.

¹⁴ The Policy Directive No. 1/8/B, "Penalisation Factors:Applicable on Parole Boards and delegated officials" of 23 April 1998, required that a prisoner had to serve three quarters of the sentence imposed upon him before being considered for parole. This was contrary to the provisions of section 65 (4) of the Correctional Services Act No. 8 of 1959. The 1959 Act stated that the person would have to serve at least half of the term of imprisonment before being considered for parole. In other words, the Department increased the period that was applicable before prisoners could be considered for parole, contrary to what had been provided for the Legislature in the Act. The Department,

number of prisoners in the system, particularly if one takes into account the imposition of the minimum sentences by the courts and the stringent bail laws.

Projections and forecasts of what is likely to happen in the future forms an integral part of the Department's responsibility. It is the duty of every Senior Manager or Chief Executive Officer of an organisation to ensure that there is a proper plan for the future of his organisation or department, as the case might be. In the case of the Department, it might even be necessary, because of its core business,¹⁵ to have a proper planning section, which has employees who are suitably qualified and who can project and plan for what is likely to happen in the future. For the purposes of doing that one might need to employ professionals, such as statisticians, either in the Department or, if the Department does not have the resources to do so, to appoint an outside organisation to give the Department the aforesaid advice and information or use the services of the Department of Statistics.

Once the minimum sentences legislation was passed, the bail conditions became stringent and the Department changed its parole guidelines. The Department should have foreseen that there was going to be an increase in the number of prisoners in both the awaiting trial section and the sentenced section. Failure to anticipate or foresee the future direction or upsurge of prisoner population cannot be an excuse under these circumstances.¹⁶

through regulations, was also violating the rights of prisoners to be considered for parole at an earlier stage. (For more details see the Parole Chapter).

¹⁵ The Department's core business is the safe custody of prisoners. Thus, whatever plan the Department had, strategic or otherwise, should have taken all the issues surrounding the admission and accommodation of prisoners, including the applicable statutes and guidelines, into consideration.

¹⁶ This is the same for a Chief Executive Officer of an airline or any of the major transport companies who cannot use the excuse that he had not foreseen that there would be a sudden increase in the number of passengers who would like to use their services. As a result, he seeks to be excused for leaving passengers at airports or on the streets (for a period of five (5) to seven (7) years) because of his lack of foresight or planning when it was clear to everyone that there would be an upsurge of passengers because of changed circumstances.

The problem with the Department is that they have failed to recruit suitably qualified people. As a result, the professional and effective management capacity is poor.¹⁷ The Department has lacked insight into the problem and so has failed to appoint people who are properly qualified to do these jobs. Many positions that should be occupied by professionals are reserved for members who sometimes do not have the relevant qualifications but end up being part of senior management. In these circumstances, some of the officials lack the capacity to understand simple management concepts and the consequences of failing to implement them, which one needs to understand for future planning and execution for the Department.

To sum up, the Commission's view is that incompetence on the part of the Managers in the Department has contributed a lot to the current state of affairs. Unless properly qualified people are appointed, this state of affairs will continue.¹⁸

Furthermore, the manner in which parole is dealt with by officials of the Department cannot be ignored. In the Commission's view, it is also a major factor that contributes to overcrowding. If one analyses the abovementioned statistics with regard to the prison population, it is clear that the unsentenced prisoners, who have been referred to as the major cause of overpopulation, have been fluctuating between 56 000 (in February 2002) and 49 000 (in August 2004). This means a fluctuation of approximately 7 000 prisoners during this period. However, on the other hand, if one looks at the sentenced prisoners they have changed from 122 000 to about 137 000. This means an increase of

¹⁷ The Department's lack of capacity was best demonstrated in the evidence of Mr Hardie Fourie, who testified about the fact that even in the case of the adoption of the Unit Management System, the adoption as a policy was done without a proper feasibility study. As it is, they are encountering problems of implementation because the South African prisons are not designed for unit management.

¹⁸ The problems of recruitment are dealt with by this Commission in the Chapter on Recruitment.

approximately 17 000 sentenced prisoners. Clearly, there has been an increase in the number of sentenced prisoners, which could be attributable to a number of factors, inter alia, the sentencing trends. However, the other contributing factor, which has already been referred to above, is the issue of parole. The Department's parole system has not been producing the desired results. This will be dealt with in more detail in this report.¹⁹

Maladministration also manifests itself in the manner in which prisoners are spread around the various prisons in the country. The Department officials seem to forget that "desperate times call for desperate measures", in any administrative environment.

Conditions are sometimes unsanitary and unbearable in that one toilet is shared by approximately sixty (60) prisoners. Prisoners also have to share beds, sometimes two (2) prisoners to one bed, whilst others sleep on the concrete floor and sometimes with only one blanket to share.²⁰ According to the evidence led before the Commission, in some of the prisons, like Bizana, prisoners had to sleep in shifts. Thus, the issue of overcrowding can clearly be regarded as a State violation of the basic human rights of prisoners, which is unconstitutional and cannot be condoned in our new democracy.

Whilst the Department has a prison in Bizana, which was 400% full,²¹ about eighty (80kms) kilometers away from there is the Kokstad Prison, which was about 7% full. Whatever the state of the Kokstad Prison is, surely for the sake of protecting the right of prisoners who have to sleep in shifts, one could consider

¹⁹ See the Chapter on Parole and the Department's failure to act on its own guidelines which were stringent.

²⁰ The Department's lack of capacity was best demonstrated in the evidence of Mr Hardie Fourie who testified about the fact that even in the case of the adoption of the Unit Management System, it was adopted as a policy without doing a proper case study or feasibility study. As it is, they are encountering problems of implementation because the South African prisons are not designed for unit management.

²¹ See Mr Morris' evidence – Cape Town Transcript, Volume 7.

moving some of the prisoners from Bizana to Kokstad Prison.²² The Commission does not foresee any complaints from these prisoners because Kokstad is supposed to be a Maximum Security Prison. The section accommodating those prisoners who have been moved there because of overcrowding could have less stringent rules. Accordingly, this is a failure on the part of the Department to implement innovative and strategic leadership.

The issue of the unequal distribution of prisoners amongst the various Management Areas and amongst the prisons within a Management Area, including the distribution of male prisoners against female prisoners, is one factor that seriously needs to be considered.

The Commission accepts that it is important for various prisoners to receive visits from their families and relatives. Accordingly, it is important that both sentenced and unsentenced prisoners be incarcerated near to their homes. The Commission is of the view that being nearer to their home and also being nearer to the court, in which their trial will be held, is very important for awaiting trial prisoners because not being so might interfere with the awaiting trial prisoner's right to a fair trial. However, with sentenced prisoners, the Department could give consideration to moving some of them to other Management Areas, which are within driving distance from their homes.

In making the aforesaid suggestion regarding accommodation, the Commission is influenced by the fact that it is possible to provide transport for the friends, family and relatives of a sentenced prisoner, even if he is not within the magisterial district of his home. For example, a prisoner who resides in the Johannesburg area could be incarcerated in a prison, which is within a two (2) or

²² According to the 2004 Inspecting Judge's Report, the Lusikisiki Prison was 285% overcrowded. The latest reports from Parliament have indicated that as of September/October 2005, Durban/Westville Management Area was in the same unbearable state of overcrowding. The same principle would apply with regard to Lusikisiki and Durban/Westville, which are not far from Kokstad.

three (3) hour drive from Johannesburg, such as the Mafikeng Prison, if it is not full. For purposes of exercising the prisoner's visitation rights during the weekend, the Department could transport family, relatives and friends in its buses to wherever those incarcerated prisoners might be. The Department has a number of buses in various Management Areas, which are utilised for the transportation of, amongst others, members. In some Management Areas these buses are also used to transport members' children to and from their schools. This will obviously call for a well defined Logistical Plan. However, it is a practical solution and is not impossible.

In this regard, the Commission would like to bring to the Department's attention the fact that the National Institute for Crime Prevention and the Re-Integration of Offenders ("Nicro") also has a similar project in the country where prisoners who are from, for example, the Cape Town magisterial district, who are incarcerated in places like Brandvlei Prison and other outlying prisons, are not denied visitation rights because members of their families, relatives and friends are transported by Nicro to visit those prisoners.²³ Accordingly, the Department could apply the same principle.

4. AMNESTY

This Commission is of the view that the State President's granting of amnesty to sentenced prisoners can be utilised to reduce overcrowding in our prisons.

The Kriegler Commission of Inquiry into the unrest in prisons appointed by the President on 27 June 1994, felt that it was not advisable for a recommendation to be made that an "Amnesty Resolution Committee" be formed to look into the various prisoners who might be released on amnesty. In this regard, the suggestion was made in light of the concern about the fact that there might have

²³ See the Nicro Report, Head Office Exhibit "M".

been prisoners who should have been released but were not when the various amnesties were announced by the Department. The Kriegler Commission's motivation was that the prerogative to grant amnesties and to determine their term vests in the President.

The issue of amnesties has caused a lot of unhappiness within the prison population because there used to be an annual amnesty to celebrate Republic Day on 31 May in certain years before 1994. Similarly after 1994, there were Special Amnesties or pardons given by Presidential Decree after the inauguration of the new democratic government and to celebrate the former President, Nelson Mandela's eightieth (80th) birthday.

In the circumstances, it is the Commission's view that the Department's consideration of this particular practice could result in both goodwill and an alleviation of the problem of overcrowding.

For the amnesties to be effective with respect to overcrowding, they need to be regular. Some members of the public expressed some negative sentiments towards these amnesties. However, the rights of the prisoners to be incarcerated under conditions that are consistent with human dignity far outweigh their concerns.

In building further on this suggestion, this Commission would like to recommend that the Department seriously consider approaching the National Council of Correctional Services to develop some guidelines.

The above recommendation is based on the fact that it has always been one of the functions of the National Council of Correctional Services to consider prisoners who have been sentenced to life imprisonment and to recommend to the Minister which of those prisoners should be released on parole. Whilst those recommendations are not binding on the Minister, the Council has always, on a

regular basis, considered the applications and made recommendations to the Minister.

5. AWAITING TRIAL PRISONERS

5.1. Management Audit

The final report of the Management Audit of the Department of Correctional Services, dated 18 February 2000, was submitted to the Commission, wherein overcrowding was recognised as one of the key issues affecting the service delivery of the Department of Correctional Services.²⁴

In the management audit report, the question of awaiting trial prisoners was recognised as an area that needs urgent intervention by the Department. In this report it was recommended, amongst other things, that there is a need for “*a reduced awaiting trial population*”.

The audit team went on to recommend that there was a need for the Department to relieve the pressure on current prisons, amongst others, as follows:

- *“By a prison building programme that takes account of current sentencing trends.*
- *A framework for the management of awaiting trial prisoners building on current projects.”*

The Department has embarked on a building programme. However, this Commission does not know whether it takes into account these concerns as raised by the Management Audit. The Department had not produced any

²⁴ See Exh. B – Part 4B, Head Office hearings held in Pretoria.

framework for the management of the awaiting trial prisoners as at the time of writing of this chapter.

A new sentencing framework was finalised by the South African Law Reform Commission on December 2000, so all the Department needed to do was to consider the proposals or, if it differed with the proposals, suggest a different sentencing framework and then align its building programmes with the accepted framework.²⁵

Once more the issue was dealt with by merely complaining about overcrowding and seeking to blame other institutions.

As recently as 26 September 2005, the Commissioner placed the blame for the Department's inadequacy to deal with the number of awaiting trial prisoners at the door of the Ministry of Safety and Security.²⁶ It appears that the argument is that awaiting trial prisoners should be accommodated at police stations. The Commission is seriously concerned about this attitude for a number of reasons. There are no adequate facilities to deal with prisoners at police stations and neither the 1998 Act nor the Constitution envisages that prisoners be dealt with other than at prisons. The legislation that guarantees and controls the treatment of prisoners is certainly aimed at Correctional Services. This view does not mean that the Commission is not aware of the multitude of problems that the Department has to face in dealing with the number of awaiting trial prisoners who are detained for long periods at the prisons.

All prisoners should, however, be in the care of our prison system. The responsibility of taking care of awaiting trial prisoners cannot be ignored and their rights have to be taken care of.

²⁵ See Report 82 of the Law Commission titled "Sentencing" (A new sentencing framework).

²⁶ See "Blame the cops, says embattled prison boss" *The Cape Argus* 27 September 2005 at page 11.

However, if the Police are arresting people and if they are detained without there being a proper basis for it, as suggested by the Commissioner, then there is a way of dealing with it. The Commissioner said:

“Police get bonuses for arresting more people, whereas this just gives me more stress, (but) I am not saying that police should not arrest people who commit crime.”²⁷

The cost of detaining awaiting trial prisoners should be part of the budget of the Department of Safety and Security. Such a provision would serve as an immediate incentive for the police not to arrest when they have not properly investigated a matter and not to unnecessarily request the detention of those who are suspected of crime and still cloaked in the presumption of innocence. The Commission is of the view that such a recommendation will alleviate the overcrowding of our prisons because it will impact on the awaiting trial prisoners.

The Commission is concerned that the current position regarding the shifting of responsibility for awaiting trial prisoners impacts negatively on the prison system as a whole because no one wants to accept that awaiting trial prisoners are also entitled to be detained in humane conditions.²⁸

5.2. Gaol Returns

The Department of Correctional Services used to file what was referred to as Gaol Returns with the Judge President of the High Court of each Division. In terms of this system, the Judges of the various divisions would receive a list of the prisoners who are incarcerated in the various prisons. This list would deal with the awaiting trial prisoners.

²⁷ See the above-mentioned *Cape Argus* Article – 27 September 2005.

²⁸ See Chapter on Sexual Violence in prison for a more detailed discussion of the lack of services rendered to awaiting trial prisoners.

The Judge President or his nominee would then check what the position was with regard to the awaiting trial prisoners. If there were awaiting trial prisoners who had been incarcerated for a long time, the Judge involved could call upon the Director of Public Prosecutions in Province²⁹ to explain to him why a prisoner's trial had not been finalised. After receiving an explanation, arrangements would be made to either set the trial down on an expedited basis or to consider bail for the prisoner.

The Department is no longer submitting the Gaol Returns to the members of the judiciary in the KwaZulu-Natal Provincial Division and the Durban and Coast Local Division of the High Court. In the Cape, the Department or certain Management Areas are submitting the returns but not as regularly as it ought to happen. Outlying prisons like Drakenstein sometimes submit the Gaol Returns. Pollsmoor has not submitted them to the Cape High Court for quite some time.

The Gaol Returns assisted the members of the judiciary to monitor what was happening with regard to awaiting trial prisoners. As it is, the absence of such information has led to a situation where no-one can call on the Director of Public Prosecutions to account for some of the delays in dealing with awaiting trial prisoners. Some prisoners have been awaiting trial for lengthy periods that are unreasonable.

There is definitely a need for the re-introduction of this system and for it to be monitored so that there can be proper and regular checks and balances. This task should not be left solely with the Office of the Inspecting Judge.

²⁹ This definitely used to be the practice in the Cape Provincial Division and KwaZulu-Natal Provincial Division of the High Court. The Commission is not sure whether this practice applied in the other provinces or divisions.

6. CONCLUDING REMARKS

The issue of overcrowding is not an issue that can be placed at the door of one particular department. It is an issue that needs the involvement of the entire Justice, Crime Prevention and Security Cluster of the Government. Accordingly, the Department should not place the blame at the door of anyone. However, it is prudent for the Department to come up with a strategy or plan to deal with the issue of overcrowding. In other words, it must do its part and all the other Departments will also do their part. Shifting the responsibility and blaming other Departments will not assist or solve the problems in this regard.

In accordance with this Commission's Terms of Reference, the recommendations set out hereinafter will be directed at the Department of Correctional Services and not the other departments that are part of the Cluster. It does not mean, however, that the other departments do not have a responsibility to contribute to the solution of the issue of overcrowding in our prisons.

What is needed are policies that require the whole criminal justice sector to regard prison accommodation as a scarce resource and to use other forms of punishment where applicable and appropriate. These policies should also promote the utilisation of section 62(f) of the Criminal Procedure Act No. 51 of 1997, to divert awaiting trial prisoners.

7. RECOMMENDATIONS

SHORT-TERM

The Commission recommends that:

- 7.1. The Department should seriously consider moving sentenced prisoners to outlying less crowded Management Areas or empty prisons within

- Management Areas to create space for other prisoners from the overcrowded Management Areas or prisons.
- 7.2. For purposes of the visitations of sentenced prisoners and for those prisoners who have been moved, the Department should consider making a detailed logistical plan for transport arrangements for members of the families, relatives and friends to be transported on a Saturday and Sunday morning to the prison where these people are incarcerated and then return the relatives/visitors to the original point of collection. The point of collection could be a Management Area.
 - 7.3. Arrangements should be made for the Department of Safety and Security to bear the costs of awaiting trial prisoners.
 - 7.4. The above recommendations should be implemented after seeking the necessary approval.
 - 7.5. The Department should re-introduce the system of Gaol Returns and ensure that all Management Areas comply with it, to enable the members of the Judiciary to intervene with respect to awaiting trial prisoners.
 - 7.6. The Department should be directed to implement the recommendations emanating from previous investigations regarding overcrowding.

LONG-TERM

- 7.7. In the light of the function of the National Council Correctional Services, this Commission would like to recommend that a sub-committee of the Council be formed, which will, amongst others, consider setting up:

- (a) Parameters for release of prisoners on amnesty who may not necessarily qualify to be released on parole. For example, the aged, the infirm and the young prisoners;
- (b) Consider recommending to the President through the Minister, the need, or otherwise, of:
 - (i) regular amnesties being recommended to ease the overcrowding;
 - (ii) to make recommendations to the various Parole Boards to consider releasing various categories of prisoners when there is a need.

7.8 The Parole Boards be directed to consider the issue of overcrowding of prisons as one of the compelling factors that needs to be taken into consideration in any application for parole by sentenced prisoners.

7.9. The Correctional Services Board be directed to prepare a score card or a means test, which should be utilised by the Parole Boards, to take cognisance of the overcrowding situations within our prisons.

7.10. The Correctional Services Board and/or the Correctional Supervision and Parole Board prepare guidelines, which will be utilised by the Commissioner in releasing prisoners on correctional supervision in terms of section 276(1)(i), section 276 A(3)(a), section 287 (4)(a) and section 287 (4)(b) of the Criminal Procedure Act. These guidelines should be driven by, or be influenced by, the overcrowding situation in our prisons.

7.11. The Department seriously consider the appointment of a Special Task Team of experts or lawyers for a fixed period with instructions to assist with the applications to the various courts in terms of sections 276 (1)(i),

276 A(3)(a), 287 (4)(a) and 287 (4)(b) in respect of those prisoners who qualify.

CHAPTER 14

ABUSE OF POWER

CHAPTER 14

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CHAPTER 14

ABUSE OF POWER

1. INTRODUCTION

This Chapter deals with the treatment and harassment¹ of female employees of the Department, senior officials abusing their positions of power and the manner in which the Department's disciplinary system is open to manipulation and abuse by the Department's senior officials to achieve their personal aims.

Evidence was led at the Commission hearings, which commenced at the Port Elizabeth High Court on the 12 August 2002, by three (3) complainants, Ms Vosloo, Ms van Heerden and Mrs Louw, who alleged that they were sexually harassed by Mr Khoza, one of the Prison Heads at St Albans. This issue of the sexual harassment of Ms Vosloo, Ms van Heerden and Mrs Louw was part of the Commission's wider investigation into the entire disciplinary system of the Department.

It is expected of officials employed in positions of authority in the Department to maintain exemplary conduct and at all times to adhere to higher standards of dedication, impartiality and integrity in the conduct of their duties. By accepting positions of authority they assume a position of trust, not only to implement Departmental policy and directives but also to represent and protect the legitimate interests of those in the Department who fall under their authority.

¹ The Commission is of the view that harassment is a by-product of the hierarchical relationship in the Department and that the harassment constituted an abuse of power. See C Cooper "Harassment on the basis of sexual gender: A form of unfair discrimination" (2002) 23 ILJ 1 at 1.

No circumstances whatsoever justify officials abusing their power to victimise subordinates or to achieve sinister objectives. The higher the ranking and standing of the official, the greater the responsibility that rests on such official to maintain the standards referred to, to adhere to policy and to afford protection to Department personnel who are being subjected to any form of abuse or unfair or discriminatory practice. Sexual harassment can be labeled a form of sexual discrimination.²

Against this backdrop, it was disturbing for the Commission to discover that although all three (3) complainants had been extremely traumatised by the sexual harassment³ they had endured at the hands of a senior official, Mr Khoza, they repeatedly stated that their main area of grievance was the manner in which officials of the Department had dealt with their complaints.

The disciplinary proceedings, which one of the complainants was subjected to, appears to have been riddled with irregularities and delays by several officials, including the Provincial Commissioner, Mr Mataka, who interfered with and manipulated the process to obtain a desired outcome.

The three (3) complainants were dissatisfied with the manner in which their complaints were handled and decided to challenge the Department for not effectively dealing with the harassment. They alleged that instead of being

² C Cooper *op cit* 1 states as follows:

“Harassment is discriminatory because it sets up an arbitrary barrier to the full and equal enjoyment of a person’s rights in the workplace. It also constitutes a violation of the dignity of the individual and it can never be deemed acceptable by the individual.”

³ Section 6(3) of the Employment Equity Act No. 55 of 1998, clearly defines ‘harassment’ as a form of unfair discrimination and it is prohibited on any one of the listed grounds in section 6(1), which reads as follows:

“(1) No person may unfairly discriminate, directly or indirectly, against an employee, in the employment policy on practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.”

assisted by the Department, they were victimised to the extent that one of them decided to resign, another had to be medically boarded and the third, who decided to remain in the service, was subjected to disciplinary proceedings and ultimately dismissed by the Department.

Their treatment was in stark contrast to the treatment meted out to the alleged harasser, Mr Khoza, who was transferred to the provincial office to a more senior post and escaped disciplinary action entirely.

The disciplinary action taken against one of the complainants and the resultant dismissal were clearly a way of victimising her as there could have been no basis in law to dismiss her for the alleged transgressions. The entire disciplinary system was abused and used as a tool to victimise and frustrate the third complainant, Ms Vosloo. This complainant, however, appealed against the dismissal and on appeal she was reinstated but given a final warning. The appeal itself was riddled with irregularities and was only finalised after a delay of approximately two years, which led to the member being even more frustrated. While the appeal dragged on, Ms Vosloo remained suspended from her duties, which in itself constituted an unfair labour practice⁴ and had serious cost implications for the Department.⁵ Her case is a classic example of how the Department's disciplinary process can be manipulated to bring about a desired outcome should anyone challenge those in senior positions.⁶

The actions of the Department officials were clearly meant to torment the complainants and constructively dismiss them. Right from the onset those in power showed gross insensitivity towards the complaints. The Commission is concerned that the Department, through the conduct of its members, is at risk of being vicariously liable for the failure to take reasonable steps to protect its

⁴ See *Louw and Another v Golden Arrow Bus Service (Pty)Ltd* (1998) 19 ILJ for the view that a continuous suspension constitutes an unfair labour practice.

⁵ Ms Vosloo has subsequently resigned from the Department.

⁶ See chapter on Disciplinary Inquiries for an in-depth discussion.

employees against sexual harassment. Recently the Supreme Court of Appeal in *Media 24 Ltd and Another v Grobler*⁷ held that it is settled law that an employer owes a common law duty of care to its employees. *In casu*, a manager failed to take action when he received a complaint and the court held that the employer was vicariously liable for the manager's failure to take action against the alleged perpetrator.⁸

Similarly, the Department also failed in its duties in dealing with the complaints of the women sexually harassed at St Albans Prison. Such failure, if occurring today, would make the Department vicariously liable for a claim of damages.⁹

As regards the sexual harassment, the facts were not in dispute and were never challenged by the alleged transgressor, Mr Khoza, in any way. He elected neither to tender any version to the Commission nor to place any other evidence before the Commission to contradict what had been said by the three (3) complainants. In dealing with the complaints of sexual harassment of the three (3) victims therefore, this report will in particular focus not only on the harassment itself, but

⁷ (2005) 7 BLLR 649 (SCA). Also see R le Roux "Sexual Harassment in the work place: Reflecting on *Grobler v Naspers* (2004) 25 ILJ and B Whitcher "Two Roads to an employer's vicarious liability for Sexual Harassment: *Grobler v Naspers Bpk en 'n Anders* and *Ntsabo v Real Security CC* (2004)" 25 ILJ 1907.

⁸ *Op cit* at 650 G-H.

⁹ See section 60 of the Employment Equity Act that deals with the liability of an employer. The relevant sub-sections read as follows:

"(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

(3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."

also on the manner in which the complaints were dealt with and how the Department treated these three (3) victims.

The conduct of the Department and its officials is merely the tip of the iceberg and is a further clear indication of the deeper-rooted problems related to the culture of the Department and the Department's disciplinary process.

This report will show that the disciplinary system of the Department, presently in operation, is open to abuse by those in power who vindictively institute disciplinary proceedings if and when they want to "punish" anyone that dares to challenge them as seniors. It will further be shown that discipline in the Department is instituted in an arbitrary and, in some instances, biased fashion as some members are not disciplined even though they have committed serious transgressions.¹⁰

2. SEXUAL HARASSMENT

2.1 Introduction

Before dealing with the evidence of the three (3) complainants regarding the acts of sexual harassment, it is necessary to pause and consider what has been said in the Industrial Court in *J v M Ltd*,¹¹ regarding the nature of sexual harassment;

"Sexual harassment, depending on the form it takes, will violate that right to integrity of body and personality which belongs to every person and which is protected in our legal system both criminally and civilly. An employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation within the workplace. Victims of

¹⁰ See Chapter on Disciplinary Inquiries.

¹¹ (1989) 10 ILJ 755 (IC).

*harassment find it embarrassing and humiliating. It creates an intimidating, hostile and offensive work environment.*¹²

In a constitutional context it can be said that sexual harassment is considered to be a violation of the fundamental human rights of men and particularly women. In terms of the Constitution,¹³ it can also be considered a violation of the right to equality,¹⁴ human dignity,¹⁵ security of a person¹⁶ and fair labour practices.¹⁷ South African labour legislation addresses sexual harassment in a number of statutes.¹⁸

Sexual harassment on the surface specifically infringes upon the right to human dignity contained in s10 of the Constitution, which provides as follows:

*“everyone has inherent dignity and the right to have their dignity respected and protected and the right to privacy enshrined in s14 of the Constitution.”*¹⁹

¹² *Op cit* at 757 I – 758A. For further references see also the pioneering work of Catherine McKinnon in her book “Sexual Harassment of Working Women (1979)” at page 1, where she defines sexual harassment as: “The unwanted imposition of sexual requirements in the context of a relationship of unequal power.” See for comparative purposes J.G. Mowatt ‘Sexual Harassment – New Remedy for an Old Wrong’ (1986) 7 ILJ 637; Lisa Doncaster ‘Sexual Harassment in the Workplace: Should SA adopt the American Approach’ (1991) 3 ILJ 449.

¹³ See the Final Constitution of the Republic of South Africa, Act 108 of 1996, hereinafter referred to as ‘the Constitution’.

¹⁴ See section 9 of the Constitution.

¹⁵ See section 10 of the Constitution.

¹⁶ See section 12 of the Constitution.

¹⁷ See section 23 of the Constitution.

¹⁸ These include the Labour Relations Act No. 66 of 1995; the employment Equity Act No. 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000. The Equity Act also contains the Code of Good Practice on the handling of sexual harassment cases.

¹⁹ Section 14 of the Constitution provides as follows:

Everyone has the right to privacy, which shall include the right not to have –

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

What flows from this constitutional right is that employers have an obligation to see to it that the dignity of their employees will not be impaired, and even a greater obligation in matters where there is an inherent risk that their right to privacy might be infringed upon. Sexual harassment in the work place has, since 1998, also been dealt with in the Code of Good Practice on the Handling of Sexual Harassment cases issued by the National Economic, Development and Labour Council in terms of section 203 of the Labour Relations Act.

As the evidence set out hereunder will show, the conduct of the Department and its employees in their treatment of the three (3) complainants clearly breached many of the basic terms of our Constitution and the aforementioned laws. The complainants were afforded no protection whatsoever to their inherent right to equality, security of person and above all, their right to human dignity.

2.2 Policy of the Department

The main objective of the Sexual Harassment Policy of the Department of Correctional Services²⁰, as contained in Resolution 6/99, is the elimination of sexual harassment in the Department and to provide for procedures to deal with the problem to prevent its re-occurrence.²¹

Most importantly, the policy, in terms of para 2(1)(c) and (e), provides that allegations of sexual harassment will be dealt with seriously, expeditiously, sensitively and confidentially and that members who lay charges will be protected against victimization or retaliation.²²

²⁰ See Appendix F2 attached to this report.

²¹ Para 1(1) of the Policy filed as Appendix 'F2' to this report reads as follows:

“(1) The objective of this policy is to eliminate sexual harassment in the Department of Correctional Services and provide appropriate procedures to deal with the problem and prevent recurrence.”

²² See 2(1) for the said policy reads as follows:

“*The Department of Correctional (sic) states the following:*

The set aims and objectives of the Sexual Harassment Policy illustrate that the Department, in theory, is sensitive to the needs of its employees and that it is committed to combating sexual harassment in the workplace. The conduct of the members of the Department, however, should be examined against the backdrop of the policy and what the policy provides. The evidence of Mr Delport, the Chief Psychologist at St Albans Prison, is therefore important since it demonstrates how the management at St Albans Management Area and the Provincial Office failed to adhere to the Department's Sexual Harassment Policy and in doing so neglected the rights of the three (3) complainants in the matter.

Incidents of sexual harassment also surfaced before the Commission at the Durban-Westville Management Area, where a senior member harassed a junior member after hours at the staff quarters.²³

2.3 Mr Marius Delport

Mr Delport, a qualified psychologist who has a Masters in Clinical Psychology, and is employed as the Chief Psychologist at St Albans, emphasised the fact that he never assessed the complainants and that his evidence was not based on any clinical evaluation of them. In his opinion, the sexual harassment was very traumatic for all three (3) of the complainants, mainly because the advances of the transgressor, Mr Khoza, were unwanted and they had not expected such

-
- (a) *All its employees, job applicants and other persons who have dealings with the Department, have the right to be treated with dignity and respect;*
 - (b) *A person who has been subjected to sexual harassment in the Department has the right to raise a grievance about it should it occur and the appropriate action will be taken;*
 - (c) *Allegations of sexual harassment will be dealt with seriously, expeditiously, sensitively and confidentially;*
 - (d) *Sexual harassment in the Department will not be permitted or condoned;*
 - (e) *Members will be protected against victimization, retaliation for lodging grievances and false accusations."*

²³ See Third Interim Report for more details.

behaviour from their superior. What exacerbated their trauma was that the Department did not take their complaints seriously.

Mr Delpont pointed out that the extremely hierarchical structure within the Department, with its various power levels, also hampered the spontaneous reporting of harassment by complainants. Members are very conscious that the right channels and levels of communication have to be followed. Accordingly, a person complaining of ill treatment or harassment would not confront the person involved directly but would rather, to avoid repercussions, try and resolve the issue through the right channels. Another added burden for victims of sexual harassment in the Department is that they work in a prison, which is a very stressful work environment. All these factors therefore had to play a role in the minds of the complainants when they had to pluck up the courage and report the conduct of their superior.

In Mr Delpont's opinion, the Department did not offer the complainants empathy, support or concern regarding their plight for help. Considering the nature of the complaints, it would be expected of a sensitive employer, once the complaint is laid, firstly to keep the complainant fully abreast of all developments relating to the issue and secondly to look at ways to empower the employee, who has suffered through the harassment, and to put them back in the work situation. On an interpersonal level, a sensitive employer would also enquire about the well being of the employee. When all is considered it is clear that neither Ms Louw, nor Ms van Heerden, nor Ms Vosloo received this kind of treatment. Ms van Heerden and Ms Louw, in particular, were so deeply affected by the treatment they received from the Department that they had not recovered at the time they testified before the Commission and were still dealing with post traumatic stress.

Mr Delpont commented on the following provisions of the Department's Sexual Harassment Policy and indicated how the officials of the Department in their

treatment of the three (3) complainants had breached the provisions of the Policy:

- (a) Para 2(1)(a) *“All its employees, job applicants and other persons who have dealings with the Department, have the right to be treated with dignity and respect;”*

The evidence of the complainants showed that they were not granted the opportunity to be treated with dignity or respect. In the case of Ms van Heerden, the failure to treat her with dignity or respect was more apparent in the way she was moved from one section to another once she had lodged a complaint of harassment.

- (b) Para 2(1)(b) *“A person who has been subjected to sexual harassment in the Department has the right to raise a grievance about it should it occur and the appropriate action will be taken;”*

The Department through its managers at St Albans had failed the complainants. The evidence of the complainants was that they indeed complained in the appropriate manner and fulfilled the requirements of the Policy but that the Department never took their complaints seriously.

- (b) Para 2(1)(c) *“Allegations of sexual harassment will be dealt with seriously expeditiously, sensitively and confidentially;”*

It is abundantly clear that the allegations of the three complainants were not treated expeditiously as the investigation took an awful long time. Furthermore, their complaints were definitely not treated sensitively, not even by the investigator who showed no compassion or understanding of what the transgressions entailed when he took their statements. Never during the proceedings was there any evidence that showed that that they were taken

seriously and dealt with sensitivity. The mere fact that they were harassed by other workers after they had lodged the complaints left the suspicion that the matter was never dealt with in confidence.

(d) Para 2(1)(e) *“Members will be protected against victimization, retaliation for lodging grievances and false accusations.*

The Department failed dismally in handling the complaints of the three (3) women. The circumstances as set out by the complainants showed that they have each been victimised in different ways. No protection was rendered to them to protect them from victimization at the workplace.

The provisions of the Policy were clearly not adhered to and remain mere aspirations on paper.

Mr Delport also expressed the view that having examined the Policy of the Department and in dealing with the case of the complainants, it is clear that the policy is not the problem but that the implementation of the policy causes problems and needs to be addressed. Mr Khoza did not challenge the evidence of Mr Delport.

3. EVIDENCE OF SEXUAL HARRASSMENT

The three (3) complainants, Mrs Debbie Louw, Ms Maryke Vosloo and Ms Adele Van Heerden, testified in detail before the Commission at the St Albans hearings about allegations of sexual harassment against Mr Khoza.

Even though the facts relating to the sexual harassment appear not to be in dispute and were never challenged by Mr Khoza, who elected not to give evidence, in order to understand the Commission’s findings in this regard, it is

important that the facts of the sexual harassment complaints be set out in full, as the abuse of power and disciplinary process is closely linked to this.

3.1 Mrs Debbie Louw

Mrs Debbie Louw stated that she was working in the personnel office during 1999 when Mr Khoza started making certain suggestive remarks to her. Most specifically she remembered an incident where he locked her in the office, grabbed her and tried to kiss her. When she refused his persistent sexual advances, he became so obnoxious that she could no longer perform her duties in the personnel office.

Mr Khoza made her life intolerable. He made certain derogatory remarks during meetings and tried to make her look incompetent and foolish in front of all her managerial staff. She gave the Commission a few examples of these incidents, one of which related to a certain staff member, Mr Simon, who was booked off work to be on sports duty. Mr Khoza was of the view that Mr Simon should take leave without pay, which was not the Departmental policy. This incident had caused Mr Khoza to shout and scream at her.

She further testified that on the 30 June 1999, she complained to Mr Nweba about the sexual harassment, and then made a statement about the incident on the 1 July 1999.

She explained that after working hours she would receive phone calls at home and that they were mostly rude/lewd messages relating to the anatomy of a man. The persistent harassment of her at the office and at home took its final toll when her husband could no longer endure it, and started divorce proceedings in December 2000.

When she was asked how she felt about the manner in which the Department had handled her complaint of sexual harassment, she responded as follows:

“They let me down for one man. I gave them thirteen years of my life but for one man, Khoza, they let me down.”

Mrs Louw was very tense in the witness stand and at times gave evidence in tears when she related to the Commission what she had to endure for nine (9) months from Mr Khoza. She explained that not only did his advances upset her and impact on her professionally but they also scarred her mentally and she ended up requiring psychiatric treatment at a mental institution.²⁴

At the time when she testified, she was no longer employed by the Department of Correctional Services but was medically boarded. Mrs Louw gave her testimony under difficult circumstances and it was clear that she was still emotionally affected by what had happened to her and held the Department responsible for her mental condition. Despite her distress and emotional plea, she remained a confident witness and did not contradict herself on any aspect nor did she deviate from her earlier testimony. She courageously decided to take the matter forward so that victims like her may be spared the harsh treatment she had received from the Department.

3.2 Ms Maryke Vosloo

Another complainant, Ms Maryke Vosloo, testified that she is a female psychologist and has been employed by the Department of Correctional Services since the 12 January 1998. She was stationed at Medium B Prison, St Albans, Port Elizabeth at the time she was sexually harassed.

²⁴ It affected her psychologically and she ended up requiring psychiatric treatment at a mental institution and ultimately her condition impacted negatively on her marriage.

Ms Vosloo explained that she had also lodged a complaint of sexual harassment against Mr Khoza in July 1999 and set out all the relevant facts relating to the sexual harassment as well as those relating to her disciplinary enquiry.

It was her testimony that the first woman who had laid a complaint against Mr Khoza was Mrs Debbie Louw followed by the complaint of Ms Adele van Heerden and finally herself. She was therefore the third person to lodge a complaint of sexual harassment against Mr Khoza. She explained to the Commission about the complaints and made it quite clear that her evidence would focus on the manner in which the complaints were handled and their dissatisfaction with the Department in handling it, coupled with the fact that she was finally victimised by having to endure the process of a disciplinary hearing and to suffer the humiliation of being dismissed.

Not long after laying the complaint of sexual harassment referred to above, she was charged with breaching security arrangements for giving a prisoner a psychological report. She explained to the Commission that the whole matter was a misunderstanding and that she had needed to finalise the report of the inmate Mr Crouse. She had therefore handed a copy of his preliminary report to him to check the graphic details. She said that this was explained to all the relevant people when her conduct was questioned. However, she was still charged in terms of the Departmental B-Orders with sabotage, publishing documentation she was not authorised to publish and breaching security regulations. She was not satisfied with her disciplinary hearing and the matter was still pending on appeal on the day that she testified before the Commission.

Ms Vosloo's main grievance at the time when she testified before the Commission was that nothing came of the complaints laid by the three women. Their complaints were not taken seriously and because the Department failed them, they were forced to seek justice through the criminal process. Even the criminal case was, at the time of writing this report, still pending.

By “promoting” Mr Khoza, the harasser, to the Provincial Commissioner’s office shortly after the complainants had laid the charges, a clear message was sent out to these women that they would not be believed.

The action taken by the Provincial Commissioner raised within them a perception that the matter would definitely be swept under the carpet and that Mr Khoza would not be disciplined for his actions. The fact that they did not receive any support from Mr Nweba, the Head of Personnel, strengthened their belief that the Department would not supported them in their pursuit of justice.

3.3 Ms Adele Van Heerden

Ms van Heerden, who previously worked for the Department of Correctional Services at Medium B Prison, St. Albans, testified about an incident that happened during September/ October 1998, when Mr Khoza kissed her against her will while she was alone photostating copies of the G144’s in the conference room of the Area Manager’s office.

She furthermore referred to other incidents of harassment when she worked permanently on first watch night duty in the radio control room at Medium B, when Mr Khoza would visit the prison, remark on her beauty and tell her that he is in love with her and wants to kiss her. Sometimes he begged her to kiss him. She did not welcome his sexual advances and told him so.

She told the Commission that he went so far as to send her a text message from his cell phone number, namely, “Good evening you Beauty, that’s Verrom.” She saw this name, Verrom, on his calculator in his office. She never reported the incident to the Anti-Corruption Unit but reported it to her parents, who advised her not to take action as that might have led to complications that could have affected her future in the Department. Another member offered to report the matter to the

Psychologist, Ms Vosloo. Ms Vosloo came back to her the following day and told her that she had more or less the same experience with Mr Khoza and that they should decide what to do about the situation. Ms Vosloo later advised her not to take action because of the complications that may ensue from such a complaint. This is why she did not report the matter to any authority until she could no longer bear it.

There was an attempt to deal with her complaint against Mr Khoza at a management meetings but one of the Popcru shop stewards, Mr Minners, told her that she was using the sexual harassment charge to her own advantage. Ms van Heerden was reduced to tears when she told the Commission how Mr Minners words made her lose control to the extent that she grabbed him. She told the Commission that she was so hysterical at that time that she had to receive medical treatment. Throughout her testimony, she struggled to control her emotions and to relay to the Commission what had happened without being overcome with emotion.

After the meeting where Popcru was represented, she was moved to the Transport Section where she had to endure further victimisation because members constantly made remarks about her complaint.

Initially, and in accordance with the Department's Sexual Harassment Policy, she was informed by the Personnel Officer that she could use 'special leave' because her 'injury' was an injury on duty. However, later she was informed that because Mr Khoza was not convicted internally on any incident of wrongdoing, she could no longer be granted special leave despite medical evidence supporting the fact that mentally she was unfit to work due to the trauma suffered at the work place. The denial of special leave exacerbated her trauma.

She could not go back to work because of her mental instability and was 'forced' to resign.²⁵ Ms van Heerden felt extremely frustrated by the fact that the Department did not grant her the opportunity to get the benefits that any other member would have got when he/she was injured on duty, particularly since her mental instability could all be attributed to the sexual harassment.

She is no longer employed by the Department and is now the owner of a small coffee shop. According to her, she has struggled to make ends meet and has been financially destroyed by Mr Khoza's harassment. She is aggrieved that the Department left her no choice but to resign. She begged the Commission to look into the matter so that at least her claim for being injured on duty could be processed by the Department.²⁶

Ms van Heerden was also cross-examined by Mr Nweba but never deviated from what she had said earlier in her evidence in chief. She did, however, elaborate on the fact that when she had asked Mr Nweba whether he cared about what was happening to her that Mr Nweba had said to her that he only cares about two things in life, his God and his Union.

It is clear from Ms van Heerden's evidence that she attributed her second nervous breakdown to the Department's failure to process her claim for special sick leave and Workmen's Compensation. Working for the Department became so intolerable that she had to give the Department 24 hours notice of her resignation since she was in no mental condition to continue with her work.

²⁵ See discussion below where the view is held that the Department may have constructively dismissed Ms van Heerden.

²⁶ The harassment occurred at the prison and the Commission is of the view that Ms van Heerden's psychological injury occurred in the course and scope of her work.

4. MANNER OF INVESTIGATION

Before evaluating the evidence of the three (3) complainants, the initial investigation of the complaints of sexual harassment by the investigator, Mr Z.S. Gaqa, requires closer scrutiny and comment.

The first area of concern to the Commission is the fact that the investigation was carried out by a male investigator, Mr Gaqa, despite the fact that all the complainants were female coupled with the fact that all their complaints related to wrongful sexual conduct by a male.

Sexual harassment must be distinguished from other forms of harassment at the workplace.²⁷ Victims of sexual harassment are generally traumatised by the events and in many cases are required to relay intimate details to the investigator. It is important therefore that victims are comfortable with the way the matter is investigated.

The appointment of a male investigator in circumstances where the services of a female investigator was required hampered the proper investigation of the case. This is supported by the fact that Ms Vosloo, who had initially refused to give a statement to Mr Gaqa, was able to give a more detailed and elaborated second statement to Mrs Thembisa Spambo, a Deputy Director, employed by the Department at a later stage. Clearly whoever appointed Mr Gaqa showed a lack

²⁷ See J G Mowatt "Sexual Harassment – New remedy for an old wrong" (1986) 7 ILJ 637 at 638 wherein he describes sexual harassment as follows:

"Sexual harassment occurs when a woman's sex role overshadows her work role in the eyes of the male, whether it be a supervisor, co-worker, client or customer; in other words, her gender receives more attention than her work. In its narrowest form sexual harassment occurs when a woman is expected to engage in sexual activity in order to obtain or keep her employment or obtain promotion or other favourable working conditions...It is generally agreed that the effect of sexual harassment in the short term is to make the victim embarrassed, disillusion or humiliated and, in some instances, her work performance may suffer."

of insight and demonstrated insensitivity into the nature of the alleged transgressions.

The manner in which Mr Gaqa handled the investigation into the complaints of the three (3) women also left much to be desired. His lack of interest in the matter and his general attitude to his duties as investigator, was clearly demonstrated in the initial stage of the investigation when he had no time to take down Ms Vosloo's statement. Instead, he directed her rather to sign a blank statement form. Such conduct, coming from an investigator, is not only totally unacceptable but also unethical. He furthermore failed to keep the complainants properly informed of the progress of his investigations where it was expected of him to keep them informed.

It is clear that Mr Gaqa acted most inconsiderately to the complaints and without any appreciation of the alleged conduct of the alleged perpetrator. It cannot be said that he acted and investigated impartially. At best, the handling of the complaints of sexual harassment can be described as a successful attempt of rubbing salt into the wounds or even secondary harassment.

In order to show the shortcomings in the handling of the complaints, the findings made by Mr Z.S. Gaqa in his investigation report,²⁸ which is annexed²⁹ hereto, will now be discussed.

It is clear from the reading of Mr Gaqa's report that he was very sympathetic to the harasser, Mr Khoza, so much that one can say that he almost sided with him. His sympathy to the harasser showed no attempt to treat the complaints seriously or fairly. The findings show that there was a general expectation from the investigator that the complainants could not be believed since they had no witnesses observing the incidents. If Mr Gaqa's reasoning is to be accepted then

²⁸ These findings are contained in a report that formed part of St Albans hearings Exhibit 'J', a statement made by Ms Vosloo.

²⁹ See Appendix 'F2' attached to this report.

it would mean that no single witness would ever be able to bring a charge of rape or sexual assault, since there would be no witness to substantiate their complaint if they were alone with the perpetrator. This is also contrary to our law. In South Africa you can be convicted on the evidence of a single witness.³⁰

Furthermore, a review of the report reflects little if no understanding of what sexual harassment entails. It is seriously flawed in many ways. It has been alluded to early in this report that the investigator erred by arguing that the complainants should have corroborated each other on the occurrence of the harassment. Not only were they single witnesses to the events but evidentiary concepts such as similar facts strengthen the probability that they were sexually harassed. This had been completely overlooked by the investigator.

A review of the recommendations made by Mr Gaqa shows that he had no basis for rejecting the charges of the complainants nor was there any reason for him to doubt their credibility. His task was to investigate and not act as judge and jury in the matter. In usurping the function of a Disciplinary Tribunal, he did the Department and the complainants a disservice.

A responsible manager and investigator would have taken cognizance of the nature of the transgressions and would have recommended that, under the circumstances, disciplinary action be instituted in the matter because of the *prima facie* evidence that existed.

5. ANALYSIS

It is most disconcerting that at a time when most organizations in the new democratic South Africa, be it public or private, have become more victim

³⁰

See Section 208 of Act 51 of 1977 that reads as follows:

“An accused may be convicted of any offence on the single evidence of any competent witness.” (own emphasis)

orientated and sensitized in dealing with the rights of victims, the Department offered little support to the victims in this matter. There seems to be a clear disregard for the rights of victims, particularly female employees, where serious offences had been committed against them.³¹

It is regrettable that these three (3) complainants had to seek justice in a criminal court where they are burdened with the highest standard of proving their case. If the department was truly sensitive towards the rights of its employees, it would not have neglected its duty and the matter would have taken its normal course through the Department's disciplinary process where the standard of proof is on a balance of probabilities.

The neglect of the rights of these three (3) victims shows a reluctance to discipline, which is not in accordance with general labour practices. Since there was no explanation for such reluctance, it is reasonable to infer from all the evidence presented so far and in particular that of Ms Kgosidintsi, Ms Tseane and Ms Molathedi that the rights of female employees of the Department are less protected and less important than those of their male counterparts.

Much reliance was placed by the officials of the Department on the fact that the three (3) complainants did not corroborate each other. However, if one looks at the investigation of the matter itself, it is clear that this was not simply a single complaint from one woman but in fact three (3) different complaints from three (3) different women about three (3) different events at three (3) different times and that the only common denominator was that the transgressions were committed by one single individual, namely Mr Khoza. It is therefore not only improbable but also impossible that these three (3) complainants could have conspired in an attempt to corroborate each other if they are witnesses to different events. It is also mind boggling how the Department could deduce from its investigation that these witnesses, namely Ms Vosloo and Ms van Heerden were supposed to

³¹ See paragraph 4.2 of Mr Gaqa's investigation report attached hereto as Appendix 'F1'.

corroborate the evidence of Mrs Louw. Such argument defies any logic. There is no clear indication that they either individually or collectively conspired against Mr Khoza when they laid their complaints. Despite all the facts showing that any conspiracy was impossible, the Department elected not to pursue the matter through the disciplinary system but instead, preferred to make a biased credibility finding in the investigation report regarding their truthfulness without granting the complainants the chance to respond to such a finding or to prove their credibility before a disciplinary tribunal. Through this action alone the complainants were denied the opportunity to state their case to an objective tribunal, which only exacerbated the trauma suffered by them and ultimately denied them any justice in the process.

In deciding upon the issue of disciplinary steps, much weight was attached by the Provincial Office to the fact that the complainants did not complain immediately. However, the management lost complete sight of the fact that is quite understandable that a complainant might have a plausible reason for not reporting the incident of sexual harassment immediately or soon after the occurrence. By being denied the opportunity to motivate the delay the victims were prejudiced and had to seek recourse through the criminal courts.

An analysis of Mrs Louw's evidence shows that the conduct of Mr Khoza, who was her supervisor, could not be excused in any way. He was clearly seeking sexual favouritism and when she did not want to submit herself to his sexual advances he made her professional life a misery. What makes his conduct more reprehensible is the fact that it was not a once-off incident but a persistent series of harassments. He abused his authority in the hope of extorting a sexual favour under circumstances where it was unwanted and inappropriate for a manager to conduct himself in such a manner.

In this matter, there was a clear message sent out to the complainants that their complaints would not be believed when the harasser, Mr Khoza, shortly after they

had laid the charges, was “promoted” to the Provincial Commissioner’s office. This action of the provincial office gave rise to their perception that this matter would be swept under the carpet and that the perpetrator would not be disciplined. The fact that they were then accused of being part of “a racist conspiracy to discredit a senior black manager” gave their perception even greater weight. What they construed as being most unfair was that after they lodged complaints against Mr Khoza for sexually harassing them, they were in turn subjected to harassment and victimisation at the work place.

It is this victimisation that resulted in Ms van Heerden and Mrs Louw leaving the Department in different ways, that is, the one resigning and the other being medically boarded. It needs to be stated that in the case of Ms van Heerden, the working conditions became intolerable because the Department shifted her from one position to another in the prison without ever considering the fact that she was traumatised by the events. An objective analysis of the treatment received by Ms van Heerden after she had fallen prey to Mr Khoza's harassment shows that the Department and those members handling of her "transfers" in the prison effectively and constructively dismissed her.³² Not a single manager acted in accordance with the sexual harassment policy, namely to create an environment

³² It is important to consider in the case of Ms van Heerden the provisions of the Labour Relations Act and in particular, section 186(1)(e) of the Act that reads as follows:
Section 186(1)(e) of the LRA reads as follows;

Dismissal means that ...

“(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”

Also see *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) at 985A-B, Nicholson JA stated:

“The enquiry then becomes whether the Appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended repudiation of the contract; the court’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. I am of the view that the conduct of the parties has to be looked at as a whole and its cumulative impact assessed.”

See also *CEPPWAWU & another v Glass Aluminium 2000 CC* (2002) 5 BLLR 399 (LAC) at 404G-406D).

and climate in which a victim of sexual harassment will not feel that their grievances are ignored.³³

6. RECOMMENDATIONS

6.1 It is recommended that:

- (a) All supervisors be trained and sensitized regarding the Department's Sexual Harassment Policy to enable them to properly apply the provisions of the Policy. Without such training the Policy will remain mere rhetoric and sexually harassed employees will continue being denied justice at the workplace.
- (b) All managers should be tasked to implement the Departmental Sexual Harassment Policy and disciplinary action should be taken against employees who do not comply with the policy. All managers must be trained and made aware of the fact that sexual harassment differs in nature from other disciplinary transgressions and hence investigators tasked with such investigation should be appointed with greater care and caution. In the matter discussed, for example, the victims would have been more comfortable and at ease with an investigator of the same gender. If attention is not paid to the needs of victims, there is a real likelihood that victims will not reveal all the details to the investigator due to the intimate nature of some of the harassments.
- (c) The Department should consider amending its Sexual Harassment Policy to empower harassed complainants in the following way: to

³³ See Sexual Harassment Policy- Appendix 'F2' at para.6.

give them the opportunity, once an investigation is completed and the complaint is founded, to decide in conjunction with management whether the matter should be dealt with informally or formally. This proposal will alleviate the grievances of complainants in matters like this and at the same time be sensitive to their needs. It will also be more in accordance with the Code of Good Practice on the handling of sexual harassment cases.

- (d) Mr Gaqa not be used as an investigator as he lacks the required objectivity and impartiality that is needed to investigate matters. His bias in this matter also leaves a question mark whether he would be suitable objectively to preside in disciplinary matters in future.
- (e) The Department process the claim instituted by Ms van Heerden to the Workmen's Compensation without delay. Her application should have been lodged when she was still employed and she should not be prejudiced by the inaction and negligence of members of the Department.
- (f) That Mr Khoza be departmentally charged with three (3) charges of contravening Column A clause 5.5 of the Department's Disciplinary Code, in that he sexually harassed the three (3) complainants. In making this recommendation, due cognisance is taken of the fact that the formal disciplinary hearings have a time frame of three (3) months in which such disciplinary hearings should be instituted. However, the Code provides that in matters where the employer can submit good reasons, the disciplinary hearing can still proceed despite the time that may have elapsed.³⁴

³⁴ See Clause 7.4 of the Department's Disciplinary Code. In the present case sound reasons exist for charges to be brought against Mr Khoza. The investigation was never fully completed and only became completed once the Commission filed this report.

It would be a travesty of justice and nothing short of a disgrace if someone who is accused of such reprehensible behaviour continues with impunity to go about his duties in the Department.

7. MANAGERIAL ABUSES

The Commission earlier on in this report alluded to the fact that the problems facing the Department are multi-faceted and deeply rooted. One of the major factors contributing to the disarray that exists in the Department appears to be an inefficient disciplinary system that lacks the will or capacity to properly discipline the employees.³⁵ The system is often abused and manipulated to obtain results desired by management who have their own agendas. At almost every prison that the Commission has investigated it has heard that discipline is a problem, employees and managers alike feel that discipline is not fairly instituted for the function that it should fulfil, namely to ensure that employees are obedient and contribute effectively and efficiently to the goals set by the Department.

Discipline in the main should be implemented in accordance with the processes prescribed in terms of the Department of Correctional Services Disciplinary Code³⁶ as provided for in terms of the Departmental Bargaining Council Resolution 1/2001. The Code envisages that unauthorised behaviour and criminal conduct of employees should be addressed.³⁷

While the objectives of the Departmental Code are admirable, their implementation is a matter of serious concern to the Commission. The sexual harassment at St Albans demonstrated that the power the Code gives to

³⁵ See the Chapter on Disciplinary Inquiries for a detailed discussion.

³⁶ Hereinafter referred to as the Code.

³⁷ See the purpose of the Code as contained in Clause 1, Annexure C of the Department of Correctional Service's Disciplinary Code.

managers can easily be abused and in fact was abused in the case of Ms Vosloo.

An in depth analysis of the conduct of all officials involved in the St Albans matter is therefore necessary.

7.1 The Provincial Commissioner

Mr Raphepheng Ephraim Mataka, the Provincial Commissioner of the Eastern Cape, was the first manager that could throw light on the events of the actual sexual harassment complaints, the disciplinary inquiry that ensued for one of the complainants and the disciplinary system itself.

Mr Mataka affirmed that Ms Vosloo and two (2) other employees lodged complaints of sexual harassment against Mr Khoza, a senior member employed by the Department, who was no longer working at the St Albans Prison but in fact working at the Provincial Commissioner's office. He confirmed that despite the allegations of the three (3) complainants against Mr Khoza that he never ordered that a disciplinary inquiry be instituted against him in the matter of the sexual harassment. He also confirmed that the third complainant, namely Ms Maryke Vosloo, was the only complainant that remained in the employment of the Department and that pursuant to her complaint, she was charged for breaching the security regulations of the Department of Correctional Services by handing over a psychological report to an inmate, who was one of her clients.³⁸

Mr Mataka tried to explain to the Commission why the investigation against Ms Vosloo was initiated and given such high priority that he personally got involved and requested a special initiator from North West Province, to wit Mr Mphanya. He initially denied during his testimony that he specially requested the services of

³⁸ A detailed summary of all charges preferred against Ms Vosloo follows below.

Mr Mphanya. However, evidence dealt with below convincingly showed that Mr Mataka had not been truthful when he wanted the Commission to believe that it was sheer coincidence that Mr Mphanya was sent to the Eastern Cape to do the investigation in Ms Vosloo's case.

Mr Mataka was asked to comment on the fact that Ms Vosloo's dismissal was manipulated by the Provincial Office through his intervention in the process. Although he conceded that a perception could exist that the transfer of Mr Khoza to his office could be a "promotion", he was reluctant to admit that the disciplinary inquiry of Ms Vosloo that followed shortly after the transfer of Mr Khoza strengthened a perception of unequal treatment and an abuse of power.

He was also asked to comment on the fact that the 'wrongdoing' of Ms Vosloo was to hand a psychological report to the very same inmate who was the subject matter of the psychological report referred to, and that the only intention for such hand over was to let the client confirm his personal details and secondly, whether he would agree that the dismissal of Ms Vosloo was grossly unfair if the circumstances sketched were indeed true. His comment on both submissions was that he would fully agree that Ms Vosloo's dismissal would have been unfair if the submissions were borne out by the proven facts.

Mr Mataka was confronted by the evidence leader to explain his decision to withhold the two (2) statements of Mr Khoza and of another senior member of Correctional Services, Mr Eric Nweba, from the three (3) complainants, who wanted the documents to test whether the Department's decision not to institute disciplinary action against the perpetrator was indeed proper. Mr Mataka explained that he needed to consult with both Mr Khoza and Mr Nweba because he believed that the statements were confidential. Further testimony was then tendered before the Commission that all three (3) complainants were forced to approach the Commission for Conciliation, Mediation and Arbitration³⁹ for relief

³⁹ Hereinafter referred to as the "CCMA".

because they were not granted an opportunity to examine the statements of Mr Khoza and Mr Nweba.

Mr Mataka acknowledged that he decided not to hand the documentation to the complainants because he was of the opinion that they had approached the wrong forum for relief. Mr Mataka stated that he had handed the documentation to the police after the women had laid criminal charges against Mr Khoza. He indicated that he did not hand the information to the women because the matter was in the hands of the police. He considered the police as being the first party in the matter and the women merely as interested parties and maintained that they had no right to the statements.⁴⁰

Mr Mataka was questioned by Mr Soni about the suspension of Ms Vosloo, namely that she was suspended because her presence might interfere with the investigation into the allegations that she supplied a confidential psychological report to the prisoner, Mr Hugo Crause. It was the submission of Mr Soni that despite the impression that was created in the media⁴¹ that Ms Vosloo was involved in the Fanie de Lange matter⁴², nothing in the investigation report by Mr Mphanya supported such an allegation.

⁴⁰ Mr Mataka's action clearly contravened the guiding principles in the Code of Good Practice, particularly clause 5(1)(b) that provides as follows:

“5. Guiding principles

(1) Employers should create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained in which victims of sexual harassment will not feel that their grievances are ignored or trivialised, or fear reprisals. Implementing the following guidelines can assist in achieving these ends:

(b) All employers/management and employees have a role to play in creating and maintaining a working environment in which sexual harassment is unacceptable. They should ensure that their conduct does not cause offence and they should discourage unacceptable behaviour on the part of others.”

⁴¹ Mr Mataka released a press statement in a press conference and a copy of such is filed as Appendix 'F3' and attached to this report.

⁴² The Fanie de Lange matter is discussed in more detail later in the Chapter.

Mr Mataka admitted that it was not true that Ms Vosloo was involved in the Fanie de Lange matter and it was also correct that her suspension had nothing to do with the Fanie de Lange matter. It was put to Mr Mataka that she was suspended based on a letter that Mr Mphanya had written to the Area Manager at St Albans.

The letter was handed in as Exhibit "J" and reads as follows:

*The Area Manager
Correctional Services:St Albans
Private Bag X6055
PORT ELIZABETH
6000*

*Ref: S13/5
Date : 9\03\2001
Enq.: Mr P Mphanya*

"Investigation into application for conversion of sentences and / or placement under correctional supervision various cases at St Albans Management Area.

It has come to the attention of this office during investigations specifically on 2001\03\08, that a report from the Psychologist, Ms Vosloo, to the Chairperson of the Institutional Committee had been found in possession of inmate Hugo Crause (98594744) on 25th February 2001. The said inmate attempted to have the report handed to his wife during this specific time.

It needs to be mentioned that the report is a confidential document and must be handled as such.

These office views the leaking of confidential information or documents in a very serious light as it has the potential of causing the Department embarrassment. This type of conduct is also criminal in nature and very serious.

This office is of the view that Ms Maryke Vosloo was gross negligent in handling the matter and strongly recommends that she be suspended pending the finalisation or possible disciplinary steps.

Kind Regards

(sgd.) Paul Isak Mphanya

Investigating Officer

Acting Area Manager

Rustenburg : North West.

Mr Mataka struggled to answer the question whether he thought that he could escape responsibility for instituting disciplinary action against Ms Vosloo. He maintained throughout his testimony that the decision to institute disciplinary enquiries indeed rested with him and that he will have to take responsibility for such decision. Mr Soni submitted that he was concerned by following the facts:

- (1) there was no publication of the statement of Mr Hugo Crause;
- (2) there was no way that Ms Vosloo could have endangered the safety of the Department;
- (3) that he, as a Provincial Commissioner, lacked judgment in deciding upon these facts to institute disciplinary action against Ms Vosloo.

Mr Mataka's answer never dealt with the concerns raised. Instead he preferred to state that the evidence leader's concerns were merely one person's view on the case.

Mr Mataka's conduct demonstrated to the Commission that he either never entertained the true facts leading to the disciplinary action against Ms Vosloo or if he did, that he could only have acted with malicious intent.

Objectively, Ms Vosloo's conduct could never have endangered the safety of the Department nor could it be seen as the 'publication' of a confidential document. At no time did she give the confidential psychological report of the inmate Hugo Crause to a third person. If the inmate wants to disclose such information to a third party or his wife, as the letter from Mr Mphanya alleged, then that is his prerogative. It would be another matter entirely if Ms Vosloo submitted the document to another institution without the client consenting to it or verifying it. In such circumstances she, as a psychologist, would clearly have acted unprofessionally and *contra* to the ethics of her own profession.⁴³ None of this occurred in this case.

If there was no malicious intention on the part of Mr Mataka, it should have been obvious to him, as the most senior official in the Department in the province, that the disciplinary proceedings against Ms Vosloo were being instituted maliciously. It is reasonable to have expected him to do his duty and to intervene decisively to put an end to what was developing into nothing more than a vindictive "witch hunt" against Ms Vosloo.

On the contrary, he did nothing of the sort, but rather appears to have assumed an active and direct role in the initiation of the disciplinary proceedings against Ms Vosloo that resulted in her dismissal. He allowed his hand picked official to investigate, compile a report, initiate disciplinary proceedings and tender evidence before the tribunal regarding Ms Vosloo's alleged transgressions. He therefore not only contravened the Department's Sexual Harassment policy ensuring protection against victimisation and retaliation to members who lodge grievances but also abused the power vested in him.

⁴³ See the Health Professions Act No. 56 of 1974 that also governs psychologists. Such conduct would be considered unprofessional specifically in terms of Section 1, which reads as follows:

"unprofessional conduct means improper or disgraceful or dishonourable or unworthy conduct or conduct which, when regard is had to the profession of a person who is registered in terms of this Act, is improper or disgraceful or dishonourable or unworthy."

Mr Mataka's lack of good judgment, truthfulness and general unsuitability for the office of Provincial Commissioner, is also apparent from his evidence wherein he appeared to find nothing untoward or wrong when confronted with the fact that Mr Khoza had never been disciplined, that Mr Khoza had, in the midst of serious sexual harassment claims been "promoted" to the provincial office, that vindictive and flimsy charges were brought against Ms Vosloo to intimidate or victimise her, that such charges did not justify her dismissal and that he had generally interfered with the due process as a manager.

If the seriousness of the allegations against Mr Khoza are considered and the fact that his defence was nothing more than a mere denial, then it is evident that neither Mr Mataka nor any of the other officials involved in the matter had any desire to discipline a senior member for his conduct.

It is apparent to the Commission that the Department should be extremely cautious in the guidance it gives to managers handling matters of sexual harassment, since the risks of being vicariously liable as a Department is very likely.

7.2 Mr Paul Izak Mphanya

Mr Mphanya played an integral role in the disciplinary matter of Ms Vosloo. Despite the fact that he is from the Northern Province and was especially selected by the Provincial Commissioner, Mr Mataka, to come to the Eastern Cape and investigate irregularities regarding an inmate, Mr Fanie de Lange, he at the same time investigated alleged transgressions committed by Ms Vosloo, the psychologist at the St Albans Prison. Mr Mphanya also compiled a report regarding the investigation into corruption and mismanagement at the Medium B Prison.

The report compiled by Mr Mphanya relating his investigation of the transgressions allegedly committed by Ms Vosloo was handed in and filed as Exhibit "R3". His role however, did not end there since he was also elected to act as the initiator at Ms Vosloo's disciplinary hearing.

Mr Mphanya is well known to Mr Mataka since the time that they have worked together in the North West Province and as the evidence hereafter set out will show, his choice, as the investigator, was not without significance.

Mr Mphanya stated during his testimony that he was appointed by the Provincial Commissioner Eastern Cape, Mr Mataka, after due consultation with the Provincial Commissioner North West, Mrs Tseane. When Mrs Tseane, the Provincial Commissioner North West, came to testify before this Commission on a matter not related to this specific incident of sexual harassment, she informed the Commission that she was not consulted to release Mr Mphanya to handle the investigation in the Eastern Cape but was in fact requested by the Provincial Commissioner Eastern Cape to specifically appoint Mr Mphanya to come and investigate the matter in the Eastern Cape. She then merely complied with this specific request.

Besides the oral testimony of Mrs Tseane, the correspondence relating to his appointment as investigator in the matter, also supported and corroborated Mrs Tseane's testimony that Mr Mphanya's services were especially requested. The document marked St Albans Exhibit 'R2' is illustrative and reads as follows:

"

*Provincial Commissioner : North West
Private Bag 62006
Mabatho 2735
2001/03/05*

The Area Manager

Rustenberg Management Area

Ref : S16/3

Private Bag X82108
Rustenburg
0300

Enquiries : Mr Masikane
Tel. 018-3846076\9
Ext. : 144
Fax : 018-3846071

Attention Mr P I MPHANYA

Dear Sir

**Re: REQUEST FOR SERVICES OF MR M P MPHANYA : PROVINCIAL
COMMISSIONER, EASTERN CAPE**

Reference is hereby made to the telephonic conversation between Mr Mphanya and Mr Masikane of our respective offices this morning.

The request by the Provincial Commissioner, Eastern Cape for your services at the latter mentioned province, have been approved by the Provincial Commissioner, Ms Tseane on 25/02/2001.

Your office is kindly advised to communicate directly with the office of the Provincial Commissioner, Eastern Cape, for further details.

Any inconvenience that might have been caused to your good self during the arrangements is sincerely regretted. Kind regards and good luck.

Yours faithfully

(sgd) "S O Masikane"

Acting Provincial Commissioner: North West."

The contents of this letter and Ms Tseane's evidence convincingly showed that neither Mr Mataka nor Mr Mphanya had been truthful when they wanted the

Commission to believe that it was not engineered that Mr Mphanya should be sent to the Eastern Cape to do the investigation into the Vosloo matter.

Mr Mphanya's testimony was that although he was initially appointed as investigator of the matter, he was also appointed as initiator in the disciplinary matters of Mr Ben and Ms Vosloo.

Mr Mphanya was also appointed to finalise the hearing of the appeal on or before the 13 May 2002.

Mr Mphanya during his testimony stated that once he was appointed to investigate the corruption and mismanagement at the St Albans Prison, he decided to interview a number of people, inter alia, Mr Ben, Mr Hugo Crause, Mr Shamiel Mohamed, and Mr Peterson but that he never interviewed the chief psychologist, Mr Delport. Despite Mr Delport being the supervisor and line manager of Ms Vosloo, he decided it was not important to interview him. Nevertheless, Mr Mphanya claimed that he compiled a comprehensive report and dealt with all the collected information.

To show how much the disciplinary process was abused, it is essential to focus on the information that Mr Mphanya relayed to the office of the Provincial Commissioner regarding the wrongdoing and transgressions committed by Ms Vosloo. The summary of the investigation and the findings he had made in the matter, which are contained in St Albans Exhibit 'J' at pages 122-124 will be dealt with.

Regarding the mishandling of the information, he found and recommended as follows:

**"MISHANDLING OF OFFICIAL INFORMATION; Ms MARYKE VOSLOO
PSYCHOLOGIST: ST ALBANS MEDIUM B PRISON**

FINDINGS

That on Sunday the 25 February 2001, Miss Nozuku Dayile was assigned duties at the section, and whilst there she was approached by inmate Hugo Crause, with a request that he would like to hand over to his wife a letter, that upon searching the envelope, Miss Dayile discovered that the contents were in fact a psychological report addressed to the Chairperson of the Institutional Committee. That inmate Hugo Crause, also agreed that he was in possession of the said report and indicated that it was not a final report. That the said incident was also reported to Mr Ben. That the said report is marked 'strictly confidential' and that it was compiled by psychologist, Maryke Vosloo. That the latter declined to give a statement. That misuse/mishandling and the leaking of information should be viewed in a serious light.

That misuse of confidential information is a serious transgression, which could result in summary dismissal of the perpetrator if, found guilty.

Further that it is alleged by Shamiel Mohamed that inmate de Lange, from time to time would consult the psychologist, Maryke Vosloo, and that during such consultations de Lange would receive parcels and took them inside the prison. That inmate Shamiel Mohamed was at the time assigned duties as a tea boy at the office of the Head of Prison, (Mr Ben).

Recommendations

That Maryke Vosloo be brought before the Disciplinary Tribunal on account of misuse of confidential information. Further that she be charged on account of breaching of internal security arrangements.

(sgd.) P I MPHANYA

Investigating Officer.”

When Mr Mphanya was cross-examined it became clear that before he commenced the investigation, he had no written mandate describing the nature of the allegations that he should investigate and the scope of the corruption that he should investigate. Mr Mphanya admitted that Mr Mataka did not hand him a written mandate setting out any terms and that the letter dated the 5 March 2001 marked St Albans Exhibit R2' does not stipulate what should be investigated.

Although he conceded that the said letter only stated that his services as an investigator were required in the Eastern Cape, he claimed under cross-examination that his brief was to look into the conversion of sentences at the St Albans Prison, more particularly the remission of sentences. He also said that Mr Mataka gave him certain files, *inter alia*, the file of Mr Fanie de Lange to investigate and process.

Mr Mphanya was cross-examined at length regarding the relevancy of the report that Ms Vosloo compiled in the case of Mr Crause, and its relevance to the investigations that he was conducting, namely the remission of sentences. He had great difficulty in answering this question and at best, could say that there was a connection between the Fanie de Lange matter and the matter of Hugo Crause, because Ms Vosloo although not directly involved in the Fanie de Lange matter was indeed indirectly involved. Nonetheless he conceded that in the report, which he compiled on Fanie de Lange, he had never mentioned that Ms Vosloo had been involved in the Fanie de Lange case at all.

Mr Mphanya was not only involved in the investigation of Ms Vosloo's disciplinary matter but was also instrumental in suspending her when he went as far as compiling a report requesting her suspension on the 9 March 2001. In his testimony he confirmed that the reason for Ms Vosloo's suspension was that she did not want to give him an explanation with regard to the Hugo Crause matter

and that it sufficed for her to be suspended. He later changed his version and after more questioning stated that there were two (2) reasons why he thought she should be suspended: 1) that she did not want to give him a written explanation in answer to the allegations and 2) that there was foul play on her behalf. Based on this, he thought it appropriate to draft a letter to the Area Manager requesting her suspension.

When he was confronted with the letter written to the Area Manager and the reasons for her suspension, which were stated in that letter, Mr Mphanya was at sea and could not explain why she'd had to be suspended. In an attempt to justify his conduct, Mr Mphanya stated that when he wrote the letter to the Area Manager, he had already come to the conclusion that Ms Vosloo was involved in irregularities regarding the Fanie de Lange matter and that her wrong doing was not only limited to the Fanie de Lange matter. However, in the same breath, he admitted that he never raised the issue of Fanie de Lange with Ms Vosloo, nor did he consult with her regarding the Fanie de Lange matter. All evidence in this matter, including the testimony of Ms Vosloo, overwhelmingly showed that the Fanie de Lange matter was never raised with her neither was she involved in it.

Mr Mphanya remained adamant that the Fanie de Lange matter was indeed the impetus to Ms Vosloo's suspension. The investigation report regarding the Fanie de Lange matter was handed in, and it was marked St Albans Exhibit 'R3'. Mr Mphanya was then confronted with what he had stated in that report, most specifically in paragraph 2, namely; "allegations of favouritism, corruption and mismanagement were brought to the attention of the Provincial Commissioner, and the latter instructed that these allegations be investigated."

Mr Mphanya was asked to explain this briefly, in the light of what he had earlier stated as his original brief. There was a vast difference between what is noted in the document and what he had said. He tried to explain to the Commission but

he could not convincingly state how his brief could have developed into looking into the matter of Ms Vosloo.

Mr Mphanya did not impress the Commission as a truthful or reliable witness. He did not take the Commission in his confidence nor did he disclose the true reasons for Ms Vosloo's suspension and the ensuing disciplinary hearing. In justifying Ms Vosloo's involvement in the Fanie de Lange matter he went as far as saying she compiled the psychological report for Mr de Lange and had said that Mr de Lange was a model prisoner. However, it is clear from the evidence that Ms Vosloo never said it but that the statement was based on information that was given to her by the Head of Prison, Mr Ben and Mr Makhaye. Despite the facts not supporting him, Mr Mphanya still tried to convince the Commission that Ms Vosloo made a false statement. When asked to explain why he did not charge her for such misrepresentation, if she had filed a false report, he could not to his embarrassment tender any explanation. Instead he proffered that such failure was an omission on his part.

Things turned out for the worst for Mr Mphanya when Mr Soni confronted him with Mr de Lange's psychological report, most specifically when it was exposed that there was no reference made in the report that Mr de Lange is a model prisoner. Mr Mphanya conceded, albeit reluctantly, that there was no indication in the psychological report that Mr de Lange is a model prisoner. Despite this inexplicable contradiction in his testimony, he still tried to exonerate himself by saying that he did not want to mislead the Commission intentionally. Mr Mphanya during his testimony showed that he could not be trusted or believed as a witness.

In order to see the bigger picture of the abuse of power it is necessary to consider the charges preferred against Ms Vosloo which are contained in St Albans Exhibit "J" and which reads as follows:

**“ANNEXURE A
MS MARYKE VOSLOO**

COUNT 1

You are departmentally charged for contravening the provision of the departmental disciplinary code as at paragraph 5.6. (Left column), in that around January or February 2001 (exact date not known to management at St. Albans Medium B Prison), you misused confidential information by handing over a confidential psychological report to inmate Hugo Crause, clearly against the provisions of correctional services Order B, service order 14.

COUNT 2

You departmentally charged for contravening the provision of the departmental disciplinary code as of paragraph 5.4. (Column A) in that around January or February 2001 (Exact date not known by management) you interfered with the records and operations of the department by handing over to inmate Hugo Crause a confidential report clearly against the provisions of services order 14(CSO-B).

COUNT 3

You are departmentally charged for contravening the provisions of the departmental disciplinary code as at paragraph 5.10 (Column A), in that you allowed Fanie De Lange to receive parcels whilst consulting with you in your office which parcels were taken into the prison by Fanie De Lange (Exact date not known to Management). That the incident took place at St. Albans Medium B prison.”⁴⁴

When the charges were examined, Mr Mphanya was asked to explain how Ms Vosloo’s conduct could be considered as handing over departmental confidential

⁴⁴ See page 124 of St Albans hearings, Exhibit “J”.

documents to a third party, furthermore to explain what kind of interference had followed after the report was handed to Mr Crause. Mr Mphanya, at best, could say that the charges that were preferred against her were justified because she allowed other people who were not entitled to those documents, to have them in their possession. Illogically he then explained that if she had given Mr Crause the final report and not the preliminary report, he would not have preferred these charges against her. It escapes all reason what difference it would have made if the report was final and not preliminary. Either it is considered as a “publication” of a document or it is not.

Mr Mphanya also admitted that he informed the Provincial Commissioner, Mr Mataka, that Ms Vosloo would be suspended. However, the reasons he had given to the Commission justifying her suspension did not correspond with those contained in the suspension letter. The suspension letter, although issued by Mr Nweba, was based on information supplied by Mr Mphanya. A perusal of the letter shows a clear contradiction. Ms Vosloo was suspended on the 11 March 2001 and was issued with a letter of suspension on the 11 March 2001. The reasons for her suspension are stated in the suspension letter at page 93 of Exhibit ‘J’, and reads as follows:

“The reason why this office is considering your suspension is due to the fact that your presence at the workplace might directly or otherwise hamper the investigation in which it is alleged that you supplied a prisoner with confidential information.

(sgd.) E M Nweba

Area Manager : Correctional Services St Albans.”

Despite all his attempts to justify the suspension letter, Mr Mphanya could not convincingly show that he either applied his mind properly to the request for suspension, or that he had set out the full reasons why she had to be suspended.

Mr Mphanya stated that he definitely said that Ms Vosloo's presence would hamper the investigation. However, when asked to show where in his report he referred to such, he could not show nor find a trace of such a statement in his report. This is a very important omission. Either Mr Nweba did not consider the true reasons for her suspension and acted *mala fide* or based his decision to suspend on information that was forwarded to him by Mr Mphanya orally and went outside the scope of the formal documentary evidence.

Despite Mr Mphanya's testimony that he indeed considered her presence as a factor that would hamper the investigation, in the absence of any such statement in his own report, one must infer from the circumstances, that Mr Nweba was either acting outside the scope of the document or was ill informed by Mr Mphanya that Ms Vosloo would hamper the investigation and that her presence should not be required on the premises. Bearing in mind that Mr Mphanya was the sole investigator in this matter and that the only other person he informed of any developments in the matter was Mr Mataka, it is reasonable to infer that the information could only have come from two members, either him or Mr Mataka. Mr Mphanya denied that he ever spoke to Mr Nweba and also denied that he spoke to Mr Mataka about the reasons why she should be suspended.

If one accepts the word of both Mr Mphanya and Mr Mataka that they did not supply Mr Nweba with information, then it is disturbing that the Department could suspend professional people like Ms Vosloo in such an arbitrary fashion. In the one instance, there is a letter from the investigator stating the reasons why she should be suspended, coupled with his testimony that he applied his mind to her suspension, and then on the other hand, there is the notice of the intended suspension issued by the Acting Area Manager, Mr Nweba, stating other reasons for the suspension. This indicates that the process clearly under the circumstances, was manipulated, if not by the two (2) individuals, then such instruction came from a higher authority and they acted on it without applying their own minds.

It is evident that Mr Mphanya dealt with the Vosloo matter incompetently and changed his versions as to the basis for her involvement in the Fanie de Lange matter so many times that it is impossible to believe that he acted *bona fide* and without malice.

When his competency and his ability to deal with disciplinary enquiries were scrutinized, it turned out that he had only conducted two (2) disciplinary enquiries namely, that of Mr Ben and Ms Vosloo, both working at St Albans Prison and that these two (2) cases were the only two matters that he had handled as an investigator.

It is therefore quite extraordinary that his services were sought after to the extent that he was specially requested from another province to come and deal with the two (2) matters. As Mr Mphanya neither had the experience to deal with disciplinary matters nor did he have a proven track record as an investigator, the question remains why his services were specifically solicited by Mr Mataka for the Eastern Cape. The only reasonable inference that can be drawn from the facts at hand is that he was prepared to follow instructions and be told who to charge and what charges to prefer against the individual.

Mr Mphanya showed that he lacks integrity and honesty and should not be involved in disciplinary matters of members in future.

7.3 Ms Maryke Vosloo

When Ms Vosloo testified before the Commission in September 2002 her status was that of a dismissed employee. Her dismissal, however, was on appeal and not been finalised despite the fact that she was dismissed on the 1 November 2001 and suspended since the 12 March, 2001.

In the main, it is not necessary to again summarise Ms Vosloo's evidence regarding the sexual harassment complaint in detail, as it is not so much the specific conduct of the sexual harasser as the abuse of a disciplinary process that is important. The disciplinary process will also not be dealt with again since it was extensively discussed when the conduct of Mr Mphanya was examined.

Ms Vosloo stated that she felt betrayed by the system. As a victim of a sexual harassment at the workplace, she found herself being victimised because she had chosen to remain in the Department and to challenge the decision of the Department not to institute disciplinary steps against her former Head of Prison, Mr Khoza. This decision to stay in the Department and not to resign led her to being targeted by a disciplinary system for conduct that she did not consider as wrong.

Her dismissal has had an enormous impact on her career path because she has been without a job since the finalisation of the disciplinary hearing. Even before the disciplinary hearing was held, she had already been suspended from office. In total, she has been denied the opportunity to work for two (2) years and three (3) months. She was not only harmed by being denied an opportunity to work as a professional person but the charges that were preferred against her were without any substance.

The impact of being denied the opportunity to continue with one's employment is clearly highlighted in the case of *Muller and Others v Chairman Minister's Council, House of Representatives and Others*,⁴⁵ which is of relevance here:

"The implications of being barred from going to work and pursuing one's chosen calling, and of being seen by the community round one to be so barred There are indeed substantial social and personal implications

⁴⁵ 1999 (2) SA 508 (C) at 523 B-C.

inherent in that aspect of suspension. These considerations weigh as heavily in South Africa as they do in other countries."⁴⁶

7.4 Mr Eric N. Nweba

In order to examine the managerial abuse in its entirety it is necessary to also examine the conduct of Mr Nweba, the presiding officer of the disciplinary hearing in the case of Ms Volsoo. It should be borne in mind that it was Mr Nweba who earlier exercised the discretion to suspend her on information that was submitted to him by the investigator Mr Mphanya.

A basic rule of natural justice and our administrative law is that any arbiter should be impartial in deciding a matter. Similarly in employment law, it is required that the presiding officer in a disciplinary hearing should not have been involved in the incident that gave rise to the hearing.

In the matter of Ms Vosloo, however, it is clear that Mr Nweba was very much part of the decision to institute disciplinary steps against the member, yet when he was requested to withdraw as presiding officer at the hearing he refused to do so and proceeded to hear the matter despite his prior knowledge of her misconduct. His persistence in presiding over the matter is inexplicable and procedurally tainted the fairness of the process. Mr Nweba, as a senior manager in the Department, should have known that he should have recused himself from hearing the matter against Ms Vosloo.

The only inference that can be drawn from his persistence in hearing the matter, even when an application was lodged that he should recuse himself, was that he was committed to preside in the matter come what may. It is therefore not surprising that Mr Nweba ultimately imposed the most severe punishment,

⁴⁶ *Op cit* at 523 B-C.

namely to dismiss Ms Vosloo, even though the evidence against her was flimsy and controversial.

In the light of the testimony of her own supervisor, Mr Delpport, during the disciplinary hearing who supported her conduct as being ethical and professional and the inability of the officials Mr Mataka and Mr Mphanya to justify her “wrongdoing”, it is necessary to draw the inference that the case against Ms Vosloo was predetermined and that the entire process was abused by the officials involved.

Although Mr Delpport’s testimony has been discussed earlier, it is also important to deal with the fact that he, as Ms Vosloo’s supervisor and as the line manager, was completely ignored and side-lined by the Department officials when a decision had to be taken whether she should be disciplined.

Mr Delpport was quite upset that he had not been asked to give an opinion on whether Ms Vosloo should be charged, as the matter concerned related to a professional issue, namely, whether a psychological report should be handed to a client by the psychologist. He considered the conduct of Mr Mphanya and Mr Mataka as contemptuous of his authority over Ms Vosloo as a professional person and expressed his dissatisfaction by writing two letters to Mr Mataka to inform him that he should have been the first to be consulted whether disciplinary steps should have been instituted against a professional colleague under his supervision. His dissatisfaction, however, had no effect or impact on the steps taken against her.

An examination of the Disciplinary Code of the Department shows that Mr Delpport was quite justified in being aggrieved by the conduct of Mr Mataka, Mr Mphanya and Mr Nweba. In terms of the Code⁴⁷, which deals with the authority to take

⁴⁷ See Clause 6 of the Department’s Disciplinary Code, that reads as follows:

disciplinary action, Mr Delpont should have exercised the authority to institute disciplinary action against Ms Volsoo, unless extraordinary circumstances existed that required that he be excluded as a line manager in making the decision. Throughout the hearing no such circumstances were ever tendered by any of the three (3) officials.

Mr Nweba challenged Mr Delpont during the Commission proceedings whether he was not part of the management system that had failed Ms Vosloo since he was her supervisor. Mr Delpont explained that he is indeed her supervisor and that he assisted her in her professional conduct with Mr Khoza but that a formal complaint was never lodged with him regarding her being sexually harassed. He was very surprised that both Mr Nweba and Mr Gaqa would consider him as her supervisor when they want him, together with them, to be collectively accountable for the Department's failure in assisting her as a harassed victim and employee, and yet he was excluded as a manager when officials wanted to institute disciplinary action against Ms Vosloo.

The way Mr Mataka, Mr Mphanya and Mr Nweba ignored Mr Delpont when a decision was taken to discipline Ms Vosloo, showed nothing but contempt for a fellow manager. Ms Vosloo's so called misconduct clearly related to a professional issue and Mr Delpont was the most suited person to decide whether disciplinary steps should be instituted against her. The manner in which he was

“Discipline is a line-management function. The Commissioner shall delegate powers to different levels of line-management for the application of discipline. In the normal course of events, the direct supervisor shall be responsible for disciplining employees under his supervision. The direct supervisor shall initiate the disciplinary hearing and the following level of supervision shall have the responsibility of chairing such hearing. The principle may not be compromised and supervisors and managers may not abdicate their responsibilities in this regard unless extraordinary circumstances are present (for example, the initiator was allegedly involved in the transgression, or is temporarily or permanently incapacitated for a reason (illness), or the Chairperson dies not dispose of the delegated authority to chair the hearing or was either involved in the incident or has prior knowledge of the detail of the incident or is temporarily or permanently incapacitated for a reason (illness), etc).”

ignored and denied the opportunity to exercise his authority shows that the officials were busy with a witch-hunt and wanted to charge Ms Volsoo irrespective whether she had acted within the ethics of her profession. It needs to be stressed that Mr Delpont also tendered evidence at the disciplinary hearing of Ms Vosloo but his opinion was ignored and Ms Volsoo was found guilty.

8. ANALYSIS

The disciplinary action taken against Ms Vosloo and her resultant dismissal were clearly aimed at victimising her, as there could have been no basis in law to dismiss her for the alleged transgressions. The entire disciplinary system was abused and used as a tool to victimise and frustrate a fellow employee. Her case is a classic example of how the Department's disciplinary process can be manipulated to bring about a desired outcome should anyone challenge those in senior positions.

The fact that she was the only sexual harassment complainant that remained in the Department and the manner in which the officials tried to charge her and dismiss her for something that was quite in accordance with her professional ethics shows the high level of intolerance for an employee attempting to challenge a superior.

The evidence showed that the provincial commissioner, Mr Mataka, had gone as far as to lie to the Commission when he stated that he never requested the services of a specific individual from the Northern Province to come and help him with the investigation against her. The evidence, documentary and oral, showed that he requested the services not only of someone but specifically Mr Mphanya. Besides the fact that Mr Mataka was not honest with the Commission he also showed that he lacked good judgment when he condoned the disciplinary action that was instituted against Ms Vosloo. Had he considered the true facts of the

matter, he as the most senior official in the province would have known that it would be malicious to institute disciplinary action against her.

The manner in which Mr Mataka pursued the disciplinary action against Ms Vosloo at all cost shows that he could only have acted with a malicious intent. The maliciousness of his conduct becomes all the clearer when all the factors concerned are considered. A line-manager was deliberately ignored in exercising his authority over a sub-ordinate, an investigator was imported to investigate the matter and a special initiator and chairperson were selected to hear the matter.

Mr Mphanya, like Mr Mataka lied to the Commission on how and why he got involved in the matter of Ms Vosloo. It is as clear as daylight that his services were specifically required because he had a specific role to play.

It is rather shocking that senior officials, like Messrs Mataka, Mphanya and Nweba, who were entrusted by the Department to ensure that all disciplinary action against employees take place in a fair manner, were prepared to throw all the principles of fairness and the procedures of the Department overboard in order to get even with a subordinate that dared to challenge them as managers.

The facts before the Commission have borne out that Ms Vosloo never stood a chance of receiving a fair hearing. Everything was well planned and directed from the investigation to the penalty that should be imposed.

Such abuse of power and manipulation of the disciplinary process reinforces the Commission's view that disciplinary enquiries are a major problem and challenge facing the Department. The Department needs urgently to focus on all the shortcomings of the process in order to ensure fair labour practices and re-instill a sense of discipline in the workplace.

9. RECOMMENDATIONS

It is recommended that:

- (a) Mr Mataka⁴⁸ and Mr Mphanya be charged with contravening Column A, Clause 4.3 of the Departmental Disciplinary Code in that they furnished false and misleading evidence to the Commission.
- (b) The Department should investigate the reasons why Mr Mataka, Mr Mapahanya and Mr Nweba usurped the functions of Mr Delpont and if no good reasons are forthcoming, then all three (3) should be charged for unsatisfactory work performance, for negligence and or failing to follow Departmental policies. (See Column B, Clause 2.1 of the Departmental Disciplinary Code)
- (c) The Department should also investigate why the appeal of Ms Volsoo has been delayed for a period of approximately two (2) years and charge those responsible for the delay for dereliction of their duties.

⁴⁸

At the time of writing this report, Mr Mataka was dismissed but his dismissal was still pending before the Bargaining Council.

CHAPTER 15

DISCIPLINARY INQUIRIES

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DISCIPLINARY INQUIRIES

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CHAPTER 15

DISCIPLINARY INQUIRIES

1. INTRODUCTION

This chapter focuses on the discipline of employees in the Department and the enforcement of the Disciplinary Code in the Department generally.

Discipline is the cornerstone of sound and effective management in any organisation. It is also the prerogative of management to ensure that there is effective discipline in any working environment.

The scholar, J. Grogan, in the following extract, places discipline in its proper context in the workplace:

“The employee’s duty to obey lies at the heart of the employment relationship. Obedience implies discipline, discipline implies rules and rules, to be effective, imply the power to impose sanctions on those who break them. Employers have a right, indeed a duty, to maintain discipline in the workplace.”¹

Setting standards of conduct for the workplace and initiating disciplinary steps against transgressors are the jealously guarded territory of managers everywhere, forming as they do, an integral part of the broader right to manage, or, otherwise referred to as “managerial prerogative”.²

According to Grogan the function of discipline in the employment context is to ensure that individual employees contribute effectively and efficiently to the goals

¹ See J. Grogan *Workplace Law* 7th Edition at page 90.

² See J. Grogan *Workplace Law* 7th Edition at page 90.

of common enterprise.³ Production and the provision of services are impeded if employees are free to stay away from work as they please, to work at their own pace, to fight with their fellow employees or to disobey their employers instructions. Hence, it is the right and duty of employers to ensure that their employees adhere to reasonable standards of efficiency and conduct.⁴

The workforce is considered to be an important component of any organisation and each organisation shall thus endeavour to maintain and improve the performance of its employees.

Employers have this right and duty regardless of whether the institution is a public service or a private enterprise.

2. DISCIPLINE IN THE DEPARTMENT

2.1 The Disciplinary Code

Like all other public service institutions, the Department of Correctional Services has its disciplinary code and procedure, which was adopted in the Departmental Bargaining Council, Resolution 1 of 2000 dated 23 February 2001. Among the issues agreed in terms of this Resolution, was the adoption of the Disciplinary Code, the Disciplinary Procedure, the Disciplinary Procedure Manual and the Suspension Policy.

Despite the existence of the Disciplinary Code, the Commission has found in almost all the Management Areas it investigated the disciplinary system in the Department is in a state of disarray. The Commission has heard evidence from

³ See J. Grogan *Workplace Law* 7th Edition at page 91.

⁴ For this reason, disciplinary action is regarded as a manner in which unacceptable or intolerable behaviour and/or unsatisfactory performance is addressed – See <http://butterworths.uct.ac.za/nxt.gateway> – accessed on 11 November 2005.

employees and senior officials in the Department who complained about the disciplinary system in the Department

Very early in the hearings, the Commission heard evidence of the Area Manager of the Durban-Westville Management Area, Mr Sibiya, who testified about the poor state of disciplinary matters in his Management Area. It is clear from the evidence submitted that disciplinary matters are not dealt with timeously and that disciplinary procedures are not adhered to by members of the Department.⁵

The complaints were, however, not only confined to management. Senior members of Popcru raised the fact that discipline and disciplinary hearings are a problem in the Department. The Commission also heard from a representative of the Public Servants Association, Mr Jordaan in Pietermaritzburg, that the PSA also shares the view that disciplinary hearings are problematic in the Department.

2.2 Failure to Institute Disciplinary Proceedings Timeously

The Commission's investigations in the various Management Areas reveal that a large number of complaints that were received by the Commission from Department members and inmates had in fact already been reported to the prison authorities.⁶ These complaints had been investigated and recommendations for disciplinary proceedings to be instituted against alleged transgressors were to be made by the designated investigating officials.

The Commission's investigations revealed that notwithstanding the recommendations, either no disciplinary hearing took place, or where it did, the charges were withdrawn on the basis that the Department had failed to institute disciplinary proceedings within three (3) months.

⁵ See Durban-Westville Exhibit 'GG'.

⁶ See Chapter on Treatment of Prisoners for more details regarding prisoners' disciplinary inquiries.

The Commission has found that there was a high rate of withdrawal of disciplinary charges in all the Management Areas the Commission investigated and that the majority of charges were withdrawn due to problems with the time frame.

It is the Commission's view that the withdrawal of charges due to time frames being exceeded has contributed significantly to the state of lawlessness and anarchy in the Department.

Clause 7.4 of the Department's Disciplinary Procedure provides as follows:

"The formal disciplinary hearing should be finalised within a period of thirty (30) days from the date of finalisation of the investigation. If the time frame cannot be met, the parties involved must be informed accordingly with reasons for the delay. If the employer, without good reason, fails to institute disciplinary proceedings within a period of three (3) months after completion of the investigation, disciplinary action shall fall away".⁷

The general sentiment among the members of the Department is that the disciplinary system in the prisons is very weak, if it has not collapsed completely. They attribute the problems with the disciplinary system to the managers. The Commission's perception is that managers are reluctant to discipline personnel because they do not want to lose popularity among their colleagues. The other perception is that managers who are members of the unions collude with transgressors, who happen to be their union colleagues, by failing to institute proceedings timeously, thus enabling the transgressors successfully to raise Clause 7.4 as a point *in limine* at the disciplinary hearings.

⁷ See *Government Gazette* No. 26 626 dated 30 July 2004.

2.3 Conduct of Department Officials

In almost all the cases in which this point *in limine* has been raised, it was the chairpersons of inquiries who upheld the point by allowing offenders within the Department to go unpunished, even though they had committed serious offences, which in some instances included murder.

The Commission has found that one of the factors that contributes towards the high rate of withdrawal of disciplinary inquiries within the Department, is the role played by the initiators/investigators and chairpersons of inquiries. These matters are sometimes delayed by both initiators/investigators who are tardy in finalising the investigations, and chairpersons who are slow to commence the hearings.

The Commission also noted that these officials, the initiators/investigators and the chairperson, do not account to anyone for their handling of the hearings. They would therefore find it easy to frustrate proceedings, knowing that they could do so with impunity.

The problem is further compounded by the role played by managers entrusted with overseeing the disciplinary system. Instead of monitoring and overseeing these disciplinary cases, they play a major role in destabilising the system.

The Commission has found that most of these disciplinary matters are thrown out due to time frames, simply because of the delay on the part of both the initiators/investigators and the chairperson. In most instances, these delays are as a result of corruption or negligence on the part of these officials, which is never investigated by the managers entrusted with overseeing disciplinary inquiries after the matters have been withdrawn. These managers should investigate why these matters have been withdrawn and why they have been delayed and thus, charges should be brought against those who deliberately delayed the disciplinary process.

The disciplinary system is further complicated by the fact that there is no definite procedure that is followed to ensure that the initiator has received the letter of appointments as an initiator which indicates the date and time and that such letter of appointment was received by the appointee. The problem seems to be that once the appointment is made, the initiator and the chairperson do not seem to be accountable to anyone for ensuring that the hearings take place timeously.

Furthermore, Clause 7.4 of the Departmental Disciplinary Code states clearly that if the time frame of thirty (30) days, within which a hearing must be finalised from the date of finalisation of the investigation, cannot be met, the parties involved must be informed accordingly of the reasons for the delay. The initiators have not used this proviso to their advantage. Instead, they have decided to ignore it. Even with the three (3) month period, Clause 7.4 states that action shall follow only if there is no good reason for the delay. However, in all the cases the Commission has investigated, it has been clear that the delay was caused by the sloppiness of the initiators.⁸

The Commission has found that the approach of the chairpersons in interpreting Clause 7.4, leans in favour of the employees. Managers in charge of discipline could possibly be charged with sabotage and/or failure to obey a lawful instruction to institute a hearing timeously, and/or in the performance of their duties. If this procedure is followed by the Department, it will prevent managers from deliberately delaying the procedure to favour a transgressor.

The cases investigated by the Commission show that some initiators are reluctant to exercise discipline because they sympathise with a transgressor. The lack of urgency and apathy with which members approach these disciplinary hearings reinforces the Commission's view that, for each disciplinary case that is withdrawn in terms of Clause 7.4, there should be an investigation into the cause.

⁸ See Chapters on Management Areas for specific references.

As the statistics below on disciplinary inquiries for the period 1999 until 2003 show, a high number of charges are being withdrawn against officials due to time frames. The number of outstanding or pending matters is cause for alarm. Some of the matters have been outstanding or pending for over two (2) years. It is without doubt that most of these matters will never reach conclusion and will run foul of the restrictions of Clause 7.4 in due course.

Another aspect, which arises, is the failure of the Provincial Offices to get directly involved in ensuring that disciplinary measures are put in place. Merely to request the Area Commissioner to implement measures/action plans, when it is obvious that failure to institute disciplinary hearings has reached shocking proportions, seems to the Commission to be an abdication of responsibility by the Provincial Offices.

One other observation the Commission has made regarding matters of discipline is that Area Commissioners and Heads of Prison never follow up on criminal charges that are laid against transgressors. Transgressors do not only get away with murder internally, but also criminally. Furthermore, in all nine (9) Management Areas that the Commission investigated, the Commission has never come across a transgressor who has been charged with any of the statutory offences created under the Correctional Services Act No. 111 of 1998. It is almost as if the offences created by the Act do not exist at all.

It is the Commission's view that where rogues escape discipline on the basis of Clause 7.4 of the Code, the Act could still be used to remove unwanted elements from the Department. Area Managers/Area Commissioners must be sensitised in order to maximise all the disciplinary tools at their disposal.

Even in cases where investigations have been timeously concluded and disciplinary inquiries commenced within the time frames, one normally finds that

at the conclusion of disciplinary inquiries, the sanctions imposed by presiding officers are commonly no more than warnings, even in serious matters.

3. ANALYSIS OF THE STATISTICS

3.1 Interference in the Disciplinary Process

Tables of statistics on disciplinary inquiries have been set out at the beginning of each section on this Chapter dealing with disciplinary matters in various Management Areas.

The trend in these statistics in respect of each Management Area is that the number of misconduct matters reported and those attended to during the period 1999 to 2003 is on the increase. The number of cases withdrawn because of the time frames is also alarming.

The Labour Court⁹ has recently noted that the time frames in Clause 7.4 of resolution 1 of 2000 for bringing disciplinary proceedings against employees as set out in the resolution was peremptory and binding on the parties. The Court accordingly found that the chairperson of the inquiry should have ordered that the charges against the employee had fallen away in terms of the resolution. His failure to do so, had to be reviewed and set aside.

In some Management Areas, such as Durban-Westville, there is confusion as to who appoints the chairperson of the disciplinary inquiries. One view is that the chairpersons are appointed by the Heads of Prison and the other is that they are appointed by Area Managers. The Commission has noted that there is no

⁹ *Van Eyk v Minister of Correctional Services and Others* (2005) 26 ILJ 39 (E).

coherent policy in this regard from leadership in this province and this is also evident from the result of these hearings.¹⁰

The Commission also noted that lack of skill and/or collusion in the appointment of chairpersons of various inquiries, has led to an undesirable outcome in different disciplinary hearings which have been held within the province and in particular, in the Durban-Westville Management Area.

It seems that for almost all offences which are committed by warders, the most common punishment that is imposed by Chairpersons is a written warning to the warder concerned. For example, in the case of warders who had been found guilty of having used excessive force, which led to the death of a prisoner, they were merely given a written warning.¹¹ This has happened in more than one inquiry. Similarly, warders who have been found guilty of committing fraud by producing false matric certificates, were merely given written warnings.¹²

In some Management Areas where intimidation is the order of the day, like the Pietermaritzburg Management Area, for example, the Commission heard evidence that managers are scared of chairing disciplinary cases.

Mr B.B. Mchunu, the Acting Head of New Prison in Pietermaritzburg, testified before the Commission that when attempts were made to discipline members of Mr Russell Ngubo's clique, investigators were threatened. As a result,

¹⁰ See First Interim Report in respect of Durban-Westville Management Area, page 54.

¹¹ See chapter on Durban-Westville Management Area and the inquiry that followed after the death of prisoner, Mr Cele.

¹² See First Interim Report in respect of the Durban-Westville Management Area, pages 54 and 55.

supervisors were reluctant to take disciplinary measures against members. Mr Mchunu testified that there is a huge backlog of disciplinary hearings dating back to 1996. Mr P.M. Ntuli also testified that the outcome of disciplinary inquiries was pre-determined in about sixty (60%) per cent of the cases and that the Department often failed dismally to do anything in response to ill-disciplined Popcru members.¹³

Several members in the Pietermaritzburg Management Area who were close to Mr Ngubo have also been represented by him at disciplinary hearings, even though Mr Ngubo was the Head of Corporate Services at the time and usually senior to the person chairing the disciplinary inquiry. However, the Commission noted that the disciplinary code states that a person can be represented by a fellow colleague and does not specify that the colleague cannot be a member of the management team. Among those whom Mr Ngubo represented were Mrs Malimela, Ms Khuzwayo and Mrs Zodwa Dandile. The Commission also heard evidence that Mr Ngubo carried a gun in a holster during the disciplinary proceedings.

In one of the cases, Mr Eugene Petrus Claasen was assaulted by five (5) members after he found them consuming liquor on the prison premises while they were on duty in December 1997. The members were suspended and disciplinary action was due to be taken against them. Mr Ngubo intervened and stated that the members accused of this assault should not be suspended, and the suspensions were lifted.

¹³ See Durban-Westville Transcript, Volume 13 at pages 1 397-1 398.

Mr Vusumuzi Geoffrey Ndlovu, the Assistant Head of Prison at Pietermaritzburg Prison, testified that he had suggested that the members be suspended immediately, but was subsequently in a meeting where the Provincial Commissioner, Mr Ntoni, stated that the prison should not suffer because of one white man's broken arm.

Mr Ndlovu also testified that the fairness of disciplinary inquiries was also compromised because almost all the managers see dockets for a decision to be taken, as to whether an inquiry should be held. However, if an inquiry is held, a manager has to be selected to chair the inquiry.

Mr Davids S'khumbuzo Mthethwa, who was the Head of Prison from February 1997, testified that he found on his appointment that there was no discipline within the prison. He complained that members were reporting at different times, absconding from duty during working hours, there was high-level smuggling, no morning assembly or roll call, and a major problem was that members were intoxicated while on duty.

The Pietermaritzburg Management Area is in a state of lawlessness and anarchy, intimidation has played a significant role in preventing management from taking disciplinary action against members.

In some instances, and in serious cases which warrant the dismissal of an employee, a chairperson who has no power to impose a sanction of dismissal is appointed to chair the disciplinary hearing. This is deliberately done by certain officers in management to protect the transgressor.

Even where there have been successful prosecutions of offenders in terms of the Disciplinary Code and convictions secured and a sanction of dismissal imposed, there is still the possibility of interference. This happened in the Bloemfontein

Management Area where forty-nine (49) employees who had been dismissed for evicting Mrs Molatedi by force, were found guilty and dismissed, but were reinstated on humanitarian grounds by the Provincial Commissioner, Mr Damons.¹⁴ The Commission noted that Mr Damons failed to appreciate the seriousness of the transgressions committed by these members and by re-instating them, he confirmed their belief that they were entitled to intimidate management in the manner they did.

The Commission noted that it appears that Mr Damons opted for the route of pleasing the members, whereas he should have applied the basic legal principles and upheld the earlier decision by Mr Dikane to dismiss these employees.

The Commission is of the view that such attitude towards discipline cannot be condoned and it is not conducive to restoring discipline in the Department and in particular, at Grootvlei Prison.¹⁵

3.2 Interim Report Recommendation

The Commission, in its First Interim Report on the Durban-Westville Management Area, recommended that a special task team should be set up to deal with all disciplinary matters, both those emanating from the findings and recommendations of the Commission, as well as all future disciplinary hearings.¹⁶

The Commission has pointed out that the Commissioner of Correctional Services is empowered to order so in terms of section 55 of the 1959 Act¹⁷ and the Disciplinary Code and Procedure of the Department, which were adopted in terms of Resolution No. 1 of 2000 dated 23 February 2001.

¹⁴ See Grootvlei Transcript, Volume 16, pages 1 468-1 469.

¹⁵ See Fifth Interim Report, Bloemfontein Management Area, pages 121-122.

¹⁶ See First Interim Report, Durban-Westville Management Area, page 55.

¹⁷ The First Interim Report was submitted in 2002, when the 1998 Act was not fully in operation.

In its Interim Report, the Commission made specific recommendations with regard to disciplinary inquiries. They were:

- “(a) It is the Commission’s recommendation that a special task team be set up by the Department to deal with those guilty of misconduct. The evidence before this Commission has shown beyond reasonable doubt that investigations and disciplinary hearings are hopelessly inadequate and that experienced people are needed to deal with misconduct in the Department;*
- (b) A special task team could also be formed in consultation and in co-operation within the independent organisations, which provides such services. Such a team would ensure that investigators, initiators and most of all the Chairpersons of the disciplinary inquiries are impartial and independent.”¹⁸*

The Commission made similar recommendations in the further Interim Reports already filed. In some instances, the Commission has recommended that people appointed as presiding officers should be legally qualified. However, the case of Mr I.S. Zulu of the Durban-Westville Management Area is a classic example of an appeal process which was riddled with irregularities. The Commission has therefore no doubt that it is not enough for a person to be just legally qualified to chair a disciplinary inquiry, even if he is from outside the Department.¹⁹ It is the Commission’s view that such legally qualified persons should be persons who are knowledgeable in the field of labour relations. Knowledge of labour law should therefore be made a requirement in the recommendation dealing with the appointment of chairpersons.

¹⁸ See First Interim Report Durban-Westville Management Area, page 61.

¹⁹ See Chapter on Implementation of Interim Reports for the Department’s response to the said recommendations.

In view of the high number of disciplinary cases withdrawn due to time frames, the Commission will recommend the amendment of the Disciplinary Code, which will give the Department the power to reinstate disciplinary cases withdrawn due to time frames.

Clearly the walkout by senior managers of the Department from the Commission hearings, namely Messrs Nweba and Mpemva, at the Port Elizabeth hearings²⁰

and also by Mr Nxele at the Cape Town hearings of the Commission needs to be dealt with decisively by the Department. This once again was a clear indication of the disrespect shown by senior managers. Effectively, it was insubordination in that they were disregarding instructions emanating from the Minister and the Commissioner of Correctional Services to co-operate with the Commission.²¹

Clearly this type of disrespect from senior civil servants should not be tolerated if this Department is serious about effective and clean governance.

A message needs to be sent to these officials that insubordination will not be tolerated by this government.

²⁰ Other junior members also walked out with them namely, Messrs Mpolweni, Titus, Spelman etc.

²¹ It could also be argued that it was not only the order of the Minister and the Commissioner of Correctional Services but also that of the President because the Proclamation authorising the setting up of the Commission was signed by the President of this country.

4. DISCIPLINARY INQUIRIES IN VARIOUS MANAGEMENT AREAS

4.1 DURBAN- WESTVILLE MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003²²

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	52	29	47	80	97
No. of misconduct matters attended to	317				
Nature of finalisation:					
▪ Dismissals	1	1	2	1	7
▪ Final written warnings	5	3	5	6	9
▪ Serious written warnings	3	2	5	6	9
▪ Warnings	13	3	10	16	14
▪ Verbal warning	26	18	7	24	9
▪ Withdrawn	2	1	13	18	36
▪ Not guilty	2	1	5	6	13

It is clear from the evidence presented and the investigations conducted by the Commission, that disciplinary matters are not dealt with timeously and that disciplinary procedures are not adhered to by members of the Department.

In all the Management Areas the Commission investigated, the Commission heard evidence from a number of employees and senior officials of the Department who complained that the disciplinary system is in disarray.

²² See Durban-Westville Exhibit 'ZZZZ'.

Mr Terence Moses Sibiyi, an Area Manager of the Durban-Westville Management Area, testified about the status of disciplinary matters in his Management Area. He said that the present disciplinary system that is used by the Department does not seem to have an effect on members since all the penalties have limited time frames and are of no real effect. Members are not deterred by these penalties except for dismissals.²³ The whole system in his opinion is very weak. Members who are disciplined do not improve, and instead they are getting worse. He said there is a total collapse of discipline since the demilitarisation of the Department.

Disciplinary procedures can easily be challenged by unions and cases are easily lost at the CCMA. This leads to members not being scared of committing offences, although some cases are lost purely through flawed procedures, due to lack of training and competence. Members under this disciplinary procedure cannot be compelled to testify against fellow members, especially if they are from the same union. The process can also be easily manipulated by any person at any given time. Some of the cases at arbitration are lost purely because the Department is always ready to settle the matters out of court.

Each Head of Prison is directly responsible for the disciplinary cases of whatever nature in his/her area. Other disciplinary cases falling directly under the Area Manager's authority, are those regarded as very sensitive. Upon consideration, the functioning of the institutions or the role played by them might be suspect.

Neutral chairpersons can be appointed from within a Management Area, or the services of other managers from within the province, can be utilised if needed, as per the agreement reached in various provincial management board meetings.

²³ See Durban-Westville Exhibit 'GG'.

After the appointment of functionaries the Area Manager does not in any way interfere with the proceedings until the finalisation of that case. The initiator in most cases is usually the very same person who investigated the case.

Mr Sibiya recommended that the Disciplinary Code currently used should be replaced by a more efficient one, and even suggested that the Department should go back to the militarised system, which was much more effective.

The monthly statistics on finalised disciplinary hearings for the year 2001 at both Medium A and Medium B reveal that the outcomes of these disciplinary hearings are either warnings ranging from verbal to serious warnings and the withdrawal of the cases due to time frames.²⁴ Even in serious cases like gross negligence involving the escape of prisoners and intimidation of officials, members are merely given warnings.²⁵ This is also supported by the statistics on disciplinary inquiries set out above.

In his presentation to the Commission, Mr I.S. Zulu, the PCO Functional Services, also identified the disciplinary system as one of the problem areas within this Management Area.²⁶ Mr Zulu found it very disturbing that unions interfere with the running of the province, as when Popcru marched to the PC Office and demanded the removal of Mr Zulu and other managers who had been actively involved in disciplining corrupt officials. As a result of this incident these officials were threatened and are now reluctant to conduct investigations or to chair disciplinary hearings. During the year 2001, there was an increase in escapes due to the fact that officials did the investigations and the chairing of disciplinary hearings in their own Management Areas themselves.

²⁴ See Exhibit 'GG' – Durban-Westville Management Area.

²⁵ See Chapter on Prison Security for more details on the lack of discipline when prisoners are assisted to escape from prison.

²⁶ See Exhibit 'T' Durban-Westville Management Area.

Mr Johan Boshoff, a senior shop steward at Durban Command of the Public Service Association, Vice-Chairperson of the PSA regional branch and an Executive Member of PSA at National Level, also identified disciplinary hearings and appeals as the most problematic areas in this Management Area. He stated that the biggest problem in the Department is the non-adherence to the Departmental policies in disciplinary hearings, grievances and feedback on request by means of reports written to supervisors in the Provincial Office.

According to him the norm at the Durban-Westville Management Area is to use any person as the chairperson or initiator in the hearings. No training is given to such officials beforehand. The result is that there is no consistency when members are sentenced. He gave as an example three (3) different members who were charged with the same or similar offences, namely, taking or receiving money from a prisoner's family. Different initiators and chairpersons dealt with all the three cases. The outcome was as follows :

- (a) Case 1 – Not Guilty;
- (b) Case 2 – Written warning; and
- (c) Case 3 – Dismissed.

This inconsistency is unfair towards members. He previously made a request to management to assign only certain members to disciplinary hearings to act as chairpersons and initiators of disciplinary inquiries. He indicated that such members should be trained to enable them to make consistent decisions. He further stated that because managers do not adhere to policy they create a loophole for members to abuse and use the system to their advantage.

He referred to the following example:

A member's case was finalised on 9 September 2001. He was found guilty, dismissed and put on suspension until the outcome of his appeal. His appeal was

heard on 26 October 2001 forty three (43) days after the case was finalised. The policy states that the appeal must be finalised within thirty (30) days. From 26 October 2001, until the day of Mr Boshoff's testimony before the Commission, no feedback had been received about the outcome of his appeal. According to the policy the chairperson must submit the minutes of the hearing in writing within ten (10) working days to the Labour Relations section at the Provincial Office. Within fourteen (14) days the Provincial Commissioner must make his recommendations. From 9 September 2001, until the day of the hearing, the member was on suspension, which caused financial hardship and mental trauma to the member. It is unfair that a member must suffer because managers do not adhere to the prescribed time frames of the disciplinary code. He thereafter made the following recommendations :

1. Ten (10) members must be identified to be trained as chairpersons/initiators to conduct disciplinary hearings. This will eliminate inconsistent recommendations and sentencing. It will also help to get rid of the corrupt members who hide behind their union affiliations.
2. Heads of different departments must be made aware of the policies regarding disciplinary hearings, grievances, dismissals, appeals etc. Time frames must be adhered to at all time. If not disciplinary steps must be taken against them.

The investigations of cases of misconduct are also manipulated by senior officials. One example is the case of the warders who assaulted a prisoner, Mr Alphius Cele, who later died. Mr Breytenbach was initially appointed to investigate this matter and instructed by Mr I.S. Zulu to stop the investigations, which according to him were thereafter conducted by a junior official.

The end result of this inquiry was that the members who were involved in the assault of this prisoner got away with warnings. The disciplinary hearing in this

matter was chaired by Mr Madondo of Sevontein Prison, who had never chaired a disciplinary hearing involving assaults before. Evidence also revealed that the same Mr Madondo chaired an inquiry involving a warder who had a false matriculation certificate and who was found guilty but only given a warning.

This is a clear indication that some of the members of the Department who chair disciplinary hearings do not appreciate the seriousness of the offences involved.

It is not only the lack of experience of members involved in disciplinary hearings that impacts negatively on the morale of members. By not dismissing members who commit serious transgressions, the message is sent out to the rest of the members that they can proceed in their wrongdoing because nothing will happen to them.

There are further examples which have already been dealt with in the interim reports²⁷ where senior officials of the Department failed to take necessary actions against officials who had been investigated and the results of such investigations recommended that certain officials to be charged. In this regard the Commission refers to the cases of Mr C.V. Shezi, the Deputy Head of Durban-Westville Management Area, and Mr B. Mbatha, the Head of Management Services, who failed to act on the recommendations of Mr Tyron Baker that Mrs Amitha Govender be charged internally. This has been dealt with in the interim report referred to above.

²⁷ See First Interim Report Durban-Westville Management Area Pages 49 – 51.

4.2 PIETERMARITZBURG MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003²⁸

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported		13	10	16	26
No. of misconduct matters attended to		12	10	16	17
Total suspended		0	1	0	4
Nature of finalisation:					
▪ Pending		1	0	0	9
▪ No disciplinary steps due to lack of evidence		0	0	0	7
▪ Cases withdrawn due to time frames		2	1	0	0
▪ Not guilty		4	6	0	2
▪ Verbal warnings			0	0	0
▪ Written warning		5	1	7	2
▪ Serious written warning		0	0	7	1
▪ Final written warning		0	1	2	0
▪ Dismissed		0			1

The Commission has already indicated above that the atmosphere at the Pietermaritzburg Management Area was characterised by fear, intimidation, corruption and threats. As a result of the intimidation and fear, officials in this

²⁸ See Pietermaritzburg Exhibit 'Z'.

Management Area are afraid to conduct proper investigations and chair disciplinary hearings.

Mr Philemon Ntuli, who was employed by the Department as a Provincial Liaison Officer, also expressed concerns about the disciplinary system in the Department.

In his testimony before the Commission,²⁹ he stated that some disciplinary actions were not carried out properly. People were acquitted because of a lack of professionalism in investigations or because of a lack of capacity and training of presiding officers. According to him the outcome of most of the disciplinary inquiries was pre-determined, as chairpersons of inquiries would be briefed beforehand by certain managers to discharge, acquit or warn the accused. Approximately sixty (60%) per cent of these disciplinary inquiries were pre-determined.

Mr Ntuli also referred to the prisoner, Mr Cele, who was assaulted and died in prison. Mr Breytenbach, who initially investigated the matter, was replaced by one Mr Mkhize, who was junior official, on the instructions of Mr I S Zulu.

Mr Bux Jordan, who is an executive member of the PSA, in his submission before the Commission also raised serious concerns about the disciplinary system in this Management Area.³⁰

According to him, the trend in the investigation of cases of misconduct involving members is that they take too long to be finalised. He is of the view that the investigators did not get the necessary training, and that even initiators require more training.

²⁹ See Transcript Page 43 – Durban-Westville Management Area.

³⁰ See Exhibit 'U' – Pietermaritzburg Management Area.

He testified that since 1994 there were one hundred and twenty six (126) members investigated and charged for escaping, but until he testified in 2002, only forty six (46) cases had been finalised.

He indicated that the problem is that although policies are negotiated within the Department where Popcru and management and the PSA are role players, the PSA is outnumbered by Popcru. A further problem they had with the hearings was that, for example, when an initiator gets appointed, he is only a correctional officer grade 1, while the chairperson is a senior correctional officer, and when the member arrives his representative is a Deputy Director or Director. The result is that the member gets a lenient sanction compared to a well-balanced hearing where a member will be dealt with severely but fairly.

Mr Jappie Benjamin Thabo Chaka, who is employed by the Department as a Labour Relations Officer, in his evidence referred to the case of Ms Z. Dandile, who was represented by Mr Russell Ngubo in a disciplinary hearing while Mr Ngubo was the Head of Corporate Services in the Pietermaritzburg Management Area. He believed that it was not healthy for the Department that Mr Ngubo, as a senior official, forming part of management, should represent employees at disciplinary inquiries.

Mr Dumisani Johnson Makhaye, an Area Manager of the Pietermaritzburg Management Area also identified the disciplinary system in the Department as problematic. In his testimony, he indicated that the disciplinary system currently used by the Department does not have the desired effect as the sanctions that are imposed are not effective. He identified the lack of a review mechanism within the Area Manager's jurisdiction as another problem in the disciplinary

system. He said that there was a high number of outstanding cases in this Management Area, which is due to a number of factors, including that managers are fearful of hearing disciplinary cases. According to him, the backlog is largely due to the rampant intimidation in this Management Area. Further factors contributing to this large backlog are previous incidents in which decisions were overturned by the Provincial Office without following the correct procedures and without the necessary consideration of available facts.

This led to the belief by managers that they were not valuable and decisions would be overturned by one person at the Provincial Office. He also identified the problem of collusion by senior management with subordinates and stated that this defeated the whole exercise of disciplining members. He also mentioned as a problem the continuous sit-ins by personnel after the implementation of the directive from Head Office to suspend members for escapes.

Another incident was that of assault of a senior officer by junior members at work. The members were suspended but Mr Ngubo interfered and demanded that the Area Manager lift the suspensions. He also complained that Mr Ngubo, while Head of Human Resources, represented subordinates at disciplinary hearings, which is in direct contradiction of his responsibilities.

He also testified that due to continuous disciplinary problems, the then Provincial Commissioner, Mr Ntoni, ordered an intervention by Brite Future Consultants, a team of psychologists, in 1997, to look at the problems and to make recommendations. According to him, a report was compiled but nothing came of it as the recommendations made in that report were not acted upon.

4.3 BLOEMFONTEIN MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003³¹

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	40	136	59	99	40
No. of misconduct matters attended to	28	121	53	92	39
Nature of finalisation:					
▪ Dismissals	1	1	2	8	14
▪ Final warnings	7	94	7	3	2
▪ Serious written	1	0	2	2	0
▪ Serious written warnings	6	4	5	6	3
▪ Verbal warnings	2	5	15	9	9
▪ Performance counseling	2	10	13	8	1
▪ Withdrawn because of time frames, etc	21	21	17	63	13

Although the Commission did not hear detailed evidence regarding problems relating to disciplinary hearings in this Management Area, two (2) disturbing incidents involving the Provincial Commissioner are worth mentioning.

The November 1998 to February 1999 recruitment drives in this Management Area, left a lot of people in the area dissatisfied. The first incident relates to the

³¹ See Bloemfontein Exhibit 'F'.

conduct of an official, Mr M.S. Kosana, who was employed by the Department as the Provincial Head: Personnel Provisioning, during the recruitment drives.³²

The second incident relates to the manner in which Mr Damons, the Provincial Commissioner, dealt with the forty-nine (49) employees who had been dismissed for evicting Ms Molatedi, the Area Manager, by force. Mr Damons re-instated the forty-nine (49) employees on humanitarian grounds, which was a clear indication that he did not appreciate the seriousness of the transgressions.

Both these incidents are dealt with in the Commission's Fifth Interim Report, Bloemfontein Management Area.³³

(a) Recruitment 1998 – 1999

In respect of the complaint relating to the recruitment drive, Mr Damons conducted his own investigations relating to the complaints lodged against Mr Kosana. It is clear from Exhibit 'A47' in the report by Mr Damons, that he did not accept most of Mr Kosana's explanations regarding the irregularities committed during this recruitment drive where he did not recuse himself in the interviews involving his relatives, who were subsequently appointed.

Mr Damons failed to act against Mr Kosana. No disciplinary action was taken against Mr Kosana despite the fact that he committed serious misconduct during the recruitment drives. There is no reasonable explanation in the report prepared by Mr Damons (Exhibit 'A47') why he did not take appropriate action against Mr Kosana.

In the last paragraph of his report, Mr Damons mentioned that Mr Kosana should be careful and that he should see to it that his mistakes are not repeated. This

³² See Fifth Interim Report for recommendations regarding the transgressions committed by Mr M.S. Kosana.

³³ See Fifth Interim Report Bloemfontein Management Area pages 72 and 121.

was no more than a kind of warning, despite the seriousness of the offences committed by Mr Kosana.

(b) Reinstatement of Employees

The second incident, which is more serious, relates to the re-instatement of the forty-nine (49) employees on humanitarian grounds by the Provincial Commissioner when they had been dismissed following a properly constituted disciplinary inquiry presided over by Mr Bikane.

In respect of these employees, it is necessary to quote the result of the appeal hearing as set out in Exhibit 'A56' of the Bloemfontein Management Area prepared by Mr Damons.

The findings of the Appeal hearing reads as follows :

- "1. The purpose of this communication is for you to inform the above officials of my decision of the matter.*
- 2. It is common cause that the above officials stationed at or under the control of the Grootvlei Management were formally disciplined for their alleged participation in an unprotected strike at Grootvlei as well as the unlawful occupation of the area manager's office and the intimidation of her and her staff by some of these officials from 30 March 2000 to 3 April 2000. It is also common knowledge that unprotected strike actions in the Department of Correctional Services, as an essential services organisation, establish clear grounds for dismissal in terms of labour legislation as well as Department of Correctional Services disciplinary code.*

3. *These officials then submitted an appeal application against their convictions and the penalties of either dismissal or final warning that were issued pursuant thereto.*
4. *In my capacity as final adjudicator in this appeal procedure, I made a comprehensive study of the minutes of the hearing a quo as well as that of the appeal facilitation procedure. Due to the serious implications of these proceedings, I deemed it proper to focus on the question whether procedural and substantive fairness is reflected in these minutes with reference specifically to the individual appellants.*
5. *A number of deficiencies were identified by myself relating to among others, the drafting of charges, individualization of their appellants and the formats of the findings and penalties. The deficiencies however were not found to be material and the results of the hearing a quo are consequently fair and valid. The decision on the merits I have made in conjunction with the PCO : Corporate Service, PH Legal Services and PH Labour Relations.*
6. *Having now had the opportunity to consider not only the merits of this hearing, but also relevant extrinsic factors, my final decision on the matter is that the appeal of the appellants as per attached name list is turned down with regard to charge 1 which in effect means that the final warnings issued to the appellants in the hearing a quo remains. The appeal in terms of charges 2 and 3 is upheld.*
7. *I need to reiterate that my decision to issue only final warning to the relevant officials is not based on the merits, but on factors such as leniency and belief that the relationship between the employer and employee in this instance is not irretrievably broken down, but that there is yet fruitful employments future between DCS and the*

officials. I have also taken into consideration that other legal remedies have already been employed by DCS to normalize the employment situation of Grootvlei. The fact that these officials have also experienced a lengthy period of trauma in terms of the uncertainty of their futures, have likewise played their role in my decision.

8. *Please inform the officials without delay of my decision as per paragraphs 2 to 7.”*

The minutes relating to this appeal hearing as set out in Exhibit ‘A56’ do not support the findings made by the Provincial Commissioner in re-instating these employees.

The conduct of Mr Damons, the Provincial Commissioner, in this regard clearly amounts to an abuse of his power. It is clear that in dealing with the appeal, he did not apply his mind to all the relevant facts properly placed before him. Instead of applying his mind, he applied his heart and became more sympathetic towards these members.

In paragraph 5 of his appeal findings, he states that the deficiencies therein were not found to be material and that the results of the hearing *a quo* are consequently fair and valid. He further states that the decision on the merits was made in conjunction with PCO Corporate Services, Provincial Head: Legal Services and Provincial Head: Labour Relations.

Despite the fairness and the validity of the disciplinary hearings, he still upheld the appeal. The decision on the merits was not his alone, as the appeal chairperson, but of other officials too. Mr Damons abdicated his responsibilities

in this regard, and his conduct makes a mockery of the whole disciplinary system in the Department.³⁴

4.4 NCOME MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003³⁵

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	64	72	114	72	41
No. of misconduct matters attended to	64	72	113	72	41
Nature of finalisation:					
▪ Dismissals	6	3	6	3	3
▪ Warnings	14	4	8	7	2
▪ Final warnings	3	1	15	7	4
▪ Withdrawn	13	7	13	7	20
▪ Not guilty	8	9	12	7	7
▪ Informal/verbal warnings	20	48	59	41	5

The collapse of the disciplinary system at Ncome Prison has been marked by the withdrawal of assault cases against a large number of members who were involved in the assault of prisoners on 4 January 2003. This section is also dealt with more fully in Chapter 24 of this report dealing with Management Areas. A large number of prisoners at Ncome Prison were seriously assaulted by warders

³⁴ See also the Chapter on Prison Security where Mr Mataka, the Provincial Commissioner Eastern Cape, reinstated a member who assisted a prisoner to escape.

³⁵ See Ncome Exhibit 'BBB'.

on the said date. The assault was of such a nature that it received high publicity from the media, NGO's, political parties, human rights organisations and the members of the public at large.

To the dismay of everyone concerned about the serious violation of prisoners' rights during this assault, the charges against all the warders involved were withdrawn due to a lack of adherence to the time frame clause.

The withdrawal of charges against the members due to time frames is not only confined to Ncome Management Area but is a common phenomenon in all the Management Areas the Commission investigated.

Clause 7.4 specifically provides that if the time frame cannot be met, the parties involved must be informed accordingly with the reasons for the delay.

Mr H.P. Human, Director of Labour Relations, has noted that the problem with the Department's Disciplinary Code and Procedure is not the code and procedure but rather the imperfect application thereof. There can be a variety of reasons for the imperfect application of the code ranging from a manager not being properly equipped and empowered to exercise discipline, the use of the disciplinary system to victimise an employee or an employee/manager deliberately bedevilling the procedure. In some instances it may also be the reluctance of a manager to discipline a member because he/she might be afraid to lose popularity with the personnel. Mr Human also noted that it is unfortunate that the training and development of employees in the Department has over the past few years not received the attention it deserved. This includes training in labour relations and specifically in employee discipline.

Mr Human also noted that the Code clearly provides that if the time frame cannot be met, the parties involved must be informed accordingly of the reasons for the delay. He pointed out that the purpose of this is to get management to

communicate with the unions and to force an understanding of why the employer could not start with the hearing on time. According to Mr Human, history has shown that management conveniently neglects to liaise with the unions and conflict is the inevitable result.

Mr Human conceded during his testimony that it can be accepted that an element of mismanagement, negligence or deliberate malicious intent could be present. A lack of will to deal effectively with disciplinary hearings could also be present. Mr Human recommended that as a major aim of curbing misuse and abuse an option could be to request the Provincial Commissioner and Area Managers to collect information about and monitor every case that is withdrawn and to obtain and forward a full motivation of the situation to the next level of authority.

The Commission observed that this has been done in the Leeuwkop and Johannesburg Management Areas where investigations were conducted regarding cases withdrawn due to time frame and as a result of such investigations disciplinary action was recommended against the officials who were involved.

The circumstances surrounding the assault of prisoners at Ncome Prison on 4 January 2003 are fully dealt with elsewhere in this report.³⁶

With regard to the disciplinary hearing, the Department instituted an investigation into the alleged assaults by various members on prisoners incarcerated at Ncome Prison Medium 'A'. The findings and the recommendations of these investigations are fully set out in the report dated 29 January 2003 on pages 19 – 23 of Exhibit 'D2' Ncome Management Area. It would be useful to quote verbatim the findings and the recommendations made by the investigating team:

³⁶ See Chapter on Ncome Management Area for more details.

FINDINGS

It has been found that :

- 1. On 4th January 2003, Mr Buthelezi was phoned by one of the members working first watch night duty at C Section informing him that the prisoners were sharpening the homemade knives inside the cells.*
- 2. Mr Buthelezi organised the searching to be conducted at the prison.*
- 3. While Mr Buthelezi was asking/addressing members prior to the searching, a question was posed by a certain member to him, asking if they will be protected as members, should prisoners get assaulted, as he, the Head of the Prison had said that prisoners were undisciplined, and Mr Buthelezi's response was that they were going to be one hundred (100%) per cent covered.*
- 4. After addressing members they all proceeded to 'C' Section.*
- 5. The searching was conducted and all prisoners were assaulted in that Section. Thereafter the members moved to 'A' Section where all prisoners were also assaulted and forced to undress.*
- 6. From 'A' Section, the members moved 'B' Section where Cell B152 and B153 were searched. All inmates in those cells were assaulted whilst naked.*
- 7. The female members were involved in searching in all sections and the prisoners were forced to parade naked in the presence of those female members.*

8. *There is no proof that prisoners were not co-operating, rebellious or provocative which warranted the use of any force by the members.*
9. *There is no substantial proof that offenders assaulted members although it is possible that some of the members accidentally, sustained minor injuries.*
10. *It is not true that there were any weapons or unauthorised articles which were found during the searching in that there are contradictions between the statements by Mrs Ndzukula and Sithole (as leaders of the searching operation) on the one hand and that of Mr Buthelezi on the other.*
11. *Most of the members' statements were not reliable in that they contradicted one another and they are not divulging the information as required.*
12. *Some members did admit that prisoners were indeed assaulted and paraded naked in the presence of female members. They further stated that prisoners were un-provocative. (sic)*
13. *Mr Mdluli of Saphor did come to Ncome Prison and addressed the prisoners on 7th January 2003, where he instigated prisoners not to see the Departmental visiting doctors, as he the doctor – would connive with the prison officials to cover up. Mr Mdluli promised to arrange his doctors from Durban as a result the prisoners refused to have their injuries treated by the local visiting doctor. Mr Mdluli further called members “criminals” and that he would like to see the members wearing green prisoner’s clothes as prisoners. Mr Mdluli also made remarks that “why female members are not making*

sexual advances to prisoners to ... them, if they had such desire to assault them”.

14. *Staff meetings are not held on regular basis as prescribed and even though that way conducted members were not sympathised with regards to assault on prisoners.*
15. *No concrete evidence that there was a plot to discredit the Head of Prison.*
16. *Mr Buthelezi did all he could to report the incident in time.*

RECOMMENDATIONS

1. *The members listed on pages 20 – 22 inclusive of Exhibit ‘D2’ be charged for assault in terms of the disciplinary code transgressions.*
2. *The Head of Prison Mr F.B. Buthelezi, be charged with gross negligence in that :*
 - 2.1 *he did not ensure proper control over the members when conducting the searching;*
 - 2.2 *he did not ensure that keys or profiles were signed for before distributing it to members;*
 - 2.3 *he did not personally supervise members when searching was conducted and did not prevent members from assaulting prisoners;*

2.4 *he did not compile a comprehensive name list of the members who participated in the searching on 4 January 2003; and*

2.5 *he did not sensitize members on assaults during monthly staff meetings.*

3. *Mr F.F. Ndzukula be charged with gross negligence in that :-*

3.1 *he allowed members to assault prisoners in his presence;*

3.2 *he did not ensure that all female members did not search male offenders or ensuring that female members were out of sight of naked male offenders.*

3.3 *he did not ensure that members under his control throughout the searching adhered to the directives related to searching of members;*

3.4 *he did not intervene when noticing that members were out of control.*

4. *Mr V.I. Sithole be charged with gross negligence in that :-*

4.1 *he failed to adhere to searching directives by allowing female members to conduct strip search on male offenders;*

4.2 *he did not sign for keys used during unlocking of cells;*

- 4.3 *he did not prevent members from assaulting and not calling off the searching operations when noticing that members went out of control.*
5. *Mr V.I. Sithole also be charged with transgressions of disciplinary code in that as he as a senior officer participated in the assaulting of offenders himself.*
 6. *It is further recommended that he matter be referred to the SAPS for further investigations.*
 7. *It is also strongly recommended that Mr Mdluli of Saphor not be allowed access to prisoners in future as he instigated inmates unnecessarily to disobey rules and to undermine officials.*
 8. *It is also recommended that the Head of Prison Mr Buthelezi, as well as Mr Sithole, be reshuffled from their positions as they are incompetent.*
 9. *It is also recommended that a circular be issued to the station to sensitize officials that members of the opposite gender to inmates should under no circumstances search such prisoners and as a privacy and dignity of offenders must always be respected as stipulated in DCS Act No. 111 of 1998 Section 27.3 and see SVO Order to Chapter 14 paragraph 2.3.1 and 2.3.3.*

It is clear from the findings contained in this report that in organising the search to be conducted at the instance of the Head of Prison, Mr Buthelezi, assault on prisoners was contemplated as Mr Buthelezi offered to protect members should prisoners get assaulted.

It is also evident from the findings of this report that the dignity of the prisoners was not observed as they were naked and were forced to parade naked in the presence of female members.

It is also clear that no reason existed for the assault of these prisoners, as there was no proof that they were not co-operating, rebellious, provocative or doing anything else that might have warranted the members to use force. The investigating team's report recommended that a total of sixty six (66) members should be charged with assault in terms of the Department's Disciplinary Code.

In addition to the members referred to above, the investigating team also recommended that three (3) senior members should also be charged with gross negligence in terms of the Disciplinary Code. These members are Mr F.B. Buthelezi who was then the Acting Head, Mr F.F. Ndzukula and Mr V.I. Sithole, who were in charge of the searching operation.

Mr Vusumuzi Sydney Hlatshwayo, the Area Manager of Ncome Prison, who assumed duty on the 1 November 2003, testified that he was involved in the withdrawal of the charges relating to these assaults. In his evidence he testified that at their board meeting at the Regional Office, it was decided that cases falling outside the three (3) months period should be withdrawn. This decision related to all cases including the assault cases.

He further testified that a memorandum came from the Head Corporate Services that the cases should be withdrawn due to insufficient evidence. He, however, stated that he only partially went through the investigation report because it was too thick and he did not read the prisoners' statements, nor did he read the medical reports. The decision to withdraw the assault cases and other related cases was not his decision solely but that of the Management Board.

He also testified that no members who were involved in these assaults were charged criminally although the matter had been referred to the SAPS.

According to Mr Gabriel Gerhardus Smit, the Head of Human Resources and also Acting Head of Corporate Services, the Area Commissioner did not put it clearly why these cases were withdrawn. The investigations of these assault cases were conducted by officials from the Provincial Office. The team had very little time within which to finalise the investigations and there was a lot of pressure on them. According to Mr Smit, there were omissions in their investigations and the findings and recommendations were made without facts to support them. There were also disputes as to who should deal with these disciplinary inquiries. A further fact, which hampered the disciplinary inquiries, was that some members and prisoners were transferred to other prisons because of the drought at Ncome Management Area. According to him, the shortage of water at Ncome Prison was more important than these disciplinary inquiries. Some of the prisoners had also changed their versions and stated that they had not been assaulted. He did, however, concede that assaults of this nature were dismissible offences in terms of the disciplinary code and that the drought could have been used as a good cause for the delay as contemplated in clause 7.4 of the Disciplinary Code.

Mr Smit said he had submitted a memorandum to the Area Commissioner that the charges against these members should be withdrawn because they had been outstanding for a long time and it seemed that these cases would not be finalised.

Amongst the factors cited by Mr Smit in his memorandum³⁷ in support of the withdrawal of these assault cases are the following factors:

³⁷ See Exhibit 'D1' Ncome Management Area.

- “3. *Soon after the decision was taken to institute disciplinary action and disciplinary panels were appointed (‘consisting of members from other management areas), the water problem at Ncome began and after several emergency meetings groups of prisoners were transferred elsewhere including prisoner involved in the assaults.*

4. *When the appointed initiators all of whom from other management areas began with the preparations for the hearings they discovered that the investigations were incomplete. After several weeks we received a complete copy and distributed it to various initiators. Unfortunately the initiators also complained about the quality of the investigations and the requested more information from the investigating team, which they did not receive in many cases. When some of the initiators began with the hearing they found that some of the witnesses were transferred away or that the accused themselves were also transferred. In some cases, prisoners were returned to Ncome, only to indicate to the Chairperson that they are no longer willing to give any evidence against members. Statements to this effect were taken from them.*

5. *During 1 October – November 2003 several of the initiators and chairpersons were on study leave and during December some were on vacation leave and all the hearings were delayed again.*

6. *In January 2004, some cases resumed, but only to be postponed indefinitely as both initiators and chairpersons were still waiting for information from investigators, prisoners as witnesses were not being made available or they themselves being committed elsewhere. Until now the hearings have not yet been finalised. In some cases initiators are still waiting for information from the investigators.*

7. *This matter was delayed for a long time and will result in argument over time frames. Members are entitled to speedy finalisations of their hearings and in this case it was not possible. This office therefore recommends that the cases against all accused employees be withdrawn due to time frame.”*

This memorandum is dated 4 May 2004. The then Area Commissioner, Mrs Mthembu, has noted in the same memorandum that she concurs with the recommendation that these cases should be withdrawn due to time frame problems. She further recorded that it would be appreciated if this decision was communicated to all affected officials. The Area Commissioner signed this memorandum on 25 May 2004.

It is clear from the investigation report that investigators completed their investigations within a period of less than a month. In paragraph 5.8 of the recommendations the investigating team recommended that the Head of Prison Mr Buthelezi as well as Mr V.I. Sithole be re-assigned as are they are incompetent.

The Area Commissioner Mrs Mthembu approved all the recommendations made by the investigating team. However, her comment in the recommendation was that it is difficult for the Area Manager to concur with paragraph 5.8 at this stage as Ncome was experiencing a shortage of managers. The Area Commissioner, in signing approval of the recommendations, did not date the approval.³⁸

Mr Vusumuzi Petros Jiyane, who was one of the investigators, confirmed in his evidence that the investigations commenced on 8 January 2003 and was completed on 23 January 2003 as they were given three (3) weeks within which

³⁸ See Exhibit 'D2' Ncome Management Area.

to finalise the investigations. He however, could not state when the report was handed over to the Area Commissioner, Mrs Mthembu.

The view was expressed by Mr Engelbrecht, the Regional Commissioner for KwaZulu-Natal, that since the investigations were instituted by the Provincial Office it should have been the Provincial Office and not the Area Commissioner who should have dealt with the withdrawal of the charges against the members in the assault cases. According to him, Mrs Mthembu had no power to withdraw the charges.

Various presiding officers and initiators were appointed from various parts of the province to institute and preside over these disciplinary inquiries. In their testimony they enumerated a number of problems they had encountered that caused the delay in finalising these assault cases. Some presiding officers and initiators came from as far as Glencoe, Eshowe and Umzinto and expressed concerns about the distances they had to travel. They were of the view that initiators and chairpersons from nearby areas could have been appointed to deal with these matters.

They also indicated that in some instances the investigations were not complete and they requested further information, which was not forthcoming from Ncome Prison. They referred to correspondence, which was not replied to, requesting further information.

Mr Jacobus Taljaard, for example, in his testimony testified that he was not even approached before he was appointed the chairperson of the disciplinary hearings.

In some cases, they pointed out that the statements of witnesses were not incorporated in the documents furnished. In some instances, like in the case of Mr Mboneni Majola who was appointed as an initiator, an initiator found, when he

read the statements contained in the documentation, that the accused member was not implicated at all in the assault.

Mr Benjamin Thabo Chaka, who is employed by the Department as a Regional Co-Ordinator Employee Relations and Discipline and is stationed at the Regional Office, testified that one of his duties is the keeping of statistics for disciplinary inquiries and appeal hearings. He testified that when he requested statistics from Mr Smit of Ncome, he was advised that the problem lies with one hundred and twenty (120) members, who were involved the in assault cases, which he had requested be withdrawn due to the time frame. He was also advised that some of the initiators in the assault cases had to withdraw because the investigations were not completed. It was his view that the power to initiate the proceeding and the power to withdraw the charges lay with the Provincial Office and not the Area Commissioner. He found the statistics in cases withdrawn due to time frame at Ncome Prison shocking.

Mrs Mimie Mthembu, the former Area Commissioner of Ncome Prison, testified that she appointed both the initiators and presiding officers in respect of the disciplinary hearings involving the assault of the prisoners. According to her, she based her appointment of the initiators and presiding officers on their experiences.

She only received correspondence from one initiator, which was referred to the investigators. She did not remember receiving any other correspondence from any other initiators. In the correspondence she received, the initiator alleged that there were no statements in his documents.

She, however, confirmed receiving the report of the investigating team and making a comment on it before signing it. She received a copy of the report from the Provincial Office in July 2003 and she referred it back to the Provincial Office in August 2003. According to her this report was incomplete at that time. There

was no decision taken by the Provincial Office and the statements contained therein were not signed. Her office then sent it back to the Provincial Office. Although she was expected to read the whole report, she did not do so. All the typed statements by members and the complainants were not signed and she could not read the handwritten statements, as they were not clear.

Mr Smit stated that it is the responsibility of the Head of Prison to institute disciplinary hearings after investigations and in this case both the Head of Prison and the Area Commissioner became involved. According to protocol, the Head of Prison must inform the Area Commissioner of the search before hand and in this case there were allegations that the Area Commissioner was also involved. The investigation report should have been signed by Mr Gillingham, the then Provincial Commissioner, and it remains incomplete until he has signed it. According to Mr Smit, as the investigations had not been signed by the Provincial Commissioner, they had not been finalised.

The finalisation of these cases was affected by the transfer of prisoners due to drought. Mr Smit could not explain, however, why Mr Buthelezi as Acting Head was not charged in terms of the recommendations as no witnesses were required in his case. He stated that they were looking into the incident as a whole and not at each individual case. However, he conceded that it was a mistake on their part not to have looked at each case individually. He also stated that his staff was not equipped to deal with cases of this magnitude.

The cases of assault on prisoners were not the only cases withdrawn due to time frames. A close examination of the register of offences committed by members at Ncome Prison during the period 1999 to 2004 reveals that there are a high number of cases, including serious cases, withdrawn due to time frame. The

examination of this register also reveals that a number of members are only given warnings even when they have committed serious offences.

Lack of training on the part of investigators, initiators and presiding officers plays a major role in the collapse of the disciplinary system in this Management Area. There is a need for such training. In some instances, delays were deliberately caused by the investigators and initiators in order that such cases fall outside the time frame.

All these members who committed violent, criminal offences and misconduct in terms of the disciplinary code went unpunished. The senior officials who were the leaders of the search team and Mr Buthelezi who was the Acting Head who instigated the assault against such members were also not disciplined.

The failure of the then Area Commissioner Mrs Mthembu to transfer these senior officials is inexplicable as she alleged that she would have had difficulty in implementing the recommendation that they be reassigned or transferred to other areas because they were incompetent. The failure of Mrs Mthembu to discipline these members also amounts to gross negligence.

The Commission observed that there is a serious need to address the issue of the withdrawal of cases in terms of clause 7.4 of the disciplinary code.

4.4 ST ALBANS MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2001³⁹

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	25	46	53	70	65
No. of misconduct matters attended to	25	46	53	70	65
No of misconduct matters finalized	25	46	53	70	63
Nature of finalisation:					
▪ Dismissals	8	6	6		8
▪ Final written warnings	5	8			5
▪ Serious written warnings		2		14	7
▪ Written warnings	3	5	4	8	4
▪ Verbal warnings	3	6	6	11	10
▪ Reprimands	1	3			
▪ Counselling			1	5	5
▪ Withdrawn because of time frames	3	5	27	29	17
▪ Withdrawn due to lack of evidence or other reason	1	11	7	2	6
▪ Acquittals			1		1
▪ Not guilty	1		1	1	

In this Management Area a high number of cases were withdrawn due to non-compliance with the time frame in terms of clause 7.4 of the disciplinary code.

The collapse of the disciplinary process in this Management Area has been marked by the abuse of the process by senior officials in the Department

³⁹ See St Albans Exhibit 'UU'.

including the former Provincial Commissioner, Mr Mataka. These senior members of the Department have manipulated the disciplinary system in circumstances that amount to the abuse of power and corruption.

The general sentiment amongst the members of the Department is that the disciplinary system in prison is very weak, if it has not collapsed completely. One perception is that managers are reluctant to discipline personnel because they do not want to lose popularity amongst their colleagues. Another perception is that managers who are members of unions are colluding with alleged transgressors who are their union allies. They do this by failing to institute proceedings timeously or at all against them or to conduct such poor investigations that they can make recommendations enabling the member concerned to escape censure.

Evidence was also led in this Management Area that gave the perception that specific officials are selected to be involved in disciplinary procedures in order to gain a particular outcome in an investigation, especially where someone needs to be removed from the system.

The classic case in this Management Area, which fits perfectly in the perceptions referred to above, is the sexual harassment complaints lodged by Ms Vosloo, Ms van Heerden and Mrs Louw against Mr Khoza, who was the Head of Medium 'B' Prison at St Albans Prison.

These three (3) complainants brought this matter before the Commission because they were dissatisfied with the manner in which the Department handled their complaints.⁴⁰

The manner in which these sexual complaints were investigated by the Department clearly indicated that the senior officials had no desire to discipline

⁴⁰ See Chapter on Abuse of Power for more details of the case.

Mr Khoza for the alleged misconduct as Mr Khoza was subsequently promoted to a higher position in the Provincial Office.

Mr Gaqa's report in his investigations, which is part of Exhibit 'J' St Albans Management Area, is rather shocking if one considers the information that was placed before him.

His conclusion that there were no witness who had actually seen or witnessed these amorous advances also suggests that the complainants should not be believed. This conclusion by Mr Gaqa suggests lack of the understanding of cases of a sexual nature. Mr Gaqa noted that there were conflicting versions between Mr Khoza's version and the version of the complainants. He, however, preferred the version of Mr Khoza to that of the three (3) complainants. In doing so he was usurping the powers entrusted to the chairperson of the disciplinary inquiry. Mr Gaqa was not required to make findings on the credibility of the complainants or that of Mr Khoza or to decide which version should be believed. His function was mainly to investigate the complaints and make a recommendation to the Provincial Commissioner.

In his own evidence he testified that after considering all the information after the investigations, he was of the view that there was no *prima facie* case against Mr Khoza and decided not to recommend disciplinary action.

Furthermore, evidence established that there was an attempt by the officials of the Department to persuade the complainants to withdraw the charges. In this regard one can imagine that if they were persuaded to withdraw these charges they would certainly have been charged with the offence of falsely implicating a senior official. It was clear that they would have been victimized because they dared to complain about the conduct of a senior official.

The case of Ms Vosloo is another example wherein specific presiding officers are appointed by senior officials in the Department with the view to achieving specific outcomes in disciplinary proceedings. This is plainly an abuse of power by senior officials in the Department of Correctional Services, which has contributed significantly to the collapse of the disciplinary system in this Management Area.

Mr Delpont, who was Ms Vosloo's immediate supervisor, was entirely ignored and not involved in the whole process as he is the one who should have instituted disciplinary action against Ms Vosloo, if it was necessary. This is another illustration that the officials concerned had ulterior motives in the discipline of Ms Vosloo.

The Commission has already made recommendations with regard to the necessary action to be taken against all the officials who were involved in this matter.⁴¹

The escapes of Mr Mzimase Thungulu, commonly known as "McGyver", and the subsequent steps taken by the Department against the officials who were allegedly involved in his escape, is another example that demonstrates the collapse of the disciplinary system in the Department. The details of the escapes of Mr Thungulu are dealt with more fully in the Chapter dealing with Prison Security.

The Commission heard evidence in Port Elizabeth that Mr Thungulu had escaped from prisons in the Eastern Cape at least six (6) times. The evidence established that in certain instances he was assisted by members of correctional services to escape serving his sentences. Mr Thungulu is a dangerous criminal serving one hundred (100) years of imprisonment who was convicted of offences including murder, robbery, possession of an illegal firearm and possession of illegal ammunition.

⁴¹ See Chapter on Abuse of Power.

The details of his two (2) escapes from St Albans Prison are dealt with more fully in the Chapter dealing with Prison Security.

In respect of Mr Thungulu's escape whilst in transit from Bisho High Court to St Albans Prison on 13 November 2000, the Department charged the members involved in transporting Mr Thungulu during this trip, namely, Messrs Vava, Gama and Dasa. However, Messrs Vava and Gama merely received written warnings whilst Mr Dasa, who was the member in charge of the transport and also responsible for the safety and custody of the prisoner, was initially dismissed but the Provincial Commissioner of the Eastern Cape decided to put the dismissal aside and instead the member was given a final written warning and reinstated in his position.

These members were never charged criminally in terms of the Correctional Services Act.

The sanction of written warnings in respect of the two (2) members referred to above is an illustration of the lack of appreciation of the seriousness of the offence committed by the members on the part of the Presiding Officer, which is a problem throughout the Department of Correctional Services. The intervention by the Provincial Commissioner of the Eastern Cape in setting aside the sanction of dismissal in respect of Mr Dasa and replacing it with a final written warning and the reinstatement of the said member, is a further illustration, not only of the lack of the appreciation of the seriousness of the offence, but also of an abuse of power by a very senior official of the Department. This is also prevalent in the Department as it was also the position in the Bloemfontein Management Area, where Mr Damons, the Provincial Commissioner, set aside the dismissal of the forty nine (49) members who were involved in the forcible removal of Mrs Tseane.

This has been dealt with in the section dealing with Bloemfontein Management Area in this Chapter.

Mr Thungulu's other escapes from St Albans Prison was on 22/23 November 2000. On this occasion, Mr Thungulu escaped whilst he was detained in a single cell at St Albans Maximum Prison. From the Commission's observations during the inspection-in-loco of this particular cell at St Albans Prison, it became clear that it was absolutely impossible for an adult person to escape through the window. Mr Thungulu, however, explained that he was assisted by warders during this escape when the Commission heard his evidence in Pretoria.

Even if Mr Thungulu's version that he was assisted by warders during these escapes can not be believed, it is clear that there was gross negligence on behalf of the warders, who never properly inspected the cells during the change of shifts and never ensured that the prisoners were accounted for.⁴²

Following the escape of Mr Thungulu during this occasion, the following members were charged internally, Messrs Stander, Jordan, Jacobs and Momsanga. The outcome of the disciplinary hearings were once again shocking in that Messrs Stander, Momsanga and Jordan were found not guilty and that all charges against Mr Jacobs were withdrawn. No disciplinary action was taken against any of the other warders who were on duty during this particular shift.

The manner in which the warders, who were involved in the escape of Mr Thungulu, were handled by the Department is a further illustration that escapes are not taken seriously by the Department. Even in the second escape, no criminal charges were preferred against these members.

⁴² See Chapter on Prison Security for a more detailed discussion of the circumstances surrounding the prisoner's escape.

4.6 JOHANNESBURG MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003⁴³

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported			18	30	26
No. of misconduct matters attended to			10	30	26
Nature of finalisation:					
▪ Dismissals	12	15	16	8	12
▪ Final written warnings		1	4	3	3
▪ Serious written warning			1	1	12
▪ Written warning			3	2	4
▪ Withdrawn because of time frame			3	6	4

In his presentation before the Commission, Mr Moleko Zacharia Isaac Modise, the Provincial Commissioner of Gauteng Province, observed that personnel discipline has deteriorated with the demilitarisation and the emerging of labour movements. A serious contributing factor is the fact that the Department's investigating capacity is not up to standard. According to him, the emerging of the labour movements and the fact that outspoken and hard to please shop stewards were appointed into senior positions brought about the misconception that one must fight management to be promoted.

⁴³ See Johannesburg Exhibit 'LLL'.

According to him shop stewards and union members were accorded top priority. They were promoted from the lowest level to the highest levels without them having the necessary experience to do the job.

The problem with the Department's investigations in disciplinary matters is that they are done superficially to actually exonerate offenders and make recommendations that mislead whoever has to take the final decision. What causes this is the comradeship of officials and the fact that it is not easy to get to the root causes of problems. Unless the investigator belongs to a union different from the one of the person being investigated belongs to, one ends up with meaningless recommendations. What also happens is that some sort of "mandate" is given and a conviction and a dismissal is the result. During cases like that, innocent officials will be dismissed and, unless they appeal, they remain dismissed.

Furthermore, the disciplinary procedure and the code itself are very lenient, which adds a further complication to disciplinary matters. He is of the view that the biggest mistake that was made by management was to adopt a disciplinary procedure and code that was negotiated at the Departmental Bargaining Council and the interest of management was compromised in fear of the unions.⁴⁴

Furthermore, these are the very chairpersons who actually decide on the sanction to be imposed. It is one of the reasons why, in serious cases, only warnings are decided upon.

His recommendation is that a total revamp of the disciplinary procedure and code is an absolute necessity. Furthermore, one possible other solution is to have a team of experts to deal with all disciplinary hearings for all Departments in the Public Service.

⁴⁴ See Chapter on Trade Unionism regarding the problems encountered when management and junior personnel belong to the same Union and bargain for the same Disciplinary Code.

In support of Mr Modise's view that in most cases offenders end up with warnings in disciplinary inquiries are the statistics on disciplinary inquiries in Leeuwkop Management Area referred to above.

If one, for example, looks at the statistics referred to in 1999, the total number of misconduct cases reported is fifty three (53). There were eight (8) dismissals and six (6) withdrawals. Thirty nine (39) officials were given warnings ranging from final, serious written and verbal warnings. Thirty nine (39) of fifty three (53) cases were therefore disposed by way of warnings.

The same trend is also noted for the following year 2000 to 2003.

4.7 LEEUWKOP MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003⁴⁵

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	53	54	124	43	46
No. of misconduct matters attended to	53	54	124	43	46
Nature of finalisation:					
▪ Dismissals	8	4	1	2	1
▪ Final warnings	3	10	15	1	2
▪ Serious written warnings	7	6	11	5	1
▪ Verbal warnings	29	30	97	28	18
▪ Withdrawn	6	4	0	7	24

⁴⁵ See Leeuwkop Exhibit 'JJ'.

The Area Commissioner, Mr Modisadife, testified that there were problems relating to disciplinary inquiries in this Management Area. He testified that managers were often unwilling to take part in disciplinary inquiries against members. Managers were fearful of disciplining other members because of the concerns of reprisals from colleagues. In this Management Area there is also a high number of matters being concluded by warnings.

LABOUR RELATIONS REPORT

Total as per Type of Case	1997	1998	1999	2000	2001	2002
Disciplinary Cases held	21	32	58	59	94	33
Cases Concluded with Warnings	19*	31	52	55	89	31
Cases concluded with Dismissals	-	1	6	4	5	2

* 2 cases concluded, officials acquitted

The Labour Relations Report ⁴⁶ shows that the statistics is higher for the number of cases concluded with warnings. This statistic indicates that 99% of cases wherein disciplinary hearings were held, offenders were given warnings. Although the nature of the offences committed by these officials has not been set out in the statistics, such a high number of cases concluded by way of warnings

⁴⁶ See Annexure "B" to Exhibit 'F' Leeuwkop Management Area.

raise the alarm. According to Mr J.G. Smalberger, PCO Corporate Services, a large number of disciplinary inquiries held against officials at Leeuwkop Prison have been in respect of serious misconduct. For example, two (2) officials who stole TV's from the mess and took them to Alexander Hostel and an official who took a bribe from a prisoner, promising him an early release.

The two incidents led to the dismissal of the officials concerned. Disciplinary action has also been taken in respect of transgression such as absence, insubordination etc. No particular concern can be registered except that hearings take time to be disposed of. The reasons for the delay in the disposal of the hearings have ranged from lack of trained presiding officers to the adoption of delaying tactics by union representatives.⁴⁷ Mr H.R. Tshabalala, PC Corporate Services, pointed out that the provincial statistics reveal that for the year 2000 – 2002 the majority of employees were dismissed for offences relating to absenteeism and possession of dagga. Correspondingly, the majority of offences for which written warnings have been issued ranged from absenteeism to gross negligence and assault on prisoners.

⁴⁷ See Exhibit 'W' Leeuwkop Management Area – Page 2.

4.8 POLLSMOOR MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003⁴⁸

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	132	145	63	48	55
No. of misconduct matters attended to	132	145	63	48	55
No. of misconducts finalized	132	145	63	48	55
Nature of finalisation:					
▪ Not guilty	43	21	10	8	8
▪ Verbal warning	20	29	5	8	13
▪ Written warnings	37	46	17	12	9
▪ Serious written warning	12	18	10	13	6
▪ Final written warning	15	25	8	6	5
▪ Dismissal	5	4	5	1	1
▪ Withdrawn	0	1	8	0	12
▪ Consulted	0	1	0	0	1
▪ Dismissal because of paragraph 1.1 of the DCS Disciplinary Code (unauthorised absence for longer than 21 days)	8 of which 1 reinstated on appeal	7 of which 1 reinstated on appeal	1 who was reinstated on appeal	5 of which 1 reinstated on appeal	1 which was changed to a final written warning on appeal

⁴⁸

See Pollsmoor Exhibit 'LLL'.

Statistics on disciplinary inquiries in respect of Pollsmoor Prison set out above also reveals that a high number of offenders in disciplinary inquiries end up being given warnings. The usual form of warnings given to these offenders is the following:

- (a) verbal warning;
- (b) written warning;
- (c) serious written warning; and
- (d) final written warning.

Although the statistics furnished do not highlight the nature of the offences committed by members, such high numbers of warnings given to these offenders is of concern to the Commission.

Mr Bongani Ngxilisha, the Provincial Commissioner of Western Cape, pointed out that investigators in disciplinary matters have been found to be lacking in capacity. He pointed that in collaboration with other Departments they are involved in the training of investigators. It is a nationwide initiative that investigators in disciplinary matters should be trained as the quality of their report after investigations is not satisfactory.

He was also of the view that the disciplinary procedure should be revised as cases take too long to finalise. No further evidence other than the evidence of the Provincial Commissioner was heard relating to disciplinary hearings in this Management Area.

4.9 PRETORIA MANAGEMENT AREA

Statistics : Disciplinary Inquiries : 1999-2003⁴⁹

Details	1999	2000	2001	2002	2003
No. of misconduct matters reported	196	169	130	156	146
No. of misconduct matters attended to	195	170	130	156	146
No. of misconducts finalised	192	168	130	156	146
Nature of finalisation:					
▪ Dismissals	2	11	6	9	6
▪ Final written warnings	7	32	18	10	18
▪ Written warnings	105	36	27	58	73
▪ Verbal warnings	34	40	37	23	17
▪ Withdrawals (time frame)	16	40	43	51	36
▪ Acquittals	18	16	10	16	23

Mr Polataka Hlalethoa, the Head of Pretoria Central Prison, indicated in his presentation that during the period 1998 to 2002 there were one hundred and forty two (142) disciplinary cases which resulted in ten (10) dismissals and one hundred and twenty four (124) warnings. This means that 87% of cases during this period were disposed of by way of warnings.

⁴⁹ See Pretoria Exhibit 'SSSS'.

Mr Baloyi, the Head of Pretoria Local Prison, indicated in his presentation that during the period 1998 to 2002 they dealt with two hundred and forty nine (249) cases. These disciplinary cases were disposed of by the Department as follows:

- (a) Two hundred and twenty two (222) warnings of various forms;
- (b) Fourteen (14) dismissals;
- (c) Seven (7) pending, and
- (d) Six (6) acquittals.

Eighty nine (89) percent of the two hundred and forty nine (249) cases were disposed of by way of warnings.

This has been a trend in almost all the Management Areas the Commission has investigated.

Assault on prisoners by members is also rife in this area and disciplinary action is not normally taken against the members involved. Mr Baloyi referred to prisoner, Mr Raomobae, who was assaulted by a member in front of the Jali Commission investigator and stated that the matter was investigated and discipline was recommended against the member and the case is still pending. He, however, stated that the member was removed from that section but was not suspended. He could not explain why he did not initiate a suspension. According to Mr Baloyi, from 1999 to 2003, no member has ever been dismissed for assaulting a prisoner. He testified that after cases of assault have been opened against members with the SAPS they deem themselves as *functus officio*.

Between 1998 and 2002, one hundred and ten (110) cases were withdrawn.⁵⁰

Amongst the cases withdrawn is a case against a member charged with the escape of Louis Karp, which was subsequently withdrawn.⁵¹ There are a number

⁵⁰ See pages 39 – 46 Exhibit ‘NNN’ – Pretoria Management Area

of cases in which members were charged with assisting prisoners to escape and the members were given warnings as sanctions.

The sanctions reveal a lack of appreciation of the seriousness of the offences involved. The fact that since 1999 no member has been dismissed for assaulting a prisoner clearly shows that the officials do not take seriously offences of assault committed by members against prisoners despite our Constitution that demands that every prisoner should not be tortured or treated in a cruel, inhumane way.⁵²

This attitude of the officials of the Department towards assaults on prisoners by members is illustrated by the case of a prisoner Mr Mokgokong, who was stabbed by a male nurse, Mr Mokonoto, with a knife, for no apparent reason. An investigation was commissioned in respect of the alleged assault and the investigator made the following recommendations:

1. That Mr Mokonoto be subjected to a disciplinary hearing, column A, clause 5.7 - assault whilst on duty.
2. Mr Mokonoto must also appear before the disciplinary hearing, Column B, clause 5.8 - failure to report an injury.

It was also noted that a knife is classified as a dangerous weapon and therefore can at anytime injure any person including the owner. It stands to reason that once a person produces a knife, the lives of other people next to him are in danger. No person should be allowed to enter the security centre with a dangerous weapon. In the view of the Commission, such conduct constitutes a security breach and this must be brought to the attention of all persons.

⁵¹ See section 12(1)(d) and (e) of the Constitution.

⁵² See Chapter on Sexual Violence for the circumstances surrounding the escape of Louis Karp.

Following the investigations in this matter, Mr Rakoma, the Assistant Head of Pretoria Central Prison, appointed Mr Isaac Zacharia Moabi as an initiator in the disciplinary hearing. Mr Moabi looked at the recommendations advising that Mr Mokonoto be charged with contravening clause 5.7 column A of the disciplinary code, assault whilst on duty and contravening clause 5.8 Column B of the disciplinary code, failure to report an injury.⁵³

In his evidence, Mr Moabi conceded that he is not bound by the recommendations and stated that he could add charges in preparing a charge sheet because there may be flaws in the recommendations. He testified that it never crossed his mind to charge Mr Mokonoto with possession of unauthorised dangerous weapon inside prison.

He also conceded that he is aware of the regulations stating that a person cannot possess dangerous weapons inside the prison. He conceded that possession of a dangerous weapon inside the prison is a security risk to both members and inmates. He also conceded that he did not properly analyse the charges when he formulated the charge sheet.

He also conceded that he signed the notification of disciplinary hearing in this matter, which appears on the first page of Exhibit 'SS6', which should have been signed by his supervisor, Mr Marais.

Mr Monyamate was appointed by Mr Rakoma as the chairperson of the disciplinary inquiry. He, however, stated in his evidence that he does not have the power or authority to impose a sanction of dismissal. He only has the power to impose a final warning. Only persons with the rank of Assistant Director can impose a dismissal sanction and Mr Monyamate's rank was lower than that of an Assistant Director.

⁵³ These recommendations are contained in Exhibit 'SS6' of Pretoria Management Area.

Despite the fact that a contravention of clause 5.7 of the disciplinary code can be visited with a sanction of dismissal, the chairperson of the disciplinary hearing in this matter did not have such power.

At the disciplinary hearing convened on 27 November 2003, Mr Mokonoto pleaded guilty to both charges. At the conclusion of the proceedings, he was given a final warning valid for six (6) months on condition that he is not found guilty of the same offence again.

The chairperson of the inquiry in his testimony stated that he gave one sanction for both offences. In an attempt to justify this, he stated that at the training they were told that if a person pleads guilty they must treat all charges as one for the purposes of sentence. He attended a one (1) day labour relations training course offered by the Department. He was taught within one (1) day how to initiate and preside over disciplinary hearings.⁵⁴

This member who stabbed a prisoner should have been charged with contravening clause 5.8 Column A of the disciplinary code/unauthorised possession of a dangerous weapon and also clause 5.1, Column B breaching the internal security arrangements at a prison.

Mr Rakoma, the Assistant Head of Pretoria Central Prison, admitted that he appointed and signed a document appointing the chairperson of this disciplinary hearing. He was aware of the nature of the charges preferred against the employees.

⁵⁴ Such training, in itself, demonstrates that discipline is not given the priority it should be given in the Department. Practitioners specialising in labour law and related fields of the law spend many years on training and it should be obvious that a “one (1) day training course” is setting members up for failure.

He stated that in assessing who should be appointed as the chairperson of the disciplinary inquiry it is important to look at the nature of the misconduct and what charges have been preferred against an employee. He approved the column A offences to be brought against the employee but it slipped his mind to appoint a person with the authority to dismiss. He could not convincingly explain how he could appoint a person as chairperson who had no power to dismiss. He, however, conceded that he had made a mistake in this regard. He also conceded that he was negligent in signing Exhibit 'SS8' appointing the chairman of the disciplinary hearing. He could not explain how the inquiry took place on 27 November 2003 when the notice to attend the hearing was issued on 30 November 2003 for a hearing to be held on 4 December 2003. It is clear that Mr Rakoma acted negligently in this regard. The Commission will recommend that he be charged with unsatisfactory work performance and negligence.

5. CONCLUDING REMARKS

The responsibility of disciplining employees under his or her authority lies squarely with the Heads of Prisons. The Commission has found during its investigations that in a number of instances the Heads of Prisons do not carry out their mandate in this regard.

If one looks at the number of cases withdrawn due to time frame in all the Management Areas the Commission has investigated, there seems to be no reason why the officials who were responsible for such delays were not charged in terms of the disciplinary code.

The Commission has observed that the collapse of the disciplinary system in the Department is largely due to negligence on the part of the Heads of Prisons who are not following up these disciplinary cases.

6. FINDINGS

The Commission, having considered all the evidence and documentation before it relating to discipline in the Department, makes the following findings:

6.1 Discipline Generally

- (a) The disciplinary system is generally ineffective and has, in certain aspects, has collapsed completely.
- (b) Management in the Department has contributed largely to the collapse of the disciplinary system. The disciplinary system is often abused and manipulated by management to obtain certain results.
- (c) The disciplinary system is also used to get rid of certain officials, victimise them or otherwise retain certain officials who have committed serious offences by not disciplining them.
- (d) In some serious cases, which warrant the dismissal of an employee, a chairperson who, because of his rank cannot impose a sanction of dismissal, is deliberately appointed to chair the disciplinary hearing. In the Commission's view, this is normally done to protect the alleged transgressor.
- (e) In many cases delays are caused by poor investigations by ill-trained investigators, initiators who have not been properly trained and chairpersons who are also not properly trained in labour relations. In some cases, the role players have received no training.
- (f) The Commission also noted that the investigators, initiators and presiding officers did not have to account to anyone for the manner in which these

- disciplinary hearings were handled. They therefore found it easy to frustrate the proceedings knowing that they could do so with impunity.
- (g) The incorrect interpretation of Clause 7.4 of the Disciplinary Code, which resulted in a large number of cases being withdrawn due to the lapse of time frames, is a major problem in the Department.
 - (h) The lack of appreciation for the seriousness of certain offences leads to offenders merely being warned after being found guilty of very serious offences. The interest of the Department is also compromised in these cases.
 - (i) The sanction of warnings in serious cases is also a major problem for the Department. Corrupt and dishonest members remain in the employment of the Department due to lenient sanctions.
 - (j) There is no reason why a failure to institute disciplinary proceedings timeously should not be regarded as negligence, which should lead to disciplinary action against those managers who failed. These managers should be charged with sabotage and/or failure to obey a lawful instruction to institute a hearing timeously and/or negligence in the performance of their duties.⁵⁵ The interpretation of Clause 7.4 of the disciplinary code by presiding officers in all cases which were being withdrawn due to time frame, seems to lean in favour of the offending members.
 - (k) There is a very high number of outstanding disciplinary cases and in some Management Areas, they date as far back as 1996.

⁵⁵ See Column A – clause 5.4 of the Departmental Disciplinary Code that provides as follows:

“Sabotage: Any intentional or malicious act to interfere with the records and operation of the Department.”

- (l) Managers who were involved in deciding whether a member should be disciplined, were appointed as investigators, initiators or presiding officers in the disciplinary proceedings. Justice was compromised in these matters.
- (m) The reluctance on the part of some the initiators to discipline fellow members showed sympathy with the transgressors.
- (n) The walkout by senior managers of the Department from the Commission hearings at Port Elizabeth,⁵⁶ namely Messrs Nweba and Mpemva, and also by Mr Nxele at the Cape Town hearings, needs to be dealt with decisively by the Department
- (o) The lack of urgency and haphazard way in which members approach these disciplinary hearings reinforces the Commission's view that a disciplinary case that is withdrawn in terms of Clause 7.4 should be followed up by an investigation as to the cause of the delay. Disciplinary steps should be taken against those causing unnecessary delays.
- (p) The Provincial Offices abdicated their responsibility to ensure that the necessary systems are put in place in each Management Area. Merely to ask the Area Commissioners to implement measures or action plans when it is obvious that the failure to institute disciplinary hearings has reached shocking proportions is not prudent and certainly not satisfactory.

⁵⁶ Other junior members also walked out with them, namely Messrs Mpolweni, Titus, Spelman etc.

- (q) The Labour Relations Office as well as the Legal Services Section of the Department of Correctional Services have not rendered the necessary support and guidance in disciplinary matters.⁵⁷
- (r) The Department has failed to charge transgressors who committed offences created in terms of the Correctional Services Act No. 111 of 1998.
- (s) Area Commissioners and Heads of Prison never follow up on the outcome of criminal charges that are laid against members.
- (t) Discipline in the Department is a serious challenge, but managers of the Department have failed dismally to exercise their managerial prerogative and responsibility to discipline employees.
- (u) The recommendations of the Commission in its various interim reports that disciplinary inquiries, which resulted from its investigations, should be carried out by a Special Task Team fell on deaf ears and were not carried out in many instances.⁵⁸
- (v) Other recommendations made by previous investigations relating to the conduct of disciplinary inquiries were also not carried out or made a priority.
- (w) There is an urgent need for a dedicated unit of initiators/investigators and chairpersons to enforce the Disciplinary Code in the Department.

⁵⁷ See the Correctional Services Portfolio Committee meeting on 25 January 2002. The chairperson noted that 50% to 60% of the cases investigated by the Department have come to no consequence.

⁵⁸ See the Chapter on Implementation of Interim Reports for a detailed account from the Department.

- (x) There is a need for the Department to embark upon a programme of training for dedicated initiators, special investigators and chairpersons to enforce the Disciplinary Code in the Department.

6.2 Disciplinary Code

Although the disciplinary code contains a list of unacceptable behaviour/offences within the Department it is clearly stated in the code itself that it is not an exhaustive list. The Commission has noted that in disciplining its employees the Department has not gone beyond the offences listed under Column A and B of the Department's disciplinary code. In all the Management Areas the Commission has investigated it has not come across a disciplinary case, which involves misconduct or an offence, which is not listed in the disciplinary code. It remains, however, a generally accepted principle in labour relations that the list of offences in various disciplinary codes is not exhaustive.

The Commission wishes to address certain misconducts that it has found in its investigations and highlight certain areas of the Disciplinary Code which can be amended or expanded upon to address these problems.

6.2.1 Assaults

The Commission has found that the assault of prisoners by members is prevalent in all the Management Areas it investigated. Although assault while on duty is included under Column A, Clause 5.7 and threatening to cause bodily harm or fighting while on duty is included under Clause 5.1 Column B of the Disciplinary Code, it is the Commission's view that this is not adequate. These Clauses are sometimes incorrectly interpreted by presiding officers, which results in members being given warnings in cases of assault, and even serious assault which has resulted in the death of prisoners.

It is the Commission's view that a specific offence relating to assault on a prisoner by a member should be included under Column A so that the members are aware that assaulting a prisoner is a serious transgression which justifies dismissal.

6.2.2 Sexual Assaults

The Commission is also of the view that an offence of sexual assault on prisoners by members, or by members on members, should be included as a dismissible offence under Column A of the Disciplinary Code.⁵⁹

6.2.3 Drug Trafficking

The evidence before the Commission clearly indicates that drug trafficking and the importation of other contrabands are mainly caused by the failure to search everyone entering and leaving prison. It is therefore the Commission's view that a new transgression be incorporated in Column A of the Code _ failure to conduct a search whilst on duty _ to enable the Department to dismiss members who fail to search others entering or leaving the prison.

6.2.4 Investigations

The Department's investigation of complaints is plagued by the failure of investigating officers to complete their investigations timeously. To address this problem the Commission is of the view that the offence of failure to timeously complete investigations in misconduct cases should also be added as a dismissible offence under Column A of the Code.⁶⁰

⁵⁹ It is recommended that Sexual Assault should include a range of offences from indecent assault to the rape of a prisoner and a member.

⁶⁰ See the Chapter on Ncome Management Area for the problems experienced.

6.2.5 Sexual Conduct

The Commission also heard evidence that certain members had allowed prisoners to have sexual intercourse with visitors within prison premises.

In order to curb this practice, an offence of allowing a prisoner to have sexual intercourse with a visitor in prison premises should be included under Column A of the Disciplinary Code.

6.3 Disciplinary Procedure

As will be shown below, the disciplinary procedure relating to time frame and the representation of employees, will have to be amended to eliminate the abuse of these procedures highlighted in this chapter.

6.3.1 Clause 7.4: Time Frame

The period of thirty (30) days within which investigations should be finalised seems adequate. It has been noted that a large number of cases have been drawn out or withdrawn as a result of non-compliance with the time frame. It is mainly the interpretation of this Clause, which has led to the withdrawal of these cases. The extension of any period contemplated in this Clause would defeat the purpose of disciplinary proceedings, which must be done and completed speedily.

The Commission will recommend that this Clause be amended to include the following:

“if the employer without good reason fails to institute disciplinary proceedings within a period of three (3) months after completing the

investigations, the employee may make representations to the Head of Prison to oversee the implementation of a disciplinary hearing". (The phrase disciplinary action shall fall away and should be deleted.)

The disciplinary procedure should be amended by the inclusion of the following:

"The Department is given power to reinstate any charge withdrawn due to time frame or for any other reason."

6.3.2 Clause 7.1.1: Rights of Employees

7.1.1 Right to Representation

In the light of the observations by the Commission that senior managers represent junior employees during disciplinary hearings, the Commission will recommend that members of the rank of Assistant Director and above should not be allowed to represent employees during disciplinary proceedings. Alternatively all officials in managerial positions should not be allowed to represent employees during disciplinary proceedings.

The Commission is of the view that the collapse of the disciplinary system in the Department is due to various factors, including the lack of will on the part of managers to discipline employees. In this case, training and equipping these officials with the labour relations skills or knowledge will not on its own reverse the collapse of the disciplinary system within the Department.

The Commission has in its interim report consistently recommended that the disciplining of officials involved in misconduct within the Department should be carried out by a Special Task Team.

It has been noted that the Department has not implemented the recommendations made by the Commission in its interim report. In the case of Mr I.S Zulu for example, an outsider was appointed to deal with the matter who had no knowledge of labour relations. This is a clear indication that even if a person is appointed from outside the Department to preside over disciplinary inquiries such a person should be knowledgeable in labour law and labour relations.

It is for this reason that the Commission recommends that the task of disciplining employees in the Department be entrusted to outside independent agencies or the Public Service Commission.

7. RECOMMENDATIONS

7.1 General Recommendations

The Commission accordingly makes the following recommendations:

- 7.1.1 That the discipline of employees in the Department of Correctional Services be taken away from the Department and entrusted to independent outside agencies.
- 7.1.2 If for some reason the Department is unable to implement this recommendation referred to above then the Commission recommends that the disciplining of employees be entrusted to the Public Service Commission.
- 7.1.3 In the event that the Department is unable to implement the recommendations referred to above then the Commission makes the following recommendations:

- (a) That the Department solicit the services of specialists in Labour Law to train officials in the conduct of disciplinary hearings, i.e. investigators, initiators and presiding officers.
- (b) That officials in managerial positions from the rank of Assistant Director upwards should not be permitted to represent junior employees during disciplinary proceedings.
- (c) That the Department embark upon a full programme of training all employees about the nature and seriousness of the offences created in terms of the Disciplinary Code, and in particular assault on prisoners.
- (d) That in all disciplinary hearings where cases are withdrawn due to time frame, each case should be investigated individually and if it is found that any member involved in such cases contributed to the delay then such member should be charged with negligence accordingly.
- (e) That the Labour Relations Office as well as the Legal Services Section of the Department should render the necessary support and guidance in disciplinary matters nationally.
- (f) Managers who were involved in deciding whether a particular member should be disciplined or not should not be appointed as investigators, initiators or presiding officers in the ensuing disciplinary proceedings.
- (g) All Area Managers should retain overall responsibility to ensure that all investigations are finalised timeously and disciplinary hearings, where applicable, take place in compliance with the provisions of

Clause 7.4. Should an Area Manager fail in his duty in this regard he must be charged accordingly. All matters that are withdrawn because of the provisions of Clause 7.4 should be investigated and disciplinary steps be instituted where necessary against all initiators or chairpersons who are found to be negligent or acted improperly. This should be made standard procedure with immediate effect.

- (h) The Department should engage outside agencies for the purposes of training initiators, special investigators and presiding officers to enforce the Disciplinary Code in the Department.
- (i) The Department should establish a directorate under the Labour Relations Office which specifically deals with the disciplinary inquiries.
- (j) All Area Managers and Heads of Prison should be obliged to follow up criminal charges that are laid by prisoners or any other complainant against transgressors and make reports about progress in the cases to Head Office.
- (k) All persons appointed as Chairpersons of Disciplinary and Appeal hearings in the Department should have demonstrable knowledge of labour law.

7.2 Amendments to the Disciplinary Code

- (a) The Commission is mindful of the fact that the Department's Disciplinary Code is a product of negotiations at the Bargaining Council and is therefore a collective agreement. The trade unions would be vehemently opposed to unilateral amendments to the Code by the Department.

- (b) It therefore stands to reason that all amendments to the Disciplinary Code and Procedure should be negotiated at the relevant Bargaining Council. The Department should therefore endeavour to negotiate an amendment of the Disciplinary Code and Procedure at the Bargaining Council with the view of attaining the following recommended amendments to the Code.
- (c) The Commission recommends that the Department's Disciplinary Code should be amended accordingly as follows:
- (i) By including a specific offence of assault on prisoners by members as a dismissible transgression under Column A.
 - (ii) By including an offence of sexual assault under Column A of the Disciplinary Code. Sexual assault should include a range of offences from indecent assault to rape of a prisoner and a member.
 - (iii) By including a transgression of failure to conduct a search while on duty as a dismissible offence under Column A of the Code.
 - (iv) By including a transgression of allowing a prisoner to have sexual intercourse with a visitor in prison premises as a dismissible offence under Column A of the Disciplinary Code.
- (d) The Commission also wishes to raise other shortcomings in the Code which need to be addressed by way of negotiation in the Bargaining Council. Some of these shortcomings in the Code are:
- (i) The definition of "gross negligence" in the Code:

As the Code currently stands the definition of "gross negligence" is:

“any act or omission without considering the possible consequences thereof and where such consequences could be dangerous to human life or limb – an element of recklessness should be present.”

(ii) It is the opinion of the Commission that the definition of gross negligence should be deleted since it is of no assistance in the interpretation of gross negligence. In some Management Areas the definition was used as an excuse for why members who were grossly negligent in the execution of their duties were not charged. The argument was that the acts were not dangerous to human life and hence, the preference was to charge such members only with unsatisfactory work performance. The different sections of the definition in Column A are read in conjunction and hence the argument was that the members can seldom be charged for gross negligence.

(iii) Should the bargaining parties not come to an agreement to delete the definition, it is suggested that consideration be given to add the following words, namely:

“gross negligence is defined, amongst others as”

(e) Another Clause that caused problems is Column A, Clause 5.12, which provides as follows:

“Misuse of position in the Department/Public Service to promote or prejudice the interest of any political party.”

This Clause combines different actions, which are not always related to each other, with the effect that an employee may seriously abuse his

position in the Department but because the abuse is not aimed at promoting or prejudicing a political party, the members get charged with transgressing Column B, Clause 5.10 – Misuse of position for personal gain to the disadvantage of the employer. This transgression, however, is not a dismissible offence.

- (f) The Commission is of the view that the transgression in terms of Column A, Clause 5.12 should be amended to read:

“Misuse of position for personal gain and/or to the disadvantage of the employer; Misuse of position in the Department to promote or to prejudice the interest of any political party.”

The Commission is of the opinion that if the Clause is amended as suggested, it could be used more effectively in the disciplining of members.

7.3 Disciplinary Procedure

7.3.1 Clause 7.4: Time Frame

The Commission recommends that Clause 7.4 of the Disciplinary Code should be amended to read as follows:

1. *If the employer without good reason fails to institute disciplinary proceedings within the period of three (3) months after completing the investigations, the employee may make representations to the Head of Prison to oversee the implementation of a disciplinary hearing. The phrase “disciplinary action” shall fall away and should be deleted from the original Clause 7.4.*

7.3.2 Clause 7.1.1: Rights of Employees

1. A Clause should be added, that members of the rank Assistant Director or above should not be allowed to represent junior employees during disciplinary proceedings, alternatively, all officials in managerial positions should not be allowed to represent junior employees during disciplinary proceedings.

2. The disciplinary procedures should be amended to include the following:

“The Department should be given power to reinstate a charge withdrawn in terms of Clause 7.4 of the Disciplinary Code or withdrawn for any other reason.”

7.4 Recommendations With Regard to Individuals

7.4.1 Isaac Zacharia Moabi

- (a) The conduct of Mr Moabi, in failing to charge Mr Mokonoto with the offence of breaching internal security arrangements when he stabbed a prisoner with a knife, amounts to misconduct in terms of the Disciplinary Code.

- (b) It is accordingly recommended that Mr Moabi:
 - (i) be charged with contravening Clause 2.1 Column A of the Disciplinary Code – gross negligence, in that he failed to charge Mr Mokonoto with contravening Clause 5.10 of the Disciplinary Code.

7.4.2 Mr Monyamate

- (a) The conduct of Mr Monyamate in accepting the appointment as chairperson of the disciplinary inquiry of Mr Mokonoto, well knowing that he had no power to impose a sanction of dismissal, amounts to misconduct in terms of the Disciplinary Code.
- (b) The Commission accordingly recommends that Mr Monyamate:
 - (i) be charged with contravening Clause 2.1 Column A of the Disciplinary Code -- gross negligence in the performance of his duties.

7.4.3 Moalusi Rakoma

- (a) The conduct of Mr Rakoma in appointing Mr Monyamate as the chairperson of the disciplinary inquiry of Mr Mokonoto, well knowing that Mr Mokonoto had no power to pass a sanction of dismissal because of his rank, amounts to misconduct in terms of the Disciplinary Code.
- (b) The Commission accordingly recommends that Mr Rakoma:
 - (i) be charged with contravening Clause 2.1 Column A of the Disciplinary Code -- gross negligence in the performance of his duties.

7.4.4 Mrs Mimie Mthembu

- (a) The conduct of Mrs Mthembu, the former Area Commissioner of Ncome Prison, in failing to implement the recommendation of the investigating team that the Heads of Prison, Mr Buthelezi and Mr Sithole, be reshuffled from their positions because of incompetence, amounts to gross negligence in the performance of her duties.
- (b) The Commission accordingly recommends that Mrs Mthembu:
 - (i) be charged with contravening Clause 2.1 Column A of the Disciplinary Code – gross negligence in the performance of her duties.

7.4.5 Mr Mokonoto

- (a) The conduct of Mr Mokonoto in carrying a knife in a working environment amounts to misconduct in terms of the Department's Disciplinary Code.
- (b) The Commission accordingly recommends that Mr Mokonoto:
 - (i) be charged with contravening Clause 5.8 Column A of the Department's Disciplinary Code – unauthorised possession of a dangerous weapon;
 - (ii) also be charged with contravening Clause 5.1 Column A of the Disciplinary Code – breaching the internal security arrangements.

CHAPTER 16

NON-ADHERENCE TO OVERTIME POLICY

CHAPTER 16

NON-ADHERENCE TO OVERTIME POLICY

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CHAPTER 16

NON-ADHERENCE TO OVERTIME POLICY

1. INTRODUCTION

This Chapter focuses on the non-adherence to the policy of the Department in respect of overtime worked by members on weekends and public holidays.

As the evidence of this Chapter will reveal, payments made to members of the Department in respect of overtime is a very serious drain on the Department of Correctional Services' financial resources.

The problem of overtime payments made to members of the Department was highlighted as early as September 2002 when the Public Service Commission finalised its report on the management of overtime in the Department and made recommendations to improve the management of overtime in the Department. Amongst its recommendations, the Public Service Commission recommended the phasing out of weekend overtime and the phasing in of the seven (7) day work week.

However, despite the substantial financial savings that would have resulted, the Department had not yet, for some inexplicable reason, implemented the Public Service Commission's recommendations in this regard by the time of the Commission's hearings.¹

The evidence presented to the Commission established that the Department has a well established policy on weekend and public holidays' overtime. A Procedure Manual of the Department specifically deals with the

¹ See the Chapter on Previous Investigations for more details on the implementation of the Public Service Commission recommendations.

implementation of the system of weekend overtime remuneration.² Despite the existence of this policy, there is clear evidence that weekend overtime is not properly managed in that management areas are not complying with the weekend overtime policy.

The unions have also complained that their members were being prejudiced because the overtime policy was not being implemented properly. They particularly raised concerns that high ranking officials were working in lower ranking jobs during weekends.

The non-adherence to this policy on overtime has led to the Department to overspend on the overtime budget and thus exceed the budget allocations for each financial year. Senior officials of the Department who gave evidence during the Commission's hearings clearly articulated such non-adherence to Departmental policy relating to overtime.

2. EXPENDITURE ON OVERTIME

2.1 Ms S. M. Swarathe

The vast amounts spent by the Department on overtime can be seen from the evidence of Ms Sebatseng Miriam Swarathe, who is employed by the Department as an Assistant Director: Budget and is stationed at Pretoria Head Office. She advised the Commission that she has worked in the budget office for seven (7) years and that her duties, amongst other things, entail the preparation and allocation of the weekend overtime budget.

She testified that in determining the allocation of the weekend overtime budget, the Department takes into consideration:

² Amongst the issues dealt with in this Procedure Manual are payment; policy framework; the purpose of overtime remuneration; delegations; payment of weekend duty according to weekend establishment; grounds for the payment of weekend duty; application of principles; payment of shifts over weekends and payment/ recording of public holidays. (See Pretoria hearings Exhibit 'PPP')

- (a) the number of personnel needed to man the approved posts;
- (b) the rank of personnel, and
- (c) applicable tariffs.

To assist the Commission to understand the cost of overtime to the Department, Ms Swarathe prepared the following four (4) documents:³

SMS 1: 2002/2003 FINANCIAL YEAR

This reflects the total budget allocated for overtime to all Management Areas in South Africa for the year 2002/2003 as well as the amounts allocated for Gauteng and Pretoria.

Overtime Allocation	Approved	Financed	Budget Allocation
Total RSA	15,745	15,745	639.927,000
Total Gauteng	3,896	3,896	157,834,000
Total Pretoria Central	216	216	9,973,800
Pretoria C-Max	141	141	6,542,900

³ See Exhibit 'OOO' Pretoria hearings

SMS 2: 2003/2004 FINANCIAL YEAR

This reflects the budget allocation for the year 2003/2004.

Overtime Allocation	Approved	Financed	Budget Allocation
RSA Total	15,780	15,780	749,930,000
Total Gauteng	3,892	3,892	184,061,000
Total Pretoria Central	216	216	10,865,200
Total Pretoria C-Max	141	141	7,102,600

SMS 3:2002/2003 FINANCIAL YEAR

This reflects the annual surplus/ deficit for the financial year 2002/2003.

Overtime Allocation	Approved	Financed	Budget Allocation	Expenditure	Surplus/ Deficit
RSA Total	15,745	15,745	639,927,000	733,627,835	-93,700,835
Total Gauteng	3,896	3,896	157,834,000	172,133,649	-14,299,649
Total Pretoria Central	216	216	9,973,800	9,973,771	29
Personnel Budget			39,612,200	39,635,583	-23,383
Total Pretoria C-Max	141	141	6,542,900	6,542,928	-28

Overtime Allocation	Budget Allocation	Expenditure	Surplus/Deficit
Personnel Budget	21,632,600	21,638,201	-5,601

The Personnel Budget refers to the weekly spending

SMS 4: 2003/2004 Financial Year

This reflects the annual surplus/deficit for the financial year 2003/2004.

Overtime Allocation	Approved	Financed	Budget Allocation	Expenditure	Surplus/Deficit
RSA Total	15,780	15,780	749,930,000	810,559,511	-60,629,511
Total Gauteng	3,892	3,892	184,061,000	187,154,216	- 3,093,216
Total Pretoria Central	216	216	10,865,200	11,077,046	- 211,846
Total Pretoria C-Max	141	141	7,102,600	7,131,049	- 28,449

2.2 Expenditure Analysis

The above figures reflect that in respect of overtime:

- (i) the national budget allocated for the weekend overtime for the financial year 2002/2003 was six hundred and thirty nine million nine hundred and twenty seven thousand rand (R639 927 000,00)('SMS1');
- (ii) the national Budget allocation for the weekend overtime for the year 2003/2004 is Seven hundred and forty nine million nine hundred and thirty thousand rand (R749 930 000,00)('SMS2')
- (iii) there has been an increase of one hundred million rand (R100 000 000,00) in the budget allocation for the year 2003/2004 in respect of both Pretoria Central Prison and Pretoria C-Max, compared to the financial year 2002/2003("SMS1' and SMS2').
- (iv) there had been a deficit of over ninety three million rand for the 2002/2003 financial year.
- (v) there had been a further deficit of over sixty three million rand for the 2002/2003 financial year.

The increase in respect of the Pretoria Prisons, according to Ms Swarathe, has been caused by an increase in members' salaries as they received a nine to ten percent (9-10%) increase in their salaries during the 2002/2003 financial year. There was also an increase in the number of people working overtime during this period.

In respect of the budget deficit appearing on annexures 'SMS3' and 'SMS4', the Department has asked the regions to explain the causes of the deficit in the budget allocation.

2.3 Remuneration for Overtime

Ms Swarathe also touched on issues relating to the Department's policy in respect of the remuneration of members for overtime. Paragraph 5.6 of the procedure manual of the Department provides that overtime payments for weekend duties shall be limited to the level of Deputy Director. This implies that an official on the level of a Director and higher may not perform overtime duties regardless of whether such duties are performed on a lower level.

She was also aware that in terms of clause 5.11 of the same procedure manual, if a member is utilised and placed on duty in a post with a rank lower than the one held, he or she shall receive overtime pay of the post in which he or she was being utilised on that specific weekend and not of the rank held.

For example, a Deputy Director working overtime would be remunerated according to the maximum scale of a Senior Correctional Officer. If the Deputy Director who works weekend overtime is paid on the scale of a Deputy Director, the budget would be exceeded.

She confirmed that she herself had worked overtime at Pretoria Central Prison as a Senior Correctional Officer Grade 1, which is not her rank. She was paid at the scale of a Senior Correctional Officer until July 2003.

She said that these measures were put in place to curb overspending on overtime. The role of an Area Commissioner is, amongst other things, to see to it that there is no overspending on overtime.

She denied, however, that there was no budget allocation for weekend overtime as alleged by some officials. She pointed out that if a Deputy Director does monitoring duties during his overtime session, he/she would be remunerated as a Deputy Director if the post establishment allows that. The posts establishment received from corporate planning does not designate duties. She agreed that in terms of clause 5.11 of the procedure manual, the

determination of remuneration depends on what work a person does and not on his/her rank. An increase in prisoners will however require more warders.

2.4 Public Service Commission

Ms Swarathe pointed out that she is aware of the recommendations made by the Public Service Commission in September 2000 recommending a (7) seven week establishment but as far as she knew at the time of testifying, those recommendations had not yet been implemented.

Ms Swarathe also highlighted the cost incurred by the Department at that time in respect of overtime as opposed to the costs of changing to a seven-day week system. According to her:

- (i) new members' starting basic salary, at the lowest level of Correctional Officer Grade 1 – Grade 3 is about fifty eight thousand rand (R58 000,00).
- (ii) the basic salary plus benefits costs the Department ninety six thousand rand (R96 0000,00) each year per member.
- (iii) The Department spends a total of six hundred and forty million rand (R640 000 000,00) per annum on overtime nationally.

She was of the opinion that if the Department phased in a seven (7) day work week, as recommended by the Public Service Commission, the Department could employ a number of new members. There will be no need for overtime if the amount paid out presently for overtime is utilised to pay the salaries of the additional new members who would be employed on a full time basis by the Department.

3. DEPARTMENT'S OVERTIME POLICY

3.1 Ms M.P. Moela

The Department's overtime policy was fully dealt with by Ms Mamshita Pauline Moela who testified that she is a Senior Correctional Officer: Remunerative Allowances stationed at the Pretoria Head Office,⁴ whose duties entail policy formulation and administration of weekend and normal overtime, standby allowances, standard and special danger allowances, night shift allowances and also clothing for Community Correction personnel.

Ms Moela advised that she is aware of the Department's overtime working policy⁵ and pointed out that the policy was formulated by the Department and negotiated with the unions. The Department consulted extensively with the unions, which are aware of the weekend overtime policy.

Like Ms Swarathe, Ms Moela is aware that the Public Service Commission recommended the abolition of a five (5) day work week and in its place recommended a seven (7) day work week. This recommendation had not yet been implemented as it was still being negotiated at the time she testified.

3.2 Purpose and Implementation of Overtime

Ms Moela enlightened the Commission to the fact that, in terms of:

- (a) the purpose of overtime remuneration is to compensate personnel for additional services rendered due to an inadequate establishment and/or insufficient personnel for the rendering of essential services within the Department on Saturdays, Sundays and public holidays.⁶

⁴ Ms Moela joined the Department in 1999 at the Pietersburg Management Area.

⁵ See Exhibit "PPP" Pretoria hearings where the policy is Annexure 'A' to her affidavit.

⁶ Ms Moela referred to clause 2.1 of the Departmental overtime policy.

- (b) the implementation of a system of working overtime was introduced as an interim measure by the Department on the recommendation of the Public Service Commission, subject to the treasury approval, with effect from 1 February 1978 on the condition that the system would phase out when the Department had sufficient manpower to implement the seven (7) day service rendering establishment.⁷

Ms Moela pointed out further that the Department has a dual establishment system:

- (a) the weekly establishment (Monday to Friday) and
- (b) the weekend establishment (Saturday to Sunday).

The weekend establishment is based on rendering essential services in the Department on a twenty-four (24) hour basis, which resulted in the Department having three (3) shifts of eight (8) hours each to ensure maintenance of safety and security in prisons.

3.3 Limitations on Overtime

As working overtime was established to cater for essential services without which, Ms Moela pointed out, a prison may not operate, the weekend duties are limited to custodian, health and support personnel. Custodian and support personnel refer to full time prison warders and escape monitors, which are a Grade 3, 2 and 1 post. Health and support personnel refer to closed occupational classes, such as nurses.

The closed occupational classes may work weekend overtime but their utilisation is subject to certain conditions and procedures. However, some closed occupational classes, such as certain specialist personnel (e.g. social

⁷ Clause 2.2 of the policy.

workers and educationists), render services that are not essential. The prison can function without the services of this group at weekends.

Members from specialised/closed occupational classes, e.g. logistics, finance, social work and educationists may, if necessary, be utilised to work over weekends.⁸ The utilisation of these personnel (closed/specialised occupational classes) over weekends is subject to the following conditions:

- (i) Overtime duties shall be performed in the custodian occupation class;
- (ii) These personnel must be well versed with the nature of the duties of the post in which they may be utilised;
- (iii) Officials from the closed occupational classes may not demand to be placed on duty over weekends.
- (iii) Their utilisation is strictly subject to the provisions of paragraph 5.2.2. of the policy. This clause provides that only if the utilisation of these personnel is unavoidable and no functional custodian members, whether from Management Area, head office or prison are available and only if such practice can be motivated.

She also testified that only personnel with the corresponding post levels as provided for in accordance with the weekend establishment shall be placed on duty over weekends/public holidays except in highly exceptional circumstances, such a critical shortage of personnel with the corresponding rank levels.⁹

Furthermore, the policy manual provides that all attempts must be made to avoid the utilisation of personnel with higher post levels working at lower levels,¹⁰ for example, a Senior Correctional Officer being utilised in a Correctional Officer post.

Ms Moela made the following important points in her evidence:

⁸ This was in terms of clauses 5.3, 5.2.1 and 5.2.2 of the policy.

⁹ This was in terms of clauses 4.6 and 4.7 of the policy manual.

¹⁰ Clause 4.7.

- (a) Working overtime should not be utilised by personnel to enrich themselves and Area Managers, who are responsible for ensuring this doesn't happen, should guard against it.
- (b) In terms of clause 4.9 of the overtime policy, no official is allowed to work more than forty-eight (48) hours of weekend overtime in one (1) month. Under normal circumstances, an official is expected to work thirty-two (32) hours of weekend overtime in one (1) month. It is only in the months where there are five (5) weekends that officials of one (1) division will work forty-eight (48) hours, which is the limit in one (1) month.
- (c) The number and rank of personnel who perform weekend duties is limited to the approved finance weekend establishment according to post levels.

As indicated above, the placement of personnel should be from the same occupational class with the same corresponding rank and post. However, if it happens under highly exceptional circumstances that members of a higher rank are utilised in posts of lower rank levels, those members should be compensated on the top notch of that particular post and rank. The policy stipulates that if an official with a rank higher than that of a correctional officer in the same occupational class is utilised in a correctional officer's post during weekends, he or she will be remunerated according to the maximum salary notch of a senior correctional officer.¹¹ If, for example, a Deputy Director is utilised as a monitor, policy dictates that he should not be paid as a Deputy Director but according to the post class in which the official is utilised.

The community corrections Soshanguve weekend duty list on page 63 and 64 of Bundle A indicates that on 28 and 29 February 2004, a Deputy Director, Mrs Lesolang performed monitoring duties. She was, however, paid on the

¹¹ Clause 6.6.1. of the policy.

scale of a Deputy Director, which was one hundred and thirty five rand and fifty two cents (R135,52) for Saturday and two hundred and three rand and twenty eight cents (R203,28) for Sunday, when other officials, Mr Nedzamba Correctional Officer Grade 2 and Mr Ganyane Correctional Officer Grade 1, were paid forty nine rand and thirty nine Cents (R49,39) and fifty four rand and fifty cents (R54,50) respectively. All of these officials performed monitoring functions.

Ms Moela conceded that there was a breach of Departmental policy in this regard as all officials on the duty list for the two (2) days referred to above performed monitoring functions.

The D224 register is a register that records the details of persons who performed overtime in each Management Area. This document neither records what functions an official performed nor when he/she did the overtime. The Head of Prison has no way of knowing what function an official performed before approving each claim. If for example, an Assistant Director performed a lower rank function like monitoring, in terms of this document no-one would know that an official performed a function lower than his rank. This results in an official being paid at a higher rank contrary to the policy.

4. UNION COMPLAINTS

The lack of proper implementation of the overtime policy was also highlighted by the unions who complained that mismanagement of the overtime and the failure of the Department to adhere to overtime policy was affecting their members.

Mr Tsandzeka Kenneth Mthombeni, a Director: Employee Relations in the Department stationed at Pretoria Head Office whose duties include liaising with the unions and acting as a representative of the Department's negotiating forums, advised the Commission that he had gathered information from the

Bargaining Council that there were problems with regard to the management of weekend overtime.

Mr Mthombeni stated that the union's major concern was that officials of a higher rank level were allowed to work in posts lower than their actual post levels. Members were also allowed to work more than thirty-two (32) hours in a month of four (4) weeks and that members who were working outside the establishment were given first preference to work weekend overtime. He thereafter issued a directive to remind Regional Commissioners of the need to manage weekend overtime properly.

5. DEPARTMENT'S RESPONSE

5.1 Departmental Directives

Mr Mthombeni, who testified that part of his duties included ensuring stability in the Department, confirmed that he was responsible for issuing a number of directives to Regional Commissioners regarding the issue of overtime.

In writing these directives he was prompted by two (2) reasons, namely:

- (a) the Department's financial constraints, and
- (b) information received that weekend overtime was not properly managed in that Management Areas were not complying with the weekend overtime policy.

In advising the Regional Commissioners about proper management of overtime, reference was made by Mr Mtombeni to certain areas of the weekend overtime policy, for example in clause 5.1 of the directive where he mentioned that no officials should be allowed to work in a higher or lower post than his/her actual post level. He also referred to clauses 4.6. and 4.7 of the weekend overtime manual, which provides as follows:

“4.6 Only personnel with the corresponding post level in accordance with the weekend establishment shall be placed on duty over weekends/public holidays, except in highly exceptional circumstances such as a critical shortage of enough personnel with the corresponding rank levels.”

“4.7 All attempts must be made to avoid utilisation of personnel with higher posts levels in lower working levels (e.g. that senior correctional officers are utilised in a correctional officers’ post).”

In clause 5.2 of the directive, he mentioned that no officials should be allowed to work more than two (2) weekends in a month. Where, in exceptional circumstances, it is not possible to comply with this, prior approval must be obtained from the manager in consultation with the Regional Commissioner in terms of clause 4.14 of the Departmental policy. He also warned that in respect of the current financial year, the indication is that the Department is heading towards overspending on the overtime budget and his intervention was necessary to try to prevent this.

Mr Mthombeni advised the Commission that he is serving in a task team working together with the DPSA regarding the implementation of the recommendations of the Public Service Commission. The task team was appointed in November 2003¹² consisting of members of the Department including the Deputy Commissioner. There are also two (2) officials from DPSA on the task team. The task team started in January 2004, with the view of investigating the possibility of changing the week to a seven (7) day working week. They have finalised the investigation and the report was given to the National Commissioner for his approval. The Commission has not had sight of this report.

¹² This was established approximately three (3) years after the PSA recommendations.

He is aware that the Public Service Commission is recommending a seven (7) day working week. These recommendations were once brought to the chamber but they were stalled by the Department's top management. There was no resistance from the unions or the Bargaining Council with regard to these recommendations but no definite option was chosen at the Bargaining Council. The non-implementation of these recommendations is not due to the resistance by the union but because management stalled the recommendations.¹³

They did not deal with the Public Service Commission's report in the task team. He was not aware that this report dealt with the topic of overtime and other related issues. He has, in fact, not seen this report. The report of the Public Service Commission was not placed before the task team when they conducted their investigations.

5.2 Mr S. Gambu

Mr Sidwell Gambu is employed by the Department as an Assistant Director: Remunerative Allowances. He confirmed that the Department is experiencing problems with regard to the management of weekend overtime. During the year 2002, he saw an audit query from the Auditor General querying certain officials who worked more than forty-eight (48) hours overtime per month.

Subsequent to a number of queries that were received in respect of weekend duties, it became clear to the Department that weekend overtime was not properly managed and as a result thereof, several letters were sent to different Management Areas advising that they should properly manage weekend overtime. These letters were sent to Provincial Commissioners and Area Managers. The following are some of the problems identified by all Provincial Commissioners. The letter is annexed to his affidavit dated 11 June 2002.

¹³ On the role of management in crucial issues see Chapters one to three of this report.

- “1. *Heads of Prison as a punitive measure summarily disqualify officials from performing weekend duties when such officials are sick during the week. If Heads of Prison are however sick, they still perform weekend duties and they do not allow other officials to work in their places;*
2. *Certain officials are booked only to perform night duties;*
3. *Area Managers/Heads of Prisons refuse to pay officials who worked on a Saturday and who were sick on a Sunday. It is made clear that officials should be remunerated for all the hours they actually performed duty during a weekend;*
4. *Certain officials are allowed to perform duties during four (4) weekends whilst others are granted the opportunity only once or not at all during a month;*
5. *Discretion is not used when officials arrive late for duty and these officials are summarily disqualified from working a specific weekend;*
6. *Officials with the rank of Senior Correctional Officer and higher, perform duties in a correctional official post and are incorrectly remunerated in accordance with their own salaries. This practice is unacceptable;*
7. *Closed occupational groups are posted in strategic positions during weekends causing a security risk as they are not always equipped.”*

A paper trail should indicate if a person who is a Director performed duties of the lower rank when he worked overtime. If the computer is not properly fed with the correct information, the person would then be paid according to a wrong scale. A document Z168, is a document which is generated when a member has worked weekend overtime, however, this document does not state what the person did when he/she performed overtime. The Z168 simply indicates whether a member was present or not and does not indicate the exact time of arrival and departure. The information on this document Z168 is then transferred to another document, G224. The Head of a Department then approves and refers the G224 to the Area Manager for payment of the claims.

The persal section has no way of knowing how the official was utilised. There is no verification in these documents of what the rank of a person is and what he actually did. Departmental policy is lacking in this regard.

He, himself has worked overtime at Pretoria Maximum Prison. He was utilised as a correctional officer Grade 1.

6. CONTRAVENTIONS OF POLICY

6.1 Commission's Investigation

Advocate Shabalala, the Commission's investigator, investigated allegations of contraventions and abuses of the weekend overtime policy. During the course of his investigations, he collected various documents from the Departmental official records and some of the documents were given to him by a member, Mr Winson Naidoo, and he thereafter compiled a bundle of documents which was handed in.¹⁴

6.2 Alleged Abuse of Overtime

After perusing and analysing the documents, he made the following observations relating mainly to the alleged abuses of overtime duties by certain officials in the employ of the Department:

- (a) From the 1 to the 28 February 2003, Mrs Lesolang, a Deputy Director performed overtime duties as a monitoring official (Grade 1 post) but was paid in accordance with her salary notch of Deputy Director Level 12. She also approved her G224 for the month of February 2003.
- (b) There was no duty list available for the month of February 2003. However, a copy of the Z168, which is the official duty register,

¹⁴ See annexure 'BSI' to his affidavit marked Exhibit "TT".

suggests that Mrs Lesolang worked first watch night duty on the 15 and 16 February, 2003, and day duties on the 1 February 2003. It could not be verified where she worked because the duty sheet was missing.

- (c) On the weekend of the 3 and 4 January 2004, Deputy Director Mrs Lesolang worked day duties at Community Corrections Soshanguve. She worked on the weekend of the 31 January and 1 February 2004. She also worked on the weekend of the 28 and 29 February 2004 at Shoshanguve. On all the dates mentioned herein, she performed duties of monitoring official, which is the interchangeable post of Grade 1 – Grade 3. For the duties performed on the 3, 4, 10 and 11 January 2004, as a monitoring official, Mrs Lesolang was remunerated according to her salary notch of a Deputy Director. For the duties performed on the 31 January 2004, 1, 28 and 29 February 2004, as a monitoring official, Mrs Lesolang was also remunerated on a salary notch of a Deputy Director.¹⁵
- (d) Assistant Director H.H. Coetzee performed the functions of a monitoring official on the weekend of the 16 and 17 November 2002, at Community Corrections, Pretoria. He also performed functions of a monitoring official on the 2 and 3 November 2002 at Pretoria Community Corrections. According to the payment advice for the work performed, Mr Coetzee was paid on a salary notch of an Assistant Director for the weekend overtime work during the month of November 2002.¹⁶
- (e) Assistant Director Coetzee on the 14 and 15 December 2002, performed weekend duties in the post of monitoring official at Community Corrections, Pretoria. He also performed weekend

¹⁵ These allegations are supported by Annexures 'N1 – N6' of Annexures 'BS1' of Exhibit 'TT'.

¹⁶ These allegations are supported by Annexures 'OP' dated the 1 November 2002, and 13th November 2002, read together with Annexure 'K'.

overtime on the 1 – 28 February 2003. He was remunerated in accordance with the rank of Assistant Director on the 8, 9, 22 and 23 February 2003 although he performed first watch duty. According to the G224 form for the month of February 2003, Mr Coetzee was remunerated in accordance with his rank of an Assistant Director. The payment for extra remuneration was approved by Deputy Director, Mrs Lesolang.¹⁷

- (f) On the 10 and 11 January 2004 and again on 24 and 25 January, Assistant Director Coetzee performed the function of a monitoring official at Community Corrections, Pretoria. For duties performed on the 10, 11, 24 and 25 January 2004, Mr Coetzee was remunerated according to the salary level of an Assistant Director. This remuneration claim does not appear to have been properly approved but a person known as Mr A. Makgamatha performed certain verifications in this regard.¹⁸
- (h) Mr Coetzee again performed monitoring duties on the 7, 8, 21 and 22 February, 2004, working day duties.¹⁹ Mr Coetzee was remunerated according to his salary notch of an Assistant Director for these duties. The payment claim in this regard was approved by Mrs Lesolang.²⁰
- (i) Deputy Director P.J.P. Killian, who is stationed at the Area Commissioner's office of Acting Director Area Co-Ordinator of the Pretoria Management Area, performed weekend duties on the 16 and 17 November 2002, at the Community Corrections, Pretoria, in the post of monitoring officer. For the month of November 2002, Mr Killian performed overtime duties in the post of monitoring official. In terms of the remuneration advice for additional duties (G224) no payment is

¹⁷ These allegations are supported by Annexure 'Q'(a), and 'N'(b) and Annexure 'M'.

¹⁸ These allegations are supported by Annexure 'M5' page 54 of the bundle.

¹⁹ These allegations are supported by Annexures 'M1', 'M2', 'M3' and 'M4' of the bundle.

²⁰ These allegations are supported by Annexures 'M6' and 'M6(a)' of the bundle.

reflected. However, a manual calculation has been done on the Z168 (official duty register) reflecting the payments that were due to Mr Killian. In this regard, annexure 'T1' and 'T2', an extract from the Z168, which corresponds with the tariffs applicable to the weekend overtime, reflects the amount.²¹

- (j) He also performed weekend duties on the 14 and 15 December 2003, working as a monitoring official performing first watch night duties.²² For the month of December 2002 to the 30 and 31, Mr Killian was paid in accordance with his salary notch.
- (k) For the month of December 2002, Mr Killian received payment for overtime performed as a monitoring official at Community Corrections, Pretoria, in his salary notch as a Deputy Director. All the G224 documents pertaining to the payment of Mr Killian were approved by the Assistant director H.H. Coetzee.²³
- l) Assistant Director Mr E. Khoza worked at the Access Control Station performing certain functions on the 9 and 11 August 2002, on a six (6) to fourteen (14) hour shift, which is a Grade 1 post.
- m) Assistant Director M P Masango worked at Tower 5 first watch night duty on the 9 and 11 August 2002. This is a Grade 1 – 3 post.
- (n) Senior Correctional Officer J.J. Muller worked a shift at Tower 5 on the 24 and 25 August 2002. This is a Grade 1 – 3 post.
- (o) Assistant Director van Achtenberg worked at Tower 1 on second watch on the 3 and 4 August 2002, between 14H00 and 22H00.

²¹ These allegations are supported by Annexures 'S1' and 'S2' in the bundle.

²² These allegations are supported by Annexure 'Q' the duty list dated the 16 and 17 November 2002 and annexure 'Q'.

²³ This allegation is supported by Annexures 'S1' and 'S2'.

- (p) For the month of February 2004, Assistant Director R.R. Maake performed duties on the 14, 15, 21 and 22, at C-Max Prison. On the 14 and 15 February 2004, Mr Maake worked at C5 section on a fourteen (14) to twenty-two (22) hour shift on a post of Correctional officer 1. He worked again during day duties as a Custodial Officer on the 21 and 22 February 2004, at C section.
- (q) Assistant Director Maake's rank level at PS is Grade 1 on the duty list, however, it has been established that he is in fact an Assistant Director.²⁴
- (r) On the duty list the rank of members working at C-Max Prison have been recorded incorrectly. They appear as Grade 1 when in fact they are Senior correctional Officers and the Z168 (official duty register) gives a true reflection of their ranks, which corresponds with the G224 (payment for extra remuneration for extra duties performed).²⁵
- (s) In the month of July 2003, which had four (4) weekends, Mr Marimi worked forty-eight (48) hours overtime.²⁶
- (t) Mr M.J. Selepe, in the month of July 2003, which had four (4) weekends, he performed forty-eight (48) hours overtime.²⁷
- (u) Mrs Dusse, is a Chief Social Worker who is stationed at Pretoria Central Prison. She performed day duties on the 21 and 22 June 2002, at Medium C, the Visitors' section. The duty list was approved by Mr M. Bakoma.²⁸

²⁴ The allegations herein are supported by Annexures 'V5', 'V6' and 'V7'.

²⁵ This allegation is supported by Annexures 'W', 'X1' and 'X2' of the bundle.

²⁶ In this regard, the allegation is supported by annexure 'Y1'.

²⁷ This allegation is supported by Annexure 'Y2'

²⁸ This allegation is supported by Annexure 'Z2' of the bundle.

- (v) Mrs M.C. Johnson is a professional Educationist stationed at Pretoria Central Prison. Mrs Johnson also worked overtime on the 14 and 15 June 2003, at the Visitors' section, Medium C. She was the member in charge of the visitors' section. The duty list was approved by Mr P.F. Hlalethoa. Mrs Johnson performed weekend duties on the 10 and 11 January 2004, at Medium C, A group visits. She also performed duties on the 24 and 25 January 2004, and she worked as a member in charge of Pretoria Central Prison. The duty list for the 10 and 11 January 2004, was approved by Mr Rakoma and the list of the 24 and 25 January 2004, was approved by Mr Hlalethoa. Mrs Johnson also worked on the 8 February 2004 at Medium C, visitors' section. The duty list was approved by Mr Hlalethoa. She also worked on the 21 and 22 February 2004, at Medium C visitors' section. The duty list was approved by Mr Mashabathaka.²⁹

7. EVALUATION

7.1 Financial issues

The evidence of Miriam Swarathe has established that the initial budget allocated for weekend overtime for 2002/2003 financial year was six hundred and thirty nine million nine hundred and twenty seven thousand rand (R639 927 000,00). For the financial year 2003/2004, it was increased by approximately one hundred million rand (R100 000 000,00) to seven hundred and thirty nine million nine hundred and thirty thousand rand (R739 930 000,00).

The budget allocated for Pretoria Central Prison for the 2003/2004 financial year was nine million nine hundred and seventy three thousand eight hundred rand (R9 973 800,00) and for the next financial year it was ten million eight hundred and sixty five thousand two hundred rand (R10 865 200,00). For C-

²⁹ The allegations herein are supported by Annexures 'Z3', 'Z4', 'Z5', 'Z6' and 'Z7'.

Max Prison it was six million five hundred and forty two thousand nine hundred rand (R6 542 900,00) and seven million one hundred and two thousand six hundred rand (R7 102 600,00) for the following financial year.

Evidence also established that for the financial year 2002/2003 the Department had a deficit of ninety three million seven hundred thousand eight hundred and thirty five rand (R93 700 835,00). For the financial year 2003/2004, the Department had a deficit of sixty million two hundred and nine thousand five hundred and eleven rand (R60 290 511,00). For both Pretoria and C-Max Prisons, the deficit was two hundred and eleven million eight hundred and forty six thousand rand (R211 846 000,00) and twenty eight million four hundred and forty nine thousand rand (R28 449 000,00) for C-Max.

It is clear from the analysis of the above figures that the budget allocated for weekend overtime increases each financial year. The figures are also a clear indication that there has been a total loss of control on the weekend overtime budget by the Department officials. The officials of the Department in charge of the budget section have conceded in their evidence that there are serious problems with regard to the management of the weekend overtime budget. Various directives and letters have been issued to all Provincial Managers and Provincial Commissioners advising them that they should comply with the Departmental policy relating to weekend overtime remuneration.

As evidence has shown, there was no attempt by the Department to curtail overspending on weekend overtime remuneration nor was there any attempt by the Department to adopt a seven (7) day week establishment as recommended by the Public Service Commission. Instead as evidence has shown, there was large overspending and deficits in the weekend overtime budget.

Evidence has shown that the Department spends approximately six hundred and forty million rand (R640 000 000,00) on weekend overtime remuneration alone.

The high spending on weekend overtime remuneration and the deficit in the budget, as evidence has shown, is largely due to the Department's non-adherence to the policy governing the whole system of weekend overtime.

7.2 Remuneration Irregularities

In terms of the procedure manual for the implementation of the system of weekend overtime, remuneration is to compensate personnel for additional services rendered due to the inadequate establishment and/or insufficient personnel for the rendering of essential services in the Department on Saturdays, Sundays and public holidays. It is therefore clear from the procedure manual that the system of weekend overtime is for the benefit of the Department and not for the benefit of staff members.

Evidence, however, has established that very senior officials are allowed to perform monitoring duties in prisons and over weekends and are remunerated at their higher level salary scales. Sometimes these officials are drawn from other Management Areas.

Senior officials, including Mr Mthombeni, Mrs Moela, Mrs Lesolang and other senior officials in the Department have worked overtime carrying out monitoring duties in prisons. They have been remunerated according to their ranks. This is contrary to the policy of the Department, which requires that when these senior officials are utilised, they should be paid according to the scale of Correctional Officer Grade 1-3. Mr Shabalala has also referred to a number of officials in his evidence, who also performed monitoring duties and were paid according to their own ranks and scales. Their payment for overtime worked was also contrary to the Departmental policy. Some of these officials have worked more than the required numbers of hours per month.

Mr Shabalala however, conceded that in his investigations he did not liaise with senior officials of the Department to determine whether the utilisation of

the senior officials during weekends was authorised by the Heads of Department. Senior officials from Assistant Director and below can be utilised to perform such duties in exceptional circumstances in terms of the policy, but there can be no justification for these senior officials to be remunerated at their senior scale and rank. Both Mrs Moela and Mr Mthombeni testified that if senior officials in the rank of Deputy Directors or Assistant Directors perform such duties, then they should be remunerated in accordance with the rank and scale of the work required and not of the rank they hold. Mr Mthombeni in his evidence testified that officials get paid according to their rank. This appears to be a blatant misinterpretation of the policy by very senior officials of the Department.

The payment of Mrs Lesolang, a Deputy Director, in amounts of (one hundred and twenty two rand and sixty cents (R122,60) and one hundred and eighty two rand and ninety cents (R182,90) per hour for the weekend duty is not justified when other officials were paid between fifty four rand and thirty five cents (R54,35) and eighty two rand and twenty eight cents (R82,28) for Saturday and Sunday respectively for overtime work. Evidence has established that Mrs Lesolang together with other officials who worked overtime on the 1 November 2002 and 30 November 2002, was not justified.

Mr Shabalala, the Commission's investigator, conceded in his evidence that he did not consult or liaise with certain senior officials or heads of Departments when he conducted his investigation and found that certain senior officials who did overtime work were paid according to their scale.

It is clear from the reading of the policy that the policy itself deals with claiming for work actually done and not in terms of the rank of a person. There are, however, fundamental misinterpretations of the policy if one has regard to the evidence of Mrs Moela. According to her, if a Deputy Director is doing monitoring duties, he should be paid according to the salary scale of a Deputy Director. In terms of the policy, if officials regardless of their ranks do monitoring duties they should be paid according to the policy. There should be no differentiation in terms of their rank. Mr Mthombeni in his evidence stated

that officials working overtime are paid according to their rank and that this is a national problem.

The large spending on weekend overtime and the deficit in the weekend overtime budget is therefore also due to the misinterpretation of the Department's policy relating to weekend overtime remuneration.

The policy also prohibits the use of occupational class officials in performing monitoring duties. This class comprises of nurses, educators and other related officials. Evidence has however shown that these officials are utilised in performing monitoring duties in prisons. This compromises security of the prisons in the sense that these officials are not trained in monitoring functions. The policy only allows their utilisation only when custodial staff is not available to do such duties. There was no evidence to suggest that the occupational class officials utilised to work overtime was necessitated by the shortage of staff members as the policy allows their utilisation in the event of a shortage of other custodian staff members.

7.3 Non-implementation of Public Service Commission recommendations

It is clear from clause 2.2 of the procedure manual that the system of weekend overtime was introduced as an interim measure by the Department on the recommendations of the Public Service Commission subject to Treasury approval, with effect from 1 February 1978, on condition that the system would phase out when the Department had sufficient manpower to implement the seven (7) day service rendering establishment.

One of the recommendations of the Public Service Commission was the phasing out of weekend overtime. It recommended in its place that the Department adopt and implement the seven (7) day service rendering establishment.

There was no explanation why this recommendation of the Public Service Commission had not been implemented by the Department by the time of the hearings.

The evidence of Mr Tsandzeka Kenneth Mthombeni, who is a Director: Employee Relations in the Department has shown that the Department has been aware of the recommendations made by the Public Service Commission and that such recommendations have been tabled before the Bargaining Council and that there was no resistance from the members of the forum when the recommendations were tabled. His evidence has clearly shown that the implementation of the recommendations of the Public Service Commission was not due to resistance from the unions but that management stalled it.

Mr Mthombeni also served in a Task Team, which was appointed together with the DPSA members to consider the seven (7) day work week establishment. His evidence revealed that the Task Team has completed its investigations and submitted a report to the National Commissioner.

However, according to Mr Mthombeni, the report of the Public Service Commission was not placed before the Committee and they were not aware of the contents of the Public Service report and the recommendations therein. One wonders how the Task Team considered the implementation of the recommendations if they did not have the report of the Public Service Commission before them.

The Commission is aware that the Department has begun the process of phasing in the seven (7) day week establishment, as recommended in the Public Service Commission in their report of 2000. However, this attempt has been met with strong opposition by union members and in particular, Popcru. During the latter part of 2004, there were a number of illegal strikes nationally in protest against the phasing in of the seven (7) day week establishment. This has led to the dismissal of a number of employees in the Department.

In addressing the National Assembly on Popcru strikes,³⁰ the Minister stated:

“...we can never agree to the abuse of public funds as some have been doing with weekend work. We must use the resources of the State in such a manner that we address critical social issues such as unemployment by creating much needed job opportunities within Correctional Services.”

It also appears from the Minister’s statement that a joint Technical Committee was formed, which also involved Popcru members to negotiate the issue of weekend work.

The Public Service Commission in its report noted that the weekend duty list Z168 Attendance Register and Night Duty Journal are used to record overtime duty. None of these documents makes specific provision for the time when persons arrive and leave work. The Public Service Commission recommended the use of an attendance register, which should record the presence of custodians during the performance of their weekend overtime duty. This recommendation has also not been implemented by the Department. The verification documents G226 and Z168 do not specify the nature of the function performed by each official when they are working overtime. These documents also do not indicate the time when the member started and when he/she knocked off.

Evidence has also established that the verification procedures of the nature of the job performed by an official, the time he or she commenced and the time of departure are lacking in the documents used to determine the amount to be paid to each official who performed the weekend duty.

³⁰ See statement in the National Assembly by Minister of Correctional Services, B.M.N. Balfour, 17 March 2005.

8. CONCLUDING REMARKS

Evidence has established that there is a serious misinterpretation of the policy regarding weekend overtime. Even senior officials in the employ of the Department have different views as to how the policy should be interpreted.

Some of the views are that if a senior official like a Deputy Director performs monitoring duties during the weekend, he or she should be paid according to his or her rank but this however appears to be contrary to the policy, which shows that there is a clear misunderstanding or a misinterpretation of the policy itself by senior officials of the Department.

Evidence has shown that if the Department can adopt the seven (7) day work week establishment thousands of other new members could be employed and be paid with the money which is presently utilised to pay officials who work overtime. This could also alleviate the epidemic of unemployment in this country and the shortage of staff in the Department.

From the evidence presented before the Commission, there appears to be no reason why the recommendations of the Public Service Commission recommending the seven (7) day week establishment have not been implemented or has taken such a long time to be implemented.

The Task Team that looked into the matter and made recommendations regarding a seven (7) day week establishment did not even consider the recommendations of the Public Service Commission in this regard. In fact, evidence established that the members of the Task Team were not even aware of the recommendations dealing with overtime as contained in the report of the Public Service Commission. The Commission has not had sight of the report of the Task Team in this regard, which according to the evidence has been filed with the National Commissioner.

The policy of the Department regarding working weekend overtime is clear and straightforward. If it were properly implemented by the officials of the Department, there would be no need for the Department to spend so many millions of rands of the taxpayers' money nor would it struggle with huge deficits in the budget in order to cover the costs of remuneration for overtime work.

9. RECOMMENDATIONS

Accordingly the Commission recommends that:

- 10.1 the Department introduces a seven (7) day work week establishment within the Department, as it was recommended by the Public Service Commission during the year 2000.
- 10.2 the Department adopt proper verification procedures that clearly show the rank of the official, the nature of the work performed by the official, the time within which the official commences duties and departure time, prior to the authorisation of payment to the official who worked overtime. This is also one of the recommendations made by the Public Service Commission in its report of the year 2000.
- 10.3 Although a number of officials have been implicated as having been overpaid, in the light of the fact that there has been a serious misinterpretation of this policy as to how these officials should be remunerated, it is the view of the Commission that no recommendation should be made that these implicated officials be charged.
- 10.4 The Department should implement all the recommendations made by the Public Service Commission in September 2000.

- 10.5 The Department should embark upon an intensive training programme of all staff dealing with overtime. This training programme should emphasise the interpretation of the overtime policy.

- 10.6 The officials who failed to implement the Public Service Commission recommendations timeously should be charged with negligence as the delays have clearly caused wasteful expenditure.

CHAPTER 17

PROCUREMENT & LOGISTICS

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CHAPTER 17

PROCUREMENT AND LOGISTICS

1. INTRODUCTION

In its Terms of Reference the Commission is required to investigate and report on alleged incidents of corruption relating to the procurement of goods and services for the Department.

As the Department enters into literally thousands of contracts annually with suppliers at national, provincial and Area Management level, it soon became apparent to the Commission that procurement was a task of a magnitude far beyond the resource capabilities of the Commission. It was an area of the Department that clearly required its own separate inquiry by an outside agency with the necessary forensic investigative expertise.

The Commission therefore decided to concentrate its investigations only on certain selected areas of the Department's Logistics section of the Management Areas falling within the Commission's terms of reference in order to establish whether a wider and more comprehensive investigation by another agency was warranted and should be recommended. The auditing firm Manase & Associates was contracted to assist the Commission's investigation of the selected areas.

The selected sample areas of investigation the Commission chose were:

The Procurement of Goods and Services

This investigation focused on the procurement of goods and services at:

- o Durban-Westville Management Area.
- o Pollsmoor Management Area, as well as the Department's Head Office in Pretoria.
- o The irregular award of tenders at the Provincial Office of the Western

Cape where the conduct of a senior member of the Department at that office was examined.

- The purchase of screws by the Logistics Department at Pollsmoor at a price three times higher than the average market price for such screws.

- **Stock Control at Kitchens & Hospitals**

This investigation entailed the Commission carrying out random stocktakes at prisons, kitchens and storerooms in the Pretoria Management Area to establish whether rules and regulations were being complied with.

- **Workshops in Prison**

In this matter, the Commission investigated allegations of corruption and maladministration in the prison workshops at the Pollsmoor and Pretoria Management Areas.

2. THE PROCUREMENT OF GOODS AND SERVICES

2.1 Durban-Westville Management Area

As stated, the first investigation carried out by the Commission into the procurement of goods and services focused on the Durban Westville Management Area, as well as the Department's head office in Pretoria.

2.1.1 Objectives of Investigation

The objectives of the procurement investigations at the Management Areas were the following:

- to determine the validity of the alleged incidences of corruption relating to the procurement of goods and services for the Department of Correctional Services.

- to determine the adherence or non-adherence to Departmental policy and deviation from national norms and standards.
- to determine the extent of the alleged irregularities, if any, that occurred.
- to identify all parties involved in the alleged irregularities.
- to determine the extent of implementation of the recommendations of past investigations relating to the procurement of goods and services.
- to assist with the recovery of any losses, as determined during investigation.
- to identify weaknesses in the control environment and to recommend and assist management with the implementation of corrective action.
- to recommend and assist with disciplinary, civil and criminal action where possible.

2.1.2 Investigations

In order to fulfil this mandate, the Commission investigators took possession of various categories of documents, namely:

- order books
- provisioning advices
- contract files
- G3, G4, G5, G6 and G23 documents
- Z490 documents
- Payment documents sent to Pretoria for payment, etc.

The Commission investigators, who were mandated to investigate procurement and logistics at the Durban-Westville Management Area, went through a number

of documents to see whether there were any irregularities. The three (3) items, which caught their attention, were the tenders relating to “perishable products”, “funeral services” and “medicine supplies”.

Firstly, the “fresh cream” in perishable products caught the attention of the investigators because this item, by its very nature, would be a luxury item, which one would not associate with prison facilities. However, the explanation received was that there are certain prisoners for whom medical doctors had prescribed that they should have fresh cream. Notwithstanding that, the investigators went ahead to investigate the tenders relating to “fresh cream”.

Secondly, the funeral services caught the investigators’ attention because the number of deaths did not correspond with the limited number of the service providers who were being given the work.

Thirdly, the medical supplies caught the attention of the investigators because of the amount of drugs being ordered from a limited number of pharmacies. Furthermore, the drugs were fairly expensive. It was also apparent to the investigators that some of the drugs were supplied after hours, when in fact they could not be regarded as emergency drugs. In the circumstances, the tender procedures must have been relaxed. This then led the investigators to focus on these three (3) areas.

Some of the matters the Commission investigated were handed over to the Special Investigating Unit (SIU). The Commission is, however, not aware of the outcome of these investigations.

(a) Perishable Products

The investigation revealed that it is possible that two tenderers, namely Thandroyens Fruit Wholesalers and R & N Fresh Produce, who tendered in the financial year 2000/2001, are in fact one and the same person or business operating from the same address, namely 81 Flower Road, Clairwood. This possibility arises from a comparison of the handwriting on the documents in

question and the address.

Upon completion of the tender documents, L. Thandroyen created the impression that the company, being Thandroyens Fruit Wholesalers, is 100% owned by a woman. The invoices, however, contradict the tender.

Thandroyens Fruit Wholesalers tendered under different company and owner names, creating the impression of two separate companies, knowing that Thandroyens Fruit Wholesalers would be the supplier. The information provided on the tender document, such as the actual owners and the identification number 80016006080, is false and does not reflect the true and actual facts, as requested from tenderers L. Thandroyen and T. Claudette. The result was that the tender was fraudulently certified.

The Logistics Department should never have accepted invoices from Thandroyens Fruit Wholesalers, as the tender had not been awarded to the company.

Thandroyens, in fact, used four different companies and, as a result, the Logistics Department at Westville Prison did not obtain quotes from different companies for the provision of perishable projects but, in fact, obtained quotes from companies owned by the same entity, namely Thandroyens Fruit Wholesalers and R & N Fresh Produce (jointly referred to as the “Thandroyen’s Group”).

Two members, namely Mr Singh and Mr Khali, in the period 2001/2002, obtained quotes from the Thandroyens Group for the supply of fresh cream. The explanation supplied for not using the normal supplier, Vundla Management Services, was that the latter entity could not comply with its contractual obligations. However, there was no documentary proof that this was, in fact, the case. In addition, if it was the case, in view of the fact that a higher price had to be paid to the Thandroyens Group, there does not appear to have been any attempt by Mr Singh or Mr Khali to recover the price difference from Vundla Management Services based upon their inability to provide a service which they

were contractually bound to provide.

Commission investigators identified that, in terms of the Vundla Management Services contract, fresh cream was to be supplied at a unit tender price of:

- a) R6,70 for the period 1 April 2001 to 30 June 2001.
- b) R7,93 for the period 1 July 2001 to 30 September 2001.
- c) R8,55 for the period 1 October 2001 to 31 December 2001.
- d) R9,70 for the period 1 January 2002 to 31 March 2002.

However, when the Logistics Department subsequently ordered cream from Thandroyens Fruit Wholesalers, the price quoted by Thandroyens was R1,99 per litre higher.

Upon an examination of payment documents relating to certain order numbers, it was revealed that the invoices attached to payments were in some instances:

- copied invoices.
- altered and/or completed by a different person than the person originally issuing the invoice.
- the green copy (carbonised copy) accompanied the order and not the original invoice as required.
- issued before actual delivery of products as recorded on the G6 and/or G3 as proof of delivery.
- not substantiated by a G3 as proof of an order placed with a supplier.
- not recorded or do not correspond with the information recorded on the G3 and/or the G6.
- incomplete with regard to dates, quantities delivered and amounts completed.
- manipulated as to the content.
- lack of G6 documents as proof of delivery.

At no stage did anyone at Logistics insist that they should supply on the amounts quoted by Vundla Management Services or attempt to recover the difference in price quoted by these suppliers. As a result the Department paid more.

(b) Funeral Suppliers

An investigation into funeral suppliers to the Westville Prison revealed that there were three suppliers for the period March 1999 to February 2002, namely:

- Avbob Funeral Services.
 - Central Funeral Services CC.
 - 21st Century Funeral Services.
 - Marianhill Funeral Services.
- (i) In the case of the supplier Avbob, it was established that, with respect to order number 840966, an order was faxed to Avbob, Ladysmith for an A1 service amounting to R4 300,00 for a Mr Khumalo on 5 August 2000. However, Mr Khali (the same person who was implicated in the fresh cream issue) approved the quote only on 20 April 2001, being some eight (8) months later.
- (ii) In the case of Central Funeral Services CC, double payments occurred with respect to two (2) order numbers, 840957 and 840960. In these circumstances, although there was one (1) order number with respect to each of these matters, Central Funeral Services CC generated two (2) invoice numbers for each of these order numbers, resulting in a situation where there appears to have been an overpayment of R3 000,00. Once again, the persons implicated in the authorisation of the payment are Mr J.D. Singh and Mr M.S. Khali.
- (iii) With respect to Central Funeral Services, it was established that many invoices, against which payment was made, were photocopied invoices and not the originals, as the policy requires.

(iv) An analysis of order numbers pertaining to 21st Century Funeral Services revealed numerous irregularities. The irregularities may be summarised as follows:

- The company registration does not appear on the invoices.
- The company claims Value Added Tax but a VAT registration number does not appear on the invoices.
- There are duplicated invoice numbers.
- The Logistics Department changed invoice numbers on faxed invoices.
- The unit price accepted on the G6 does not correspond with the unit price as paid per invoice.

(v) For example, 21st Century Funeral Brokers invoice number 79 is the invoice number that is attached to three (3) different orders, being order numbers 841289, 841736 and 841746. It is, therefore, difficult to understand how the same invoice number could legitimately be generated with respect to three (3) different deceased persons. Notwithstanding this fact, authorisations of payment to 21st Century Funeral Brokers are, in each instance, authorised for payment by the same person, namely Mr M.S. Khali.

In instances where an invoice number had been changed, it was once again Mr Khali who authorised the payment, notwithstanding the changes made to the invoice. Noticeably, the invoice numbers that were changed were all changed from 79 to other numbers. It is invoice number 79 that had previously been used for three (3) different order numbers and, accordingly, considerable suspicion must arise from this analysis.

(vi) An analysis relating to quotes tendered by 21st Century Funeral Brokers reveals that the quotes are based upon three aspects:

- A basic price.
- A fee per kilometre for transport outside a 25 km radius.

- A rands amount per case for after-hour collection and delivery of the deceased and execution of after-hour funeral services.

An analysis of order numbers 841813 and 841703 reveals that the faxed invoices that emanate from these quotes, which were apparently accepted by the Department, do not contain a breakdown of the per kilometre charge, only a total amount. It then seems as if the payment was authorised without obtaining a breakdown of the costs pursuant to these quotes. In these circumstances, the accuracy of the payment that was effected must be called into question. This may be indicative of either corruption or simply negligence. Whichever the situation is, it will be crucial to interview Messrs Khali and Singh with regard to these allegations. Their conduct must be properly assessed against their obligations in terms of Departmental policy and their job description.

- (vii) The analysis by Commission investigators further revealed that there is a disturbing similarity between quotes received from Mariannahill Funeral Services and Central Funeral Services. In many instances, the wording of the quotations is exactly the same from both entities and the same font and layout of the quotes is to be observed.

This may be indicative of an attempt to sidestep Departmental policy regarding obtaining quotes. Once again, Commission investigators observed that it was Mr Khali who authorised all placements of orders involving suspicious quotations from funeral parlours.

(c) Ordering of Medicines

Original invoices, order books and proof of delivery with respect to the procurement system relating to the ordering of medicines were also investigated.

(i) Circle Pharmacy - Rinex

The investigation concerns an order, 841699, dated 19 September 2001, for

certain Rinex capsules from Circle Park Pharmacy. The G6 documentation referring to the order does not reflect any computerised unit price, although it appears from an analysis of the documents that the Circle Park Pharmacy under-quoted two other quotations from Sydenham Pharmacy and Meranti Medicine Depot. The invoice received from Circle Park Pharmacy was handwritten and did not correspond with any of the invoices submitted by that same pharmacy in the past. The Logistics Department transaction history with respect to Rinex suggests that the Logistics Department ordered Rinex for the first time on 3 October 2001, which was after the delivery of the goods ordered pursuant to order number 1841699. In these and other circumstances there is considerable suspicion that there may be another invoice relating to this amount and that this account may have been paid previously. The person identified in the approval of the payment is, once again, Mr Khali.

(ii) Circle Pharmacy - Myprodol

On the very same day, being 19 September 2001, Circle Park Pharmacy issued an invoice, number 1967, for the amount of R11 100.00 for the delivery of certain Myprodol capsules, which had been ordered together with Rinex on 19 September 2001. Mr Singh approved the order number and Mr Khali authorised the payments. This payment was split, it seems, in order to authorise it within the delegated authority.

(iii) Springmed Pharmacy - Rinex

The analysis of the respective invoice and documentation pertaining to payment of the product received from Springmed Pharmacy would suggest that the original quantity ordered was changed on the instruction of Mr Singh and increased, despite the fact that stock on hand on the date of delivery was fairly substantial. In addition, the product history obtained from the system revealed that there was no increase in the consumption of Rinex capsules that could have justified the notation "an increase in consumption" on the order, which was apparently at the instance of Mr Singh.

2.1.3 Findings

The following observations and recommendations were made by the Commission at the time of its investigation into Westville:

- a) There is a possibility of gross negligence and misconduct within the Durban-Westville Management Area Logistics Department.
- b) The control environment within procurement is weak or non-existent, enhancing the opportunity for fraudulent behaviour.
- c) The system used by the Logistics Department is outdated and lends itself to misuse and thus the possibility of corruption.
- d) The system is not user friendly and no development has taken place to upgrade the system over the past fifteen (15) years. The integrity of the data is therefore questionable.
- e) There is a lack of linkage between documentation and transactions in the system, increasing the possibility that fraudulent transactions can be processed without detection.
- f) It is easy for any person with a good knowledge of the system to bypass manual controls in order to process fraudulent transactions for personal enrichment.
- g) There is no linkage between the procurement and payment systems in order to detect fraudulent transactions before payment.

2.1.4 Recommendations

In light of these findings at the Durban-Westville Management Area, the

Commission makes the following recommendations:

- a) A manual reconciliation should be performed between the quantities, as stated on paid invoices, and the actual deliveries to chief users. This would be a manual reconciliation of the G5, G6 and G23 documents.
- b) The G23 obtained from the chief user should be reconciled with the information obtained and from the Logistics Department. This would enable the investigators to substantiate and quantify the extent of the irregularities.
- c) There should be an audit or investigation on the purchases of other products and services by the Logistics Department by a follow-up of:
 - (i) addresses.
 - (ii) employee links.
 - (iii) over-expenditure.
 - (iv) lack of written contracts.
 - (v) purchases outside contractual conditions.
 - (vi) purchases from unauthorised suppliers, for example computer equipment.
- d) There must be an audit and investigation into the adherence to policies and procedures by members, especially those employed at Logistics.
- e) There must be an audit of the adequacy and effectiveness of the procurement process, in order to recommend corrective action.
- f) Messrs Singh and Khali should be charged internally for the transgressions highlighted in this report.
- g) The veracity of the statement regarding the need for “fresh cream” to be ordered at a prison should be investigated further to establish whether there is a need for fresh cream in this facility or any other facility.

2.1.4.1 Recommendation: Drugs

The Department should seriously consider the use of generic drugs to save costs, where possible, instead of using the expensive drugs sometimes being ordered by the Logistics Department, unless a medical practitioner has specifically prescribed the expensive drugs.

2.2. Pollsmoor Management Area

2.2.1 The Investigation

The second forensic investigation the Commission conducted was at the Pollsmoor Management Area, where the scope of the investigation covered alleged corruption relating to the procurement of goods and services in the Logistics section, with the focus being on the weaknesses and alleged financial and procedural irregularities that the Commission had uncovered at the Management Area. The investigation was conducted to assess whether transactions entered into by members of the Department indicated irregular and/or fraudulent conduct.

This procurement investigation focused on the supplier base at Pollsmoor with specific emphasis and reference on transactions related to three suppliers, namely:

- MCT Suppliers.
- Ja'Millo Suppliers.
- MNM Suppliers.¹

The supplier database was evaluated with regard to the following inquiries, namely:

- Were expenses properly authorised?
- Were tender compliance procedures and controls properly observed, with particular regard to the Public Finance Management Act, Act No. 1 of 1999 and Departmental procedures?
- Was the procurement process transparent?
- Did the expenditure represent value for money or could the goods/services have been obtained cheaper?
- Was the work actually carried out and completed and the goods received before payment was made?
- Was the procurement and provisioning system fair, equitable, transparent, competitive and cost-effective?

¹ See the section dealing with the purchase of screws below.

The Commission's investigators found a number of irregularities in its investigation into the procurement of goods and services at Pollsmoor. The specific matters are dealt with hereinafter.

2.2.1.1 MCT Sales and Services

With regard to the investigation of MCT Sales and Services, it was established that Mr Anthony, who works for the Provincial Commissioner's office in the Logistics Department, is married to one Ms Sharmaine Anthony, who trades under the name of MCT Sales and Services. This is an entity that has obtained business from the Department. When Mr Isaacs, the Head of Logistics in the Provincial Commissioner's office, was interviewed, he stated that on 3 November 2000, Mr Anthony informed the Provincial Commissioner's office of the fact that his wife had opened a business and would be trading as MCT Sales and Services. A copy of that letter, however, made no mention of the fact that his wife would be tendering to supply goods to the Department.

An interview conducted with Mr Anthony himself elicited the comment that he did not deny that he helped his wife with the delivery of supplies to the prison and that he collected prison tender documents for his wife's business and delivered these documents back to the prison once completed.

He also admitted that he phoned the Logistics Department for monies owed to MCT.

In the interim, however, Mr Anthony has been transferred from the Logistics Department at his own request, with effect from 3 February 2003.

2.2.1.2 Ja'Millo Suppliers

The Commission's investigation of Ja'Millo Suppliers revealed that the wife of Mr Manewil, who works in the Personnel Department of Pollsmoor, runs a business

called Ja'Millo Suppliers. There is no indication that Mr Manewil disclosed his wife's involvement as a supplier to the Department.

2.2.2 Findings

The Commission also makes the following general findings on the procurement at Pollsmoor:

- (a) Maladministration and corruption were found to be rife in the Pollsmoor facility and serious systemic weaknesses were found to exist in the Department, which may well represent a microcosm of the general malaise that prevails in prisons in South Africa.
- (b) As regards the internal controls relating to the listing of suppliers on the database of the Department, it appears that companies are listed as general suppliers on the database, which, in turn, means that they are able to submit quotes on basically any item on the database. This may afford these companies an unfair advantage due to the fact that they supply all items.
- (c) There was non-compliance with acceptable procurement procedures, resulting in transactions that represent excessive and, in some instances, wasteful expenditure.
- (d) The process of obtaining quotations and invoices submitted by suppliers reflects serious instances of maladministration, which strongly suggest corrupt/fraudulent activities.
- (e) Officials issuing orders had no written delegation of authority and their actions were purportedly conducted with the full knowledge of the officials and management of Pollsmoor, suggesting a breach of the Public Finance Management Act.
- (f) Various officials at Pollsmoor would have had to collude to cause losses

to the Department and, accordingly, there are grounds to suspect financial misconduct in terms of the Public Finance Management Act.

- (g) There was actual financial prejudice suffered by the Department of Correctional Services at Pollsmoor, which appears to be substantial.
- (h) The best and/or competitive price for work done was not obtained in many instances and excessive payments were made for goods and services.
- (i) The accounting officer and officials at Pollsmoor have in many instances not complied with Sections 38, 39 and 40 of the Public Finance Management Act.²

2.2.3 Recommendations

In light of the above-mentioned findings the Commission makes the following recommendations:

- a) There should be properly documented official criteria detailing procedures and policies for the evaluation of suppliers entered on the database.
- b) The accounting officer and/or officials of Pollsmoor should be requested to reply, in writing, on the apparent contraventions of the Public Finance Management Act.
- c) Consideration should be given to building internal capacity in the Department, which should involve the training of members of staff with regard to processes, procedures, policies as well as ethics, good governance and best practices.

² The abovementioned sections deal with :
Section 38 - The General Responsibilities of Accounting Officer
Section 39 – The Accounting Officer’s responsibilities relating to Budgetary Control
Section 40 - Accounting Officer’s reporting responsibilities.

- d) Consideration should be given to the introduction of continual internal audit procedures to address the gap between procedures and implementation.
- e) Messrs Manewill and Anthony should be charged, internally, for the transgressions referred to in this report. If they have already been disciplined they should be removed from any position which could have influence over the Logistic Department.

The investigator's report with regard to the specific investigations of suppliers was filed as an Exhibit with the Commission.³

2.3 The Irregular Award of Accommodation Tender

2.3.1 Background

³ See Investigator's Report Pollsmoor Exhibit "KKK".

During the Commission's procurement investigation at Pollsmoor, Mr K. Hariparshad, a member of the Commission's auditing team, reported to the Commission Secretary in July 2003 that a staff member of the Provincial Commissioner's Office had made certain allegations indicating serious irregularities in the tendering and procurement process in the Provincial Commissioner's Office of the Western Cape.

Some of the allegations made were that a senior member of the Department, with dishonest intent, ensured that the proper tender system for the award of tenders for accommodation required for bosberaads were bypassed. Tenders that were called for were opened and processed irregularly and existing tenders, which had been submitted, were irregularly altered by means of "*Tippex*". There was an irregular award of a tender for rations valued at approximately R1 000 000.

2.3.2 The Investigation

As the investigation into procurement covered accommodation for seminars, the Commission investigators were then ordered to conduct investigations at the Provincial Commissioner's Office.

Detailed affidavits and statements were obtained from:

- Ms Hanelie Lategan, the staff member who made the allegations and who was employed by the Department of Correctional Services as a Head User Clerk based at the Provincial Commissioner's Office in Goodwood in the Western Cape⁴.
- Ms Ellen Dorothy Kapp who was employed as Secretary to the Provincial Commissioner's Office: Corporate Services⁵.
- Ms Lubbe, who worked as a general office worker at the Piekenierskloof Mountain Lodge, where her duties included the completion of quotations

⁴ See the affidavit of Ms Lategan Pollsmoor Exhibit "LLL".

⁵ See the affidavit of Ms Kapp Pollsmoor Exhibit "MMM".

and general administration and bookkeeping.⁶

2.3.3 The Allegations Against Mr Isaacs

The affidavits referred to above implicate the Provincial Head of Logistics, Mr M.A. Isaacs, in fraud and corruption relating to the procurement of venues for seminars in the following regard:

- a) The affidavit of Ms Lategan alleges that:
 - (i) Mr Isaacs instructed one Mr Anthony to approve certain quotations, which had been faxed, Tippexed and altered.
 - (ii) Mr Isaacs received quotations after the closing date and time from the venue Piekenierskloof Mountain Lodge.
 - (iii) The tender documentation was completed in the Provincial Commissioner's office and not by the tenderer in many instances.
 - (iv) Mr Isaacs manipulated the system to ensure that the Piekenierskloof Mountain Lodge obtained the seminar business. In this regard he did not rotate the suppliers on the database and in some instances appeared to have approved Piekenierskloof Mountain Lodge notwithstanding that their charges were eventually higher than those of other tenderers.
 - (v) Piekenierskloof Mountain Lodge misrepresented that it was a company 50% owned by a woman whereas this is not borne out by information received from the Registrar of Companies.

⁶ See the affidavit of Ms Lubbe Pollsmoor Exhibit “NNN”.

- b) The affidavit of Mrs Kapp alleges that Mr Isaacs compelled one Ms Kapp, employed by the Department of Correctional Services as a secretary to the PCO: Corporate Services, to sign a document as a witness in circumstances in which she was not permitted to see the entire document.
- c) The affidavit of Ms Lubbe describes the collusion between Mr Spies and Mr Isaacs, which was aimed at ensuring that Piekenierskloof received the necessary bookings for accommodation and conference facilities for Correctional Services events.

2.3.4 Disciplinary Proceedings Against Mr Isaacs

After its investigation, the Commission was informed that Mr Isaacs was charged in a disciplinary inquiry and received only a warning. As the Commission's investigations and the contents of the affidavits obtained from the various persons listed suggested serious and dishonest conduct on the part of Mr Isaacs, the Commission was of the view that there were substantial grounds for questioning the nature of the charges laid against Mr Isaacs and perhaps even the nature of the evidence adduced at that hearing.

During November 2004, Advocate G. Barlow, an investigator employed by the Commission, received the Department's personnel file relating to Mr Isaacs to determine how Mr Isaacs could have escaped appropriate sanction for such serious allegations.

A perusal of the contents of this file reveals the following:

- a) On 16 July 2003 (and coincidentally just after the investigations by the Commission into the activities of Mr Isaacs had been carried out in June 2003), Mr J.C. Robberts, the PCO: Operational Support Services in the Western Cape, suspended Mr Isaacs. The basis for the suspension was for the purposes of conducting an investigation with regard to alleged

irregularities into the awarding of quotations to advance transport.

- b) The Department laid certain charges against Mr Isaacs in terms of a document headed "Amended Allegations" (undated)⁷.
- c) Mr Isaacs received a written notification to attend a disciplinary hearing, which was scheduled to take place on 27 October 2003. This notice is dated 9 October 2003 and refers to the "Amended Allegations" document⁸.
- d) The matter did not proceed on 27 October 2003 but apparently proceeded on 11 November 2003. The chairperson was Mr M.J. Maako. The initiators were Mr M. Jones and Ms van der Watt. Mr Ndarana, it appears, represented Mr Isaacs.
- e) The proceedings in the disciplinary inquiry appear to have been minuted and certain documents were handed in at that inquiry. The minutes of the disciplinary hearing and the documentation handed in at that inquiry were submitted as an Exhibit⁹.
- f) On or about 12 November 2003 an "Annexure C: Warning"¹⁰ was issued by the chairperson of the disciplinary inquiry to Mr Isaacs. The

⁷ See document headed "Amended Allegations" re: Mr Isaacs Pollsmoor Exhibit "OOO".

⁸ See Notice dated 9 October 2003 re "Amended Allegations" - Mr Isaacs Pollsmoor Exhibit "PPP".

⁹ See Minutes of Disciplinary Hearing and documents handed in at Inquiry Pollsmoor Exhibit "QQQ".

¹⁰ Annexure "C" in terms of Disciplinary Code DBC Resolution 1/2001 (23 February 2001) and *Government Gazette* No 8023 dated 30 July 2004, as amended.

disciplinary measure involved a final warning, valid for six (6) months. The said warning refers to the "offence/complaint" as "see the attached document". However, there is no record in the file of a offence/complaint for which Mr Isaacs was found guilty. In other words, it is not apparent which of the "amended allegations" Mr Isaacs was found guilty of. The "Annexure C: Warning" was filed as an Exhibit.¹¹

In passing, it appears from the personnel file that Mr Isaacs has been transferred to Gonubie within the Provincial Commissioner's Office for East London with effect from 1 June 2004. Mr Isaacs, then, may have been transferred to the Eastern Cape Province.

2.3.5 Findings

Although the evidence in the Commission's possession suggests serious and dishonest conduct on the part of Mr Isaacs, an analysis of the charges preferred against Mr Isaacs in the disciplinary inquiry indicate that all of those charges were based upon alleged contraventions of clause B2.1 of the Department's Disciplinary Code. This clause of the Code is defined as the following:

"Unsatisfactory work due to negligence, apathy, carelessness or a lack of interest (e.g. failure to meet return dates, non-compliance with directives, etc)."

Furthermore, it is significant that the charges made were framed under "other transgressions" as these are defined in the Disciplinary Code and not under transgressions that could result in summary dismissal (Column "A").

It is the view of this Commission that the allegations made by the witnesses would more properly fall under clause 4 of the Disciplinary Code related to dishonesty and would, if Mr Isaacs was found guilty most probably result in

¹¹ See document marked Annexure C:Warning re: Mr Isaacs-Pollsmoor Exhibit "RRR".

summary dismissal. More particularly clauses 4.3 and 4.4 would, in this Commission's view, have been appropriate charges to be brought.

It is, once again, a clear indication of the complaints that the Commission raised in its first Interim Report that officials within the Department are manipulating disciplinary inquiries. The manipulation is not only at the stage of the hearing but it also starts at the stage of investigation and the decision as to how to charge the person. Clearly, Mr Isaacs was charged with a lesser offence instead of the more serious offence, which would have led to his dismissal. This was an attempt to, once again, defeat the very purpose of the disciplinary inquiry. He transgressed the rules and regulations of the Department, awarding tenders unlawfully, and in some cases the tenders amounted to R1 000 000,00. It can never be more serious than that.¹²

2.3.6 Recommendations

2.3.6.1 Mr Isaacs

- a) In view of the fact that Mr Isaacs was not charged with dishonesty, it is recommended that charges of dishonesty, based upon the allegations made by the witnesses in the annexed affidavits, be brought against Mr Isaacs. Mr Isaacs might claim that he is placed in "double jeopardy" by a second disciplinary hearing. However, Mr Isaacs was never charged with dishonesty, merely with unsatisfactory work performance. The facts that go towards proving unsatisfactory work performance are wholly different from allegations of dishonesty, although there may be some overlap in terms of the evidence tendered in support of the charges.
- (b) It is similarly recommended that investigations be carried out to

¹² For more details on the discussion regarding the manner in which disciplinary inquiries are being manipulated, see the First Interim Report on Durban-Westville Management Area, the Ninth and Eleventh Interim Reports on the Pretoria Management Area and lastly, also the chapter in this report dealing with disciplinary inquiries.

determine how the charges that were preferred against Mr Isaacs came to be drafted. It seems improbable that the allegations of dishonesty were not apparent to those who formulated the charge sheet at the time. It was already known at that stage that the Commission's auditors had seized certain documents from Mr Isaacs' office.

- (c) The Commission recommends that criminal charges be brought against Mr Isaacs.
- (d) The role played by Mr Roberts in this matter needs to be investigated further to see whether there were irregularities or abuse of power.

2.3.6.2 General Recommendations

In addition to the aforementioned, the Commission makes the following recommendations emerging from the forensic auditor's report dated 24 July 2003.

- (a) It appears that no proper internal audit function was carried out at the Provincial Commissioner's Office. A properly conducted internal audit function would have reported on non-compliance with procurement policies and procedures and corrective action could have been taken earlier.
- (b) Independent internal auditors should be appointed to ensure that the internal control system is operating as intended.
- (c) The internal control system for procurement should be upgraded so that:
 - (i) No member should be allowed to invite, compare and

approve quotations by himself.

- (ii) The chief user clerk should always invite the quotations by using the database.
 - (iii) After receiving such quotations and carefully evaluating the documents, these documents should be forwarded to a senior member who is delegated to approve such quotation documents. The tender/quotation documents should be disregarded if received by fax. The tender/quotation documents should be received in the same way as if it were a proper tender.
- (d) The procedure stipulated in the ST36/37 manual should be strictly adhered to.
 - (e) A proper tender committee should be elected and trained.
 - (f) All tender documents should be locked in a safe and the safe should have a double lock facility.
 - (g) Two separate keys should open the safe door and these two keys should be issued to two (2) members chosen from the tender committee.

2.4 Purchase of Screws at Inflated Prices

2.4.1 Background to Investigations

While the Commission was hearing evidence in Cape Town, the Commission received a complaint relating to an order that had been placed for 6 000 screws at a cost of R21 000 after two tenders had been obtained. It was averred that the amount paid was at least three (3) times more than the applicable, normal price of screws.

The Commission conducted an investigation and presented its findings during hearings that took place in the Pollsmoor Management Area. The Commission requested three (3) other suppliers to give quotes for 6 000 screws. The quotes received amounted to R9 000, R9 400 and R6 000 for exactly the same item. In addition, an investigator of the Commission, Mr Moloji, contacted two (2) other companies on the Department's database and received quotes from SCS Building and Renovations for an amount of R9 617,23 and Fastener Warehouse for R5 042,40.

Mr Moloji said that he was unable to get a quote from MNM even though he contacted them several times. He also tried going to the house where the business is supposed to operate from. Mr Moloji contrasted this experience with his visit to Fastener Warehouse, where he saw a book of about five or six pages which listed prices. Ozzies Engineering had taken about three or four hours to send Mr Moloji a fax with the quotation.

Mr Moloji confronted Mr Mohammed Suliman, the member who had chosen the two (2) companies to approach for prices. Mr Suliman acknowledged that there was a problem with the system and advised that he had raised the matter with Mr Anthony, who used to be the Provincial Head of Logistics. Mr Anthony had informed him that there was nothing that they could do because they were dealing with previously disadvantaged individuals and they were under obligation to award contracts to them.

According to the evidence led before the Commission, tenders are dealt with mainly by the Logistics Section at the prison. Once all the quotes have been received by Logistics and payment has been completed, the documentation is sent to the Finance Office where details are verified and the payment checked.

The Section Head of Finance at Pollsmoor, Mr Johannes Erasmus van Zyl Smit, stated to Mr Moloï that he was concerned about the transaction involving the screws and had phoned MNM Supplies to make some inquiries. At that stage, the payment had already been captured so he telephoned Mr Truter at Head Office and asked for the payment to be stopped but it could not be done timeously. In addition, the Commission's investigation revealed that the screws that were supplied by MNM Supplies were not the same as the ones that were described in the quote. In fact MNM Supplies did not supply screws of this size.

Mr Moloï said that Mr Lourens, the Head of Logistics, said they had no control over companies on the database acting as middlemen as there were no guidelines in the register of suppliers. Mr Lourens said this needed to be addressed. He also said that according to the policy of the department, the middleman is there to generate business and create jobs as well as alleviate poverty. Mr Moloï said he could not find such a reference in the guidelines, although they do state that there is a duty to determine a realistic value of the tender. Despite this, correct procedure is not being followed and it lends itself to possible abuse and certainly to maladministration.

2.4.2 Department's Procedures

The Provincial Head of Logistics for the Western Cape, Mr Martin Abraham Isaacs, said that there are Division Heads of Logistics at each Management Area and a self-accounting store, which consists of a transit section, a warehouse section and an accounting section. These stores are responsible for ordering, getting quotations, keeping records and issuing payments. The accounting section is responsible for ordering and obtaining quotations, keeping records and effecting payments and has a division head that is fully trained in procurement. Procurement personnel, such as ordering and tendering clerks, work under the

division head.

Section Heads, who are chief users, determine whether funds are available while chief user clerks do the administration, get quotations and do the necessary administration work.

The procedure for obtaining goods varies depending on the value of the goods to be bought.

- a) If the value is below R5 000, telephonic quotations may be obtained.
- b) However, from R5 000 to R30 000 only certain persons may obtain quotations and these must be in writing.
- c) Between the values of R30 000 and R100 000 only an Assistant Director can approve the quotations and certain forms must be attached.
- d) From R100 000 to R500 000 the AT/20 point system is applicable.

The Commission was advised that if the Department requires an item that has to be ordered, it invites two (2) quotes from entities that are on the database and the tender will go to the entity that has given the lowest quote. The two (2) persons elected to be approached are determined on a rotational basis.

Mr Isaacs advised that there are no means to check that the goods are worth the price that is quoted or whether the price is fair and reasonable. When it was demonstrated to Mr Isaacs that the description of the goods on the two quotes obtained was different, Mr Isaacs stated that if this had come to his notice, he would have called Mr Suliman to order and taken disciplinary steps against him. He would also have cancelled the quotations and ensured that the process was carried out correctly. Mr Isaacs was of the view that Mr Lourens did not follow correct procedure by approving an order for the amount of R21 000 because the procedure followed was for goods of R5 000 or less in value.

During the hearing, Mr Isaacs was confronted with how the documentation was forwarded to the finance section for payment when there was an oral quotation rather than a written quotation and when it was apparent that the quotes were for different items. Mr Isaacs was of the view that this was negligence. He said, however, that small and medium enterprises and historically disadvantaged people were encouraged to register on the database and to do work with the Department of Correctional Services. However, these small companies, out of necessity, charged a higher price than bigger companies because they would “not have the infrastructure” that a big company would have to buy in bulk and therefore sell at a cheaper price.¹³

Mr Isaacs was further of the view that preferential procurement was concerned with transforming procurement in government and therefore gave preference to disadvantaged people rather than tenders being issued purely on the basis of price. When an example was put to Mr Isaacs of a white owned company tendering and asking R7 for an item by comparison with a company with a black, disabled woman asking R100 for the same item, Mr Isaacs stated that, on the points system, the black disabled woman would be awarded the tender. It was Mr Isaacs' view that this is what is meant by the Preferential Procurement Regulations of 2001. However, when Mr Isaacs was further challenged with regard to this aspect and was given time to recalculate the points according to the formula, he accepted that a historically disadvantaged individual should not be awarded tenders without regard to an excessively high amount being quoted.

Mr Isaacs did, however, maintain that he had been trained regularly by the Department of Correctional Services and a Mr Laubscher, who was a member of the State Tender Board.

When asked why the Department had not asked more companies to tender for the provision of the goods, Mr Isaacs testified that the names on the database were rotated. The regulations stated that more than one person should be asked to quote for a tender, but Mr Isaacs provided no satisfactory answer as to why

¹³ Pollsmoor Transcript pages 1 876 – 1 877.

only two people were asked to tender.

2.4.3 Concluding Remarks

The Department has approximately two hundred and forty six (246) Management Areas in the whole of the Republic of South Africa. In almost each one of them there is an office which deals with the issue of procurement and logistics. Procuring goods for approximately one hundred and eighty five thousand (185 000) prisoners and approximately thirty five thousand three hundred (35 300) staff members in the Department of Correctional Services, makes the Department's procurement section a multi-billion rand industry.

It is apparent from this chapter that in the few Management Areas in which this Commission investigated workshops, procurement and logistics sections, there were clearly problems, which need to be addressed by the Department. As procurement and logistics are an area in which any person with a corrupt mind or even a slight propensity towards corruption will easily be tempted to do something illegal because of the amount of money involved, there is a need for greater scrutiny, security and checks and balances to be set in place.

The Commission found it extremely disturbing that programmes to address the economical imbalances of the past can be manipulated to blatantly enrich selected individuals. Nothing whatsoever can justify the use of taxpayers' money to purchase items at three (3) times the value merely because the purchaser is from previously disadvantaged communities of our country. This could never have been the intention of the Legislature in its drafting of the statutes to empower small contractors and to transform our society.

This was clearly a misinterpretation of the tender procedures by the individuals concerned. The price, notwithstanding the status of the individual, still has to be taken into consideration. It is once again an area where discretion is being abused because the employees ignore the intention of the Legislature.

Even though this was found to be the understanding of the officials at Pollsmoor, the Commission has compared this with a number of Management Areas and it looks like most officials employed in the Logistics Department believe this is the correct interpretation of these provisions of the Act. Accordingly, it is a great cause for concern since this could be regarded as wasteful expenditure as it could have been avoided with reasonable care.¹⁴

2.4.4 Recommendations

In light of the abovementioned, the Commission would like to make the following recommendations:

- (a) The Department should seriously consider appointing suitably qualified people to head the Department of Logistics. By “suitably qualified”, the Commission means people who have been properly trained and who have the necessary qualifications to understand the intricacies of doing what they are doing.
- (b) In the absence of suitably qualified people, the Department should train the current officials heading the various logistics departments so that they fully understand the provisions of all the applicable legislation¹⁵ and apply them accordingly.

¹⁴ See Section 1 of Public Finance Management Act No. 1 of 1999.

¹⁵ Procurement of goods and services is governed by, amongst others, the following Acts, policies and Regulations:

1. Public Finance Management Act (Act No. 1 of 1999);
2. Preferential Procurement Policy Frame Work Act (Act No. 5 of 2000);
3. Preferential Procurement Policy Regulation;
4. State Tender Board Act (Act of 1968);
5. State Tender Board, General Conditions and Procedures (ST 36);
6. User Manual: Directives to Department in respect of Procurement (ST 37);
7. Provisioning Administration System Manual (PASM).

The National State Tender Board delegated powers for the procurement of goods and services to the National Commissioner who is the Accounting Officer for the Department. The Accounting Officer further delegated the powers to provinces and the Management Areas for practical reasons.

- (c) It is also recommended that the Department should have a scheme in terms of which the logistics departments in the various Management Areas are checked so as to monitor that there is no corruption or abuse of State funds. The said system could include the setting up of an Audit Committee to attend to this. In the event of the Department not having suitably qualified people to sit on an audit committee, serious consideration should be given to employing outside people to be part of such a committee. It might even be better if an outside person chairs the committee.

- (d) The Audit Committee will have the responsibility of reporting to the Office of the Auditor General on issues relating to procurement.

CHAPTER 18

PRISON WORKSHOPS AND STOCK CONTROL SYSTEMS

CHAPTER 18

PRISON WORKSHOPS AND STOCK CONTROL SYSTEMS (KITCHENS AND HOSPITALS)

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CHAPTER 18

PRISON WORKSHOPS AND STOCK CONTROL SYSTEMS (KITCHENS AND HOSPITALS)

1. INTRODUCTION

Some of the Management Areas which the Commission had to investigate had workshops in which the prisoners were employed to work. This was either for employment purposes or to train the prisoners as part of the Department's rehabilitation programmes.

The two workshops which were investigated by the Commission were at the Pollsmoor and Pretoria Management Areas.

It was clear to the Commission that whilst the workshops partly achieved what they intended to achieve there were still a lot of problems with maladministration and corruption. This chapter of the report seeks to deal with the problems the Commission encountered in the aforesaid workshops.

The Commission investigators also took the liberty of checking the stock control measures at the various kitchens and hospital in the Pretoria Management Area. These findings will also be dealt with in this chapter of the report.

2. WORKSHOPS IN PRISONS

2.1 Previous Investigations

Prior to the establishment of the Jali Commission, auditors Deloitte and Touche, on 29 September 2000, reported to the Director: Office of the Director-General Department of Public Service and Administration with regard

to an investigation into the alleged irregularity in the operation of industries at the Boksburg Prison. In that report it is stated that it was decided in 1992 that State Departments were to be run on business principles. On a pro forma basis it was decided to determine how these principles would be adopted in Correctional Services.¹

The report describes that the Correctional Services industries included eight (8) wood and steel workshops at various prisons. These prisons supply the needs of the Department of Correctional Services and other State departments and employees of State departments under various codes, being Code 01 for the Department of Correctional Services' needs, Code 03 for State departments' needs and employees of State departments being Code 04 or "chalet work".

It is further reported that the procedures for ordering and manufacturing items are set out in the workshop manual by Correctional Services Head Office. The following documents are to be generated at the workshops:

- VAS1, being a formal requisition.
- VAS2, being a requisition sent to the Logistics Department for items used during manufacturing.
- A quote for chalet work (which the individual has to accept or reject within 30 days).
- A job card indicating the work order number.
- A document entitled G7, which is a delivery note.
- A Z10A form indicating the cost and receipt for the chalet work.

Monthly results were submitted to Head Office by each industry and various monthly reports were generated by the workshops, including income statements, allocation tables and details of income.

The investigation carried out by Deloitte and Touche revealed the following:

¹ See Head Office Exhibit "VVV"

- 1) There were unexplained surpluses of some R700 000,00 between sales amounts on the physical job cards and the system-generated financial reports.
- 2) There was an unexplained shortage of about R400 000,00 between raw materials issued per the physical job cards and the system-generated financial report.
- 3) There was an unexplained difference of R1 000 000 between two (2) financial system-generated reports. In this regard, two (2) separate financial system-generated reports, both of which provided revenue details for the same financial year.
- 4) There were large differences between the Logistics and the Workshop systems.
- 5) The values of selected items on the Logistics report were compared in certain instances to the values on the job cards. Significant variances in the values were identified in this exercise. These differences, Deloitte and Touche states, could be attributable to both input errors and system weaknesses.
- 6) It was identified that there are weaknesses in the control environment at the Workshop, Logistics and Financial offices. At that time there were three (3) independent systems in operation, which were not integrated or reconciled on a regular basis.

2.2 Department Regulations

Currently, the specific directions and provisions applicable to work at prison workshops are contained in Chapter 3 of the Workshop Manual, Amendment 1/2001, and can be summarised as follows:

- Work may be carried out on a remuneration basis for officials, member clubs or pensioners of the Department of Correctional Services, as well as the officials of certain other State departments.
- Work for the State must at all times receive preference over the chalet work.
- Chalet work may only be undertaken for the client's own use and may under no circumstances be considered unless it is clearly certified that the service is for own personal need and/or use.
- A clear explanation and/or specification of the required product/service must accompany the application.
- Only one (1) application per client for the rendering of a service or a product is allowed.
- The relevant workshop manager must approve all chalet work and this function may not be delegated.
- Any item that has been manufactured or serviced may, under no circumstances, be handed over to the client or leave the workshop before payment is finalised. A receipt must serve as proof of payment and must be presented to the official responsible for the issuing of the completed items.

Chapters 8.2 and 8.4 of the manual dictate the cost and price criteria applicable to chalet work.

Investigations further revealed that there were two (2) methods that could be used to pay for chalet work, namely by debit order or cash payment. With respect to a debit order payment, the member would complete a debit order document, which would be forwarded to the Personnel Department to ensure that monies are deducted from the member's salary. If the member decided to

pay by cash, he would be issued with what is known as a Z10A invoice. The financial officer would furnish a receipt known as a Z371 form, which must be given to the workshop before the chalet work could be released.

2.3 Pollsmoor Workshop

2.3.1 Commission Investigations and Hearings

2.3.1.1 Introduction

The Commission heard evidence about corruption in the workshops run in Pollsmoor Prison. Prisoners in the workshops manufacture various goods, some of which are ordered by the Department of Correctional Services. In addition, employees of the Department are allowed to have items made. In each case certain procedures have to be followed and members are charged accordingly for goods that they order.

The Commission heard that a number of jobs that were being undertaken were “smokkel” (smuggling) jobs. In such instances the correct forms were not filled in and prisoners were often not asked how much time was worked to determine whether the correct amount was being charged for the jobs. In some cases the member would bring material to the workshops, while on other occasions State material that was in the workshop would be used.

2.3.1.2 The Evidence

The Commission heard evidence from four prisoners on the workshops.

Mr Renier van Jaarsveld de Bruin worked as a workshop storeman from 1996. He said that people would come into the storeroom for material for making braais, for example, when they were supposed to be making beds. He said that if one walked around the workshop one would see that people are doing work that they are not supposed to be doing. He said that it is

impossible for prisoners to be doing work like that without the prison guards being aware of it.

Prisoner Mr Van Schalkwyk said that in some instances jobs for warders were not entered into the book at all, and in other cases the entries did not reflect the correct amount of material and time spent on the job.

A former prisoner whose name was withheld from publication told the Commission that while he worked in the welding section of the workshops he was asked to make various things that were not for prison purposes. He was also told by Mr Sarel du Toit that if the workshop manager, Mr Mitchell Bron, came around, he must leave the “smokkel” job alone and carry on with other work.

This former prisoner later wrote a letter to the State President, the Commissioner, Minister of Correctional Services, Judge Fagan and Concor. In the letter he stated that there is gross mismanagement of State material and labour at the expense of the Department of Correctional Services by certain sub-departmental supervisors at the workshops who are running private businesses and using workshop labour time, materials, abrasives and gas.²

He said that he was victimised after he sent the letter when warders suspected that it came from him. However, he said that it was to a large extent general knowledge within the workshops that “smokkel” jobs were being done. He also told the Commission that when it became known that he was going to testify before the Commission he received a threatening phone call.

Mr van Jaarsveld de Bruin subsequently worked in the engineering section of the workshop under Mr Ben McClune, and with Mr du Toit as supervisor. The prisoner said Mr du Toit would come to him with “smokkel” jobs, which the inmate would make and sometimes put into the member’s bag to take home.

² See Pollsmoor hearings, Exhibit “F1”.

Mr van Jaarsveld de Bruin also told the Commission that he went to Mr du Toit's house on the Pollsmoor premises many times to drop off steel, or pick up items that needed to be taken for galvanising, and to fix his floor on one occasion. The prisoner testified that there is a small welding shop in Mr du Toit's garage and he believed that some items he manufactured at the prison were private jobs that were contracted from Mr du Toit. Mr van Jaarsveld de Bruin said that State material and State machines were used to manufacture these goods.

Prisoner Johannes Albertus Kleyn said that when stock counts and audits are conducted of the tools, the number of tools is checked but not the serial numbers. This enables members to take home new equipment and replace it with their own old tools. Mr van Jaarsveld de Bruin also claimed that old and useless tools were swapped for new tools bought by the Department. For example, on one occasion, Mr van Jaarsveld de Bruin said he saw Mr McClune put a new electric drill that had been obtained by the Department in a bag belonging to Mr van Schalkwyk. The bag was subsequently taken out of the prison and the drill given to Mr McClune.

Mr Kleyn said that he had been in the workshop only two or three days when he was given his first private job to do. Amongst the items he manufactured were five (5) litre jugs for Mr van der Westhuizen, braais, jetmaster fireplaces and smokers. He kept a diary for a while of jobs that he believed were private because no hours were booked on the jobs. They were usually rush jobs and they never appeared on the job schedule that is written up on a board in the office.

Mr van Jaarsveld de Bruin said that Mr Crafford had a private business of his own which carried out sheet metal work, and he worked in the sheet metal workshop at Pollsmoor. Mr Kleyn said that in 1998 he made covers for air conditioners which were transported to a company in Montague Gardens to be polished. Mr Crafford brought them back to show what the polishing look like and then transported them home in his bakkie. Mr Kleyn said Mr Crafford

also offered Mr Kleyn, as well as one or two other prisoners, a job at his business.

Mr Kleyn told the Commission that on one occasion he was asked to make about 20 light fittings for a poultry farm. He said that Mr Crafford gave him a drawing for that job on a piece of paper that had Brackenfell Enterprises and a telephone number on it. The company is the name of the business run by Mr Crafford from his house.

Mr van Jaarsveld de Bruin said he had made items for Mr Victor in the workshop on several occasions where the member had not asked for information relating to the number of hours worked and the materials used.

Mr van Jaarsveld de Bruin started to make notes about the irregularities at the beginning of 2001 and when Mr Grant started working in the workshops and the first complaints were made. Mr Jafta spoke to him and gave him the paper work. At a later stage they saw the Institutional Committee, but nothing happened.

Mr van Jaarsveld de Bruin said “Tommy Olsen called us to a special meeting. As far as I know it was because of the letter that Grant Knight sent. The letter raised two issues: That certain prisoners were getting special treatment and that ‘smokkel’ jobs were being done in the workshop. Olsen only asked questions about treatment and racism and stuff like that, but didn’t discuss the ‘smokkel’ situation. Mr Bron was in the office at the time the questions were asked.”

Mr Bron must have known that these things happened in the past because Mr van Jaarsveld de Bruin made things for him and on one occasion fixed his iron for which he was paid R10.

Mr Ernest Marais van Schalkwyk told the Commission that the prisoners were usually paid with cigarettes or they were bought something from the shop.

Mr Bron, who was appointed as workshop manager in 1999, testified in response to the allegations. He said that “chalet work” is the name given to jobs done in the workshop for government employees and members of the Department. Such jobs require the member concerned to fill in forms after which a quotation is worked out by the artisan or production worker together with the section head. If the person requesting the item agrees on the terms, he signs an agreement. In some cases the individual will supply material but in some cases material is supplied by the Department in return for payment of the goods. As a result of the investigation by the Commission and the allegation that not all work for members was being documented correctly, Mr Bron banned the workshop from carrying out chalet work

Mr Bron denied that any “smokkel” jobs were done for himself and said that he was aware that Mr Crafford and Mr du Toit work from their houses, but he was not sure if the private work was business or hobby. However, he said it was well known at Pollsmoor that personnel have other business interests. For example, members run tuck shops from the premises at Pollsmoor.

The Department has issued guidelines to assist members to calculate the number of hours it would take to manufacture specific goods, and how much material would be required for the jobs.

The Commission resolved that argument in this matter should not be finalised and that a thorough forensic investigation should be conducted and a report tabled before the Commission.

The evidence on this matter raised the need for the entire running of the workshop to be re-considered. Of particular concern is the need for complete documentation to be kept concerning operations at the workshop.

2.3.2 The Forensic Investigations

After receiving the abovementioned evidence from witnesses of corruption and maladministration in the workshop at Pollsmoor Prison, the Commission

again engaged the services of the auditing firm Manase & Associates so as to obtain further evidence.

One of the areas prioritised in the assignment to Manase & Associates was the alleged lack of financial controls and maladministration in the workshop at Pollsmoor, with specific reference to systems and accounting for "chalet work" commissioned by Correctional staff at Pollsmoor.

The following documents were seized in conducting the investigation:

- Z10A books.
- Z371 books.
- Computer printed work sheets/job cards.
- The chalet work register.

These documents were analysed and a spreadsheet was prepared.³

2.3.3 Findings

Pursuant upon its investigations the Commission makes the following findings:

- (a) Notwithstanding the provisions of the Workshop Manual referred to above, it was established that the procedures were not being followed at Pollsmoor workshop.⁴
- (b) There are nine (9) risk areas which need to be attended to urgently :
 - (i) There is no access control to enter the administration office in the workshop, therefore anybody can enter this office freely. Documents can be removed and any member can create worksheets on the computer.

³ See Copies of spreadsheets marked "A1 to A15" - Pollsmoor Management Area Exhibit "SSS".

⁴ See the Workshop findings Pollsmoor Exhibit "HHH".

- (ii) Any member can gain access to the computer system in the Administration Office and create worksheets, as the system does not require any user identification/authorisation code. It is not running on a mainframe or network system.
- (iii) Presently there are no proper controls regarding the internal stores. Any person, being a member or prisoner, can enter these stores and take whatever they need to complete work. This maximises the risk of unauthorised work being performed by members and prisoners using State materials.
- (iv) Normal members have direct access to the workshops to request or collect their chalet work. There are no proper quotations given on formal documents to the members. Quotations are currently done on pieces of scrap paper or on the back of a chalet form. There is no proper reconciliation between the worksheet and the work order and the chalet work register before an invoice can be generated.
- (v) Members can easily run their own private businesses from the workshop or use the facilities for their own private benefit, contrary to standing orders that one should get the necessary permission to operate private businesses and that they should be disclosed.
- (vi) Any member can order materials as they are needed; therefore there is no proper control.
- (vii) All the members working in the workshop are responsible for getting outside quotations if the work justifies it. Due to this irregularities can occur.

- (viii) There is nobody responsible for controlling the outer limit gate that gives access to the workshops. Any person can currently drive into the workshop/logistics area without being checked or searched. It is easy to remove goods from the area.
- (ix) The prisoners currently receive their work orders on pieces of paper. This paper then gets thrown away. They do not know if they are doing state work or private work.
- (x) There is favouritism in the appointment of prisoners to work in the workshop.⁵

2.3.4 Recommendations

2.3.4.1 Admin Office in Workshop

The administration office should only be entered by appropriate members and should be closed off for the members working in the workshops. Better access control to this office is needed. This would minimise the risk of documents getting lost or unauthorised personnel gaining access to the computer.

2.3.4.2 Computer System in Admin Office

The computer system should be totally upgraded and linked to a central network. The user must then be able to access the network by using his/her own unique user identification code. This can also replace unnecessary documentation and minimise human error.

⁵ See Mr de Bruin's evidence at Pollsmoor Transcript Volume 5 at pages 482-3 where he alleges that this is as a result of racism.

2.3.4.3 Internal Stores

These internal stores must be relocated away from the workshops. The Logistics Department should handle this.

2.3.4.4 Chalet Work

Chalet work should be treated as state work and should proceed via the Logistics Department on proper documentation and with a proper description of what is needed. Logistics should then forward these requests to the workshops for a proper quotation. Once approved by the member, the Logistics Department must then request the work via the proper system (VAS documentation). When the work is completed by the workshops it must be sent back to Logistics, where the member will collect his/her product. Once the member accepts the quotation he should complete a debit order document. By doing this, it will ensure that members pay for what they request.

2.3.4.5 Private Work

Members should not be allowed to do outside work that is in direct conflict with their duties and Departmental steps should be taken against any member for not disclosing or getting the necessary authorisation to operate private business.

2.3.4.6 Ordering of Materials

The responsibility for ordering materials should be placed on a responsible administration clerk. An outside member should be appointed, maybe a female warder, to oversee the ordering of materials in the workshop.

2.3.4.7 Quotations

The responsibility for obtaining quotations should be placed on a designated administration clerk. An outside member should be appointed, maybe a female warder, to oversee the obtaining of quotations in the workshop.

2.3.4.8 Access Control

A member should be placed at the outer limit gate to control the access to the workshop/logistics area. Everything going in or out should be checked by this member. He must also be responsible to see if the necessary documentation corresponds with the goods going in or out.

2.3.4.9 Prisoners

Prisoners should be given proper official documentation as a method of instruction. This will measure their productivity as well as minimise the risk of doing private work unwillingly.

2.3.4.10 Favouritism

The evidence, which was led, indicated that there was favouritism in the manner in which people were selected to work at the workshop. In particular, one witness testified about the fact that the supervisor was predominantly appointing “white prisoners” to work at the workshop. In the circumstances, the Department is directed to investigate this particular aspect and ensure that:

- (i) Prisoners from all racial groups are given an opportunity to work at the workshops.
- (ii) The work force at the workshops clearly represents the demographics of this country.

- (iii) Working at the workshop should be rotated as best as possible, so that most prisoners will get the opportunity to obtain the necessary training and be rehabilitated accordingly.
- (iv) Clear guidelines should be prepared as to who will work at the workshops. In this regard, consideration should also be given to the length of the sentence the prisoner is serving.
- (v) Consideration should be given to those prisoners who are likely to be released within the next five (5) years to work at the prison workshops so that they can learn a skill or trade to enable them to be integrated back into society and earn a living upon their release.

2.4 Pretoria Workshop

Subsequent to Pollsmoor, investigations were conducted at the mechanical workshop of Pretoria Central Prison where, similarly, the investigators seized the job cards and the Z10A invoice books and members working in the workshop were investigated.⁶

2.4.1 Allegations

Advocate L. Halam, a Commission investigator, interviewed four (4) prisoners who had been working at the mechanical workshop at Pretoria Prison. Pursuant to those interviews, Advocate Halam prepared statements from three (3) of the prisoners.⁷ The prisoners were reluctant to sign the affidavits. However, an affidavit of Advocate Halam confirms that these statements were prepared by him on the basis of information provided to him by the prisoners.⁸

The allegations which were made by the prisoners against Mr Anthony

⁶ See copy of report dated 26 May 2003 – Pretoria Exhibit “OOOO”.

⁷ See Statements (4) of Prisoners prepared by Advocate Halam Pretoria Exhibit “PPPP”.

⁸ See the Affidavit of Advocate Halam Pollsmoor Exhibit “QQQQ”.

Erasmus, the member in charge of the workshop, were, amongst others, the following:

1. Mr Erasmus uses the workshop to repair private motor vehicles of members who are employed by the SANDF, DCS and SAPS. Mr Erasmus' father buys scrap cars and brings them to the workshop to be repaired under Mr Erasmus' name. His father, subsequent to that, will sell the cars to private customers;
2. Mr Erasmus regularly completes job cards and alleges that the work done on the car was minor work, when in fact it was a major service including, amongst others, the panel beating of the motor vehicle;
3. Sometimes motor vehicles are repaired and the proper procedures would not be followed in terms of collecting the monies, which are supposed to be collected from the customers. There were also allegations of theft of spares against him.

Besides the selective appointment of prisoners to work at the workshop, it also became apparent to the Commission that the criteria officials used to appoint prisoners did not take into consideration the duration of the sentence that is still to be served by the prisoner.

In this regard, it was found that in some of the workshops, especially in the privatised prisons, the prisoners who were given an opportunity to work at the workshops are serving long sentences. In fact, what that means is that even though they are given the skill, it will take time before they can utilise that skill on the outside. As a result, in some of the private prisons, the Commission observed that the prisoners ended up undergoing training in a number of trades to keep busy. These resources could be better utilised by appointing prisoners who are about to be released so that they are rehabilitated and can use those skills on the outside.

2.5 Findings

- a) Mr Erasmus, the supervisor of the mechanical workshop at Pretoria, appeared to have abused the facilities of the workshop in order to repair his motor vehicles, hardly ever completing the requisite documents correctly.

On being confronted with these allegations by the investigators, Mr Erasmus admitted that he ran a private "outside" business, which involved buying cars, repairing and then selling them.

- b) It was further established that:
 - (i) "Clients" have free access to the workshops and can communicate freely with the prisoners.
 - (ii) There appeared to be inadequate control over documentation, as job cards were not completed fully.
 - (iii) It was further found that there was no documentation on file to verify that the person who requested the work is, in actual fact, an employee of a Government department and therefore permitted to request such work in terms of the provisions of the Workshop Manual.

2.6 Recommendations

The Commission makes the following recommendations regarding workshops in prisons:

- a) Entry to the administrative office in the workshop should only be permitted to appropriate members and should be closed off to members working in the workshops. This would minimise the risk of documents becoming lost or that unauthorised personnel gain access

to the computer. It is also recommended that access to the workshops should generally be restricted to authorised personnel. Members of the public should be prohibited from being in contact with the prisoners and all communications should be with the supervisor of the workshop or with other authorised officials only.

- b) Workshops should institute controls over job cards, which would prohibit "clients" having access to these, as they may remove the job cards without effecting payment of any fees for work done.
- c) In addition, prisoners should complete and sign time sheets.
- d) A responsible official should compare these time sheets to the job cards and the invoices rendered to check for reasonableness and also as confirmation that all repairs undertaken have been invoiced.
- e) A copy of the "client's" identification card should be filed with the job card and each employee/member should also be asked to identify that the property made or being repaired is his/her own property.
- f) With regard to the computer system in the administrative office, the system should be totally upgraded and linked to a central network. The user would then be able to access the network by using his or her own unique user identification code. This could also replace unnecessary documentation and minimise human error.
- g) Chalet work should be treated as State work and should work via the Logistics Department with proper documentation and description of what is needed. Logistics should then forward these requests to the workshop for a proper quotation. Once approved by the member, the Logistics Department must then request the work via the proper system using the VAS documentation. Once the work is completed by the workshops, it must be sent back to Logistics where the member would collect his or her product. Once the member accepts the quotation, he

should immediately complete a debit order document. By doing this, it would be ensured that members pay for what they have requested.

- h) With regard to private work, it is apparent from the investigations, as well as the evidence led before the Commission in Cape Town, that members can easily run their own private businesses from the workshop or use the facilities for their own private benefit, contrary to standing orders that the necessary permission is required to operate private business with a full disclosure thereof. Members should, in no circumstances, be allowed to do outside work that is in direct conflict with their duties and Departmental steps should be taken against any member for not disclosing or obtaining the necessary authorisation to operate a private business.
- i) The current position whereby prisoners receive their work orders on pieces of paper, which are subsequently thrown away, creates a situation where it is not possible, at a later stage, to determine whether the work performed by the prisoner was State work or private work. Prisoners should be given official documentation as a method of instruction. They should also be required to detail and sign for the number of hours worked on any particular product so that proper controls are in place with regard to private work. This will have the added advantage of measuring the productivity of prisoners and also rule out the current situation whereby many prisoners are forced by members to do private work for them unwillingly.
- j) In light of the fact that the prisoners who made allegations against Mr Anthony Erasmus refused to sign affidavits, it would be difficult for the Commission to recommend that he should be charged criminally or even internally for anything. However, it is clear that Mr Erasmus is running a business similar to the work he is doing in the Department. In the circumstances, he has a conflict of interest.

In the light of the foregoing, the Commission will recommend the following:

- (i) The Department should check the records as to whether Mr Erasmus did disclose the fact that he has a private business;
- (ii) If Mr Erasmus did not make the disclosure, then disciplinary inquiries should be instituted against him for the above;
- (iii) If he did make the disclosure, then the Department should consider transferring him to another section where he will not be performing this type of work, as a result of the allegations raised against him by the prisoners.

3. STOCK CONTROL SYSTEMS: KITCHENS, HOSPITALS AND STOREROOMS

3.1 Introduction

Commission investigators conducted random stocktakes on 19 May 2003 of the kitchens at three (3) prisons situated in Pretoria, namely: C-Max, Local kitchen and Central kitchen. Random stocktakes were also conducted at a number of hospitals and storerooms.

This section of the Chapter considers the findings of these stocktakes and recommends various interventions that the Department of Correctional Services should make.⁹

⁹ In addition to this, auditors conducted an investigation into the alleged irregularity in the operation of industries at the Boksburg Prison on 29 September 2000, prior to the establishment of the Jali Commission.

3.2 C-Max Prison

The Commission investigators selected a few items to check whether there was compliance with the regulations.

The Commission investigators found the results of the C-Max Prison count disappointing, as none of the ten (10) items selected for stocktake checks agreed with the stock sheet. For example, thirty five (35) kilograms of brown sugar, fourteen (14) kilograms of milk powder, forty four (44) kilograms of chicken, ten (10) kilograms of pork and nine (9) kilograms of chicken noodles could not be accounted for.

The kitchen head, Mr Molate, had not signed any stock records for about a month. He would, in any event, only be in a position to sign these records once he had checked the stock sheets. When asked why he had not conducted the necessary stock checks, Mr Molate's response was that he is sometimes away at meetings and does not have time to check the records.

Obviously, this situation is untenable in that the flow of rations whilst he is away, coupled with the absence of proper stock controls, facilitates corruption.

The investigators further established that the stock sheet that was being used to compare against physical stock was the previous year's stock sheet. It appeared that the stock clerk had mistakenly continued adding and subtracting the food balances from the 2002 stock sheets, thereby creating an imbalance in the records.

This issue was raised with Mr Molate, who appeared embarrassed because the filing system was so poor. The investigators observed that the current and previous year's stock records were filed in one file, without any dividers.

3.3 Local Prison

The local kitchen serves the biggest prison in Pretoria, which caters for sentenced and awaiting trial prisoners totalling, at times, some 6 000 prisoners. Mr Seleke was the member in charge of the kitchen. The stock count that the Commission undertook rendered a totally satisfactory result in that all the items selected for the count agreed with the stock records.

The Commission investigators observed that the system used in this kitchen was totally different from the kitchens in the Leeuwkop and Johannesburg Management Areas. The kitchen in this instance uses a computer ordering and recording system, as well as a manual ordering and recording system. The computer system in use records the daily issues and receipts of the rations and it also shows the total number of every stock item.

The Commission found the filing system at this kitchen to be very good, as it was possible to easily identify a stock item and perform a stocktake. Furthermore, it was observed that frequent stocktakes had been undertaken to reconcile the physical stock.

3.4 Central Kitchen

The Commission investigators observed only one imbalance in this kitchen. The records showed twenty (20) kilograms more of Halall beef than the physical stocktake revealed. The head of the kitchen was Mr Motsepe.

3.5 Hospitals and Storerooms

During the Commission's random stocktakes at hospitals and storerooms, it was found that there were no controls on medicines, except for Schedule Five medicines with respect to which there is a register for control.

In addition to the recommendation, it would appear that the hospitals have not complied with the Department of Correctional Services Provisioning Administration System Manual and, more particularly, paragraph 9.0¹⁰, which deals with the storage, safekeeping and care of State stock and equipment.

Upon questioning of Mr Paxton, Head of Legal Services at Head Office by this Commission it was advised that paragraph 9.0 of the provisioning regulations referred to above is the only stock control direction applicable to hospitals, storerooms and kitchens.

4. CONCLUDING REMARKS

The workshops, kitchens and hospitals need regular stock taking to avoid problems within the Department. Stocktaking and proper controls are of significance especially if one considers that it is not only the prisoners but also the members who may abuse the stock in the kitchens and hospitals. In this regard one should refer to the Interim Reports¹¹ and one other Chapter¹² in this report, which deal with this aspect.

In light of the foregoing evidence, there is a need for regular stocktaking and auditing of the various workshops, kitchens and hospitals. If the Audit Reports do indicate that there is some form of corruption, or irregularities, or mismanagement, then thorough investigations should be conducted either by Forensic Auditors or the structures suggested in this report.

This report is merely a sample of what is going on in this area within the Department. The Commission is of the opinion that there is clearly a need for intervention by the Department or one of the Agencies within the Public Service. Stocktaking could be done by a dedicated unit in the Department.

¹⁰ The Manual is written in English and Afrikaans

¹¹ See the Eighth and Ninth Interim Report which dealt with the abuse of medicines and the sale of scheduled drugs (Rohypnol) to prisoners by a member.

¹² See Chapter dealing with the Theft of Prisoners' Food in this report.

5. RECOMMENDATIONS

Accordingly, the Commission makes the following recommendations regarding control and stocktaking.

5.1 Stock Controls Generally

- a) It is recommended that the Department consider separate directives with regard to the storage of State stock from those directives that would be applicable to equipment in view of the fact that certain stock, for example as may be found in the kitchen, is perishable and more susceptible to theft, given its situation. In this environment, more careful and detailed stock control measures need to be introduced.
- b) The Commission also recommends that a periodic physical stock count, at least once every second month, should take place, when:
 - (i) Items should be physically counted and have their descriptions and quantities recorded on stock sheets.
 - (ii) Thereafter, the stock should be priced per item and the stock sheets accumulated and totalled so that it is possible to determine the value of the stock on hand.
 - (iii) A team of two (2) people per area should be used during each stock count, one person to count and the other to record. A team of “checkers” should independently check their work.
 - (iv) Reconciliation must take place between stock counts. This is achieved by taking the opening stock count from the previous count to which must be added purchases since the opening stock, less legitimate issues from that stock and spoilage. This should result in a theoretical closing stock. Once this figure has

been obtained, the actual physical stock must then be compared with the results obtained from the reconciliation between stock counts.

- (v) Any material variances that emerge must be explained.
- c) The Department should make an effort to translate the Provisioning Administration System Manual into the other nine (9) official languages, besides English and Afrikaans.

5.2 Stock Controls in Kitchens

The objective of stock control at the kitchens is to ensure that the quantities of stock being requisitioned from stores are reasonable relative to the number of prisoners to be fed.

The Commission therefore recommends that a “walk-through test” be performed periodically as follows:

- a) Determine the total number of prisoners that the kitchen serves on that particular day.
- b) Obtain the menu for each meal and determine the quantities of ingredients required for each serving.
- c) Obtain the kitchen’s requisition of stock from stores.
- d) Perform a reasonableness test of the quantities of items ordered against the food prepared. Where material variances are identified, inquire as to the reasons.
- e) Determine what happens to uneaten meals.
- (f) The issue of uneaten meals can be a major source of abuse by officials

and prisoners. In the circumstances, guidelines should be prepared as to what happens to uneaten meals. The guidelines should seek to ensure that there are as few uneaten meals as possible to avoid pilferage and wastage.

5.3 Kitchens at Pretoria Prisons

As regards the kitchens investigated in the Pretoria Management Area, the Commission recommends that:

- a) More frequent stocktakes are required to be done in all kitchens to reconcile physical stock. With respect to the kitchen at C-Max, in particular, a stocktake should take place every week to reconcile the existing stock records.
- b) All kitchens should ultimately adopt the system used at the Local Prison kitchen, which requires that ordering and recording is effected both electronically (on computer) as well as manually. The results of the investigation at the Local Prison kitchen suggest that the Department's stock control system is not, in itself, deficient but rather that the personnel at C-Max are either negligent and/or lacking in training and supervision.
- c) In this regard, Mr Molate at C-Max should be charged in terms of the provisions of clause B (2.1) of the Department's Disciplinary Code and Procedure in that the investigation reveals that his work performance has been unsatisfactory due to negligence.
- d) The stock clerk at the Central Prison kitchen requires urgent training with regard to the methods and purposes of stock control.

5.4 Hospitals

With respect to stock control at hospitals, the Commission recommends that:

- a) The nurse in charge should properly record the receiving and issuing of normal medicine so that the flow of medicines can be monitored against the prisoners' hospital files.
- b) The stocktaking should be done regularly. It should be overseen by senior officials from Head Office or, alternatively, by the Audit Committee referred to earlier in this Chapter.
- c) The physical stock control to be implemented at hospitals should follow the same format as the stock count, which is referred to earlier in this Chapter.
- d) The recommendation set out above regarding the use of generic drugs at Durban-Westville Management Area is also applicable here.

CHAPTER 19

PREVIOUS INVESTIGATIONS INTO THE DEPARTMENT

CHAPTER 19
PREVIOUS INVESTIGATIONS
INTO THE DEPARTMENT
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CHAPTER 19

PREVIOUS INVESTIGATIONS INTO THE DEPARTMENT

1. INTRODUCTION

The Commission's Terms of Reference require it amongst others:

1. *to inquire into and report on-*
 - (a)
 - (d) *the extent of implementation of the recommendations of past investigations relating to the Department.*¹

The Terms of Reference of the Commission, however, do not specify the period over which the Commission's investigation into previous investigations was to cover. As the Department has been subjected to numerous investigations and commissions over the period of its existence, the Commission deemed it necessary to confine its investigation to those investigations which had been conducted after 1994, when the new democratic order came into being in South Africa.

2. DEPARTMENTAL RECORDS

At the outset it must be stated that the Commission experienced great difficulty in completing its mandate regarding previous investigations due to the fact that it

¹ See Paragraph 1 (d) of the Terms of Reference of the Commission.

was unable to obtain a comprehensive list of the investigations conducted from the Department.

From the early period of the Commission's existence, it has attempted, without much success, to establish precisely how many investigations had been conducted into the Department.

It was soon apparent to the Commission that no one in Department was in charge of such previous investigation reports. Members were not able to advise the Commission of the number of investigations conducted. They were also unable to locate the reports and appeared not to be aware as where such reports were likely to be.

After persistent requests from the Commission's investigators, the Commission ultimately obtained confirmation from the Department that the following reports had been handed over to one of the Commission's investigators:²

- 2.1 Unrest in Prisons: June 1994;
- 2.2 Report by Commission of Inquiry into the events at the Barberton Maximum Prison on the 20 and 30 September 1983;
- 2.3 Investigation into Prison Gangs with special reference to the number of gangs coloured prison gangs;
- 2.4 Commission of Inquiry into unrest in prisons appointed by the President on 27 June 1994;
- 2.5 Board of Inquiry into the events of violence at Pollsmoor prison during the period 23 May 1997;
- 2.6 'n Ondersoek na Onderwysvoorsiening aan die Gevangene
- 2.7 Performance Audit of the rehabilitation of prisoners by means of Education and Training;

² See Head Office Exhibit 'Z'.

- 2.8 Boulevard Hotel: Advocate Matalala;
- 2.9 Final report on the investigation into the alleged irregularities in the operations of industries at the Boksburg Prison;
- 2.10 Work Group Report; Health Care Services in South African prisons
- 2.11 Draft Report: Nutritional Services to prisoners;
- 2.12 Human Science Research Council Report: Prison Health Care Service: Legislation, Perception and Statistics

The delay by officials of Department locating the reports once again confirms the Commission's opinion expressed elsewhere in this report that the control and management of the Department's records and statistical information is not in accordance with what one would expect from a state department forming part of the security cluster.

3. COMMISSION'S INVESTIGATIONS

The Commission considered it extremely unlikely that the twelve investigations referred to by the Department was the complete list of all the previous investigations conducted into the Department. The Commission, accordingly, conducted its own investigations and discovered further investigations that had also been conducted into the Department. Whereas the Department's list reflected twelve (12) reports, the Commission's list totaled twenty (20) previous investigations. The list of these investigations is contained in the Appendix annexed to this report.³

It needs to be stated however, that notwithstanding the Commission's own investigations, the Commission is still not in a position to unequivocally state that the list prepared by the Commission is in fact the full reflection of the

³ See Appendix 'D'

investigations conducted into the Department. With the Department being unable to confirm the contents of the list of investigations, the Commission is simply not sure that the list is comprehensive.

4. REQUEST TO THE DEPARTMENT

As the Commission was of the opinion that the National Commissioner was the most suitable person to assist the Commission in fulfilling its mandate, a letter was addressed to the National Commissioner on the 10 March 2005.

The Commission specifically requested that:

- 4.1 a report be prepared setting out in full the extent to which the past investigations mentioned in the Commission's list have been implemented by the Department, and that,
- 4.2 a detailed response would be appreciated as to which recommendations had been implemented.

To avoid any misunderstanding, the Commission forwarded both the list furnished by the Department and the list compiled by the Commission to the Department.

5. DEPARTMENT'S RESPONSE

Subsequent to such letter, the Commission received the Department's report to the Commission's request which report is annexed to this final report.⁴

⁴ See Appendix 'J'.

The report received from the Department had the following annexures attached to it:

- (a) White Paper on Corrections, marked 'A';
- (b) The Final Draft of Department of Correctional Services Strategic Plan for 2005/6 – 2009/10's Strategic Plan, marked 'B';
- (c) Annual Report for the 2003/04 Financial Year; marked 'C', and
- (d) Symposium to Address and Promote Issues of Community Involvement held on 1-2 August 2000 at the Technikon SA Conference Centre, Johannesburg, marked 'D'.⁵

A reading of the Department's report to the Commission reveals that the report is divided into two (2) broad sections titled:

- 5.1 General Response, and
- 5.2 Specific Response to Recommendations.

In the first section it sets out the general response to the recommendations and in the second, it makes specific comments on each of the investigations conducted into the Department.

5.1 General Response

In this section of the report the Department has chosen to respond generally to the Commission's request. It has not provided a full report on the implementation, or lack thereof, of the recommendations of each and every previous investigation into the Department as requested by the Commission. Only some of the previous investigations are dealt with and commented upon by the Department.

⁵ The Department's Response together with all the Annexures are filed as Head Office Exhibit 'AA'.

The Department furnished several reasons for adopting this approach, the more important one being the endorsement of the new Constitution. For ease of reference, the Commission quotes the following extracts from the Department's general response which give some insight as to the Department's approach to the implementation of previous investigations:

- *The endorsement of the new Constitution in 1996 necessitated a re-look at the department to sharpen its alignment with the Constitution and also to reassess its key deliverables in the journey to making Correctional Services a more client and community focused department.....⁶*
- *It is important to indicate that the department did not in all instances subscribe to the recommendations made in some of these investigations...*
- *The Annual Report will also demonstrate existing challenges in recruitment and retention of several professional occupational groups like nurses, social workers, psychologist, pharmacist, etc. Many of these occupational groups were subject to various reports and against the generally known problems of skills scarcity and labour market competition, some of the recommendations made were rather too unrealistic....⁷*

And elsewhere that:

- *The scope the recommendations requested by the Commission covered a period during which the current Commissioner of Correctional Services and a number of the senior managers had not been appointed to the Department.⁸*

⁶ See page 2 of the Department's Report.

⁷ See pages 2-4 of Appendix "C" to the Department's Report.

⁸ See page 2 of the Department's Report

The Department also pointed out that:

*several investigations practically duplicated their scope and others, due to the unique and uniform operation environment, made similar recommendations.*⁹

Elsewhere in the report the Department intimates that in hind-sight some of the measures recommended by these investigations proved to be inadequate given the enormity of the required task on fundamentally transforming the Department.

5.2 Specific Responses

Under the section, the Department has elected to discuss only certain of the reports. The Reports that were discussed in some detail in the section are the following:

- (a) Judges Kriegler, Langa, Pillay and Van Zyl;
- (b) Draft Report : Work Group Nutritional Services to prisoners –
- (c) Brigadier G. Gordon;
- (d) IMSSA Committee Report in respect of Pollsmoor Management Area;
- (e) IMSSA Committee Report in respect of the Victor Verster Management Area;
- (f) IMSSA Committee Report in respect of the Johannesburg Management Area;
- (g) Report regarding irregularities in the operations of industries at the Boksburg Prison by Deloitte & Touche.

⁹ See also page 2 of the Department's Report.

It appears from the Department's response that some of the reports were passed onto the Special Investigation Unit.¹⁰ Other reports dealt with matters which were regarded by the Department as having been finalised.¹¹ The remaining reports were ignored outright.

6. ANALYSIS OF DEPARTMENT'S RESPONSE

6.1 Commission's Mandate

The Commission's mandate as contained in its Terms of Reference is clear in that it is required to inquire into and report on the extent of the implementation of the recommendations of past investigations to the Department. The Department's general response to the Commission's request therefore makes it difficult for the Commission to fully comply with its mandate to report on the extent of implementation of such previous reports because some reports were ignored.

The Commission does, however, accept that it is the prerogative of the Department not to follow some of the recommendations contained in these previous investigations. Clearly some of the recommendations were found not to be relevant. Be that as it may, there remain certain aspects of the Department's report that need closer scrutiny.

6.2 Lack of a Detailed Response

It is the Commission's view that both the general and specific response sections contain certain features, which are of concern to the Commission. The main

¹⁰ See the report on the Investigation on Procurement of Office Accommodation on behalf of Department of Correctional Services: Boulevard Hotel.

¹¹ See the report of the Auditor-General on Special Investigation into irregularities by Senior DCS Officials.

concern for the Commission is that many parts of the Department's response lacks detail and adequate explanation. This appears to be the case with most of the responses received in respect of the previous investigations.

For example, in the general response section the report says that it is important to indicate:

“that the Department did not in all instances subscribe to the recommendations made in some of the investigations.”

The Commission's difficulty with this response, is that no details are given about what was not “subscribed to” nor are any reasons therefore given, consequently the Commission is not aware which recommendations were rejected and why such recommendations were rejected.

Some of the views of the Department are supported by what the Commission found to be the situation in the management areas investigated.

For example in referring to the introduction of a credit system, the Department states that:

On matters related to offenders, save for recognition of their rights, the department introduced a credit system. The system aimed to compensate offenders for good behavioural attitudes and this became a significant milestone in promoting rehabilitation initiatives.....

The Commission's investigations however have revealed that these initiatives have created more problems for the Department.¹²

¹² See the Chapter on Parole – These are the initiatives which have created more problems within the Department.

On the issue of overcrowding, which is a very topical issue in the country at present, the Department makes the following two (2) statements:

“Overcrowding is a countrywide phenomenon. The Department is engaged in several interventions to alleviate this problem.”¹³

The Department also responded to the same issue of overcrowding as follows:

“10.5 Awaiting trial detainees and the impact of overcrowding

An interdepartmental task team has been established to address the matter of overcrowding.

The department has also developed a comprehensive 8 point strategy to address the matter.”

Once again the lack of detail in the Department’s response is glaringly obvious. Its response to the very important challenge of overcrowding, is merely to state that it has an 8 point plan which is not disclosed to the Commission. In another part of the report, the Department states that the issue of overcrowding has been dealt with interdepartmentally. From these responses, this Commission still does not know what the Department’s plan is with regard to overcrowding.

The Department also states that:

The policy framework contained in the White Paper enabled the department by redefining its organizational structure to appropriately respond to its defined mandate. Several of recommendations made by almost all reports on personnel were addressed through this process.

¹³ See page 36 which deals with Advocate M.J. Motata’s report dated 21 July 1997.

However, when the Commission conducted its investigations into the areas of recruitment, for example it soon found that many of the important recommendations of the Public Service Commission regarding recruitment, were not implemented by the Department. This will again be referred to again in this report.¹⁴

In dealing with the question of affirmative action and training, the Department states the following:

The concomitant need for application of Affirmative Action policies also meant that several people were appointed and promoted without the necessary training ...

The Commission believes that the statement made about affirmative action clearly shows the fact that the Department has an incorrect interpretation of what the concept of affirmative action is all about. The Commission's understanding is that you identify the people with potential. Once you have identified them, they get appointed to the various positions. To develop that potential they should be given extra training to enable them to excel in their jobs.

The fact that people were promoted without training is not an issue. Training becomes an issue after the appointment. Clearly the Department failed in its duty to train those appointees and accordingly they were bound to fail.

7. IMPLEMENTATION OF RECOMMENDATIONS

Regarding the reports of the previous investigations, there are a number of places where the Department either dealt inadequately with the actual

¹⁴ See Chapter dealing with Recruitment and the analysis of the Public Service Commission recommendations.

recommendations emanating from the various agencies or has not made full disclosure to this Commission of the manner in which it dealt with them.

A few will be dealt with hereunder.

7.1 Report by Judges Kriegler, Langa, Pillay and van Zyl

One of the recommendations of the report by Judges Kriegler, Langa, Pillay and van Zyl was the holding of a symposium to further the concept of community involvement.

The Department's response to this recommendation, is the following:

*"A symposium was held by the Department on 1-2 August 2000 to address and promote issues of community involvement in the correctional system as was recommended by the commission."*¹⁵

What is of concern to the Commission relating to this aspect is that the Department's report omits to point out that whilst the recommendation referred to was implemented only in 2000, the actual report of the Commission in question is dated 9 February 1995. The delay of more than five (5) years in the implementation of the recommendation is not explained in the Department's response.

7.2 Auditor-General Report on Special Investigation into irregularities by Senior DCS Officials.

This is one of the reports which the Department regarded as having been finalised as can be seen from the following response:

¹⁵ Page 6, paragraph 1.3 of the Department's report.

*Findings in the report were dealt with by the former Minister of Correctional Services in consultation with the Minister of Public Service Administration. Decisions taken are believed to have closed the chapter of irregularities referred to in the report.*¹⁶

Once again the Department has been extremely vague in its response. The Department does not specify who the senior officials are and what action was taken against these officials. Accordingly, the Commission cannot tell whether the Department has implemented these recommendations in accordance with the report or not, thus again the Commission had difficulty in fulfilling its mandate.

7.3 Draft Report: Work Group: Nutritional Service to Prisoners : Brigadier Gordon's Report

In this report the following recommendation was made regarding the serving of meals to prisoners later in the afternoon:

“Serious and urgent consideration be given to employing the full staff compliment which could then be deployed in such a manner that dinner be served later in the afternoons that for the interim, additional commodities in the form of a prepacked “snacks/take aways” be issued to prisoners at dinner for consumption during the evening.”

In paragraph 2.15 of the Department's response,¹⁷ the Department explains the implementation of this recommendation as follows:

¹⁶ See page 41 of the Department's response on the report of the Auditor-General on Special Investigation into irregularities by Senior DCS Officials.

¹⁷ See page 10 of Department's response attached to this

The Department is embarking on serving dinner later in the afternoon since the implementation of Section 8(5) of the Correctional Services Act 111 of 1998 which makes provision for the three meal system. The implementation of a take away snack was used but in many instances is no longer necessary because dinner is served between 17:00 and 18:00.”

Despite the above, the Commission’s investigations into the nine management areas, have clearly shown that this has not been adhered to in a number of management areas.¹⁸ Clearly this recommendation is not being enforced by the Department.

7.4 Work Group Report : Health Care Services in South African Prisons : Chairman Brigadier G L Gordon

This investigation into the Department had made the following recommendation regarding health care services:

“To ensure the maintenance of quality and cost effective health care services to prisoners, the development of guidelines for quality inspections in prison hospitals is strongly recommended. Provincial nursing managers should be responsible for these inspections, which should take place at regular intervals (at least once a year) at each prison hospital.”

The Department’s response to this recommendation was the following:

An inspection tool has been developed to be used by nursing managers when conducting quality inspections in Correctional Centre Hospitals. The

¹⁸ See Chapter dealing with the Management Areas and the Chapter dealing with the Treatment of Prisoners for further details.

regional Coordinators: Health Care Services are expected to conduct an inspection twice per annum in each of the Correctional Centre Hospitals.

The Work Group Report goes further and recommends that:

“Health Care Services in prisons should also be subject to independent professional monitoring, (“peer group review”), and possibilities in this regard should be explored.”

The Department’s explanation as to the action it has taken to implement this recommendation is the following:

Health Care Services in Correctional Centres have not yet been subjected to independent professional monitoring e.g. SANC, SAPC etc. and possibilities in that regard have not as yet been explored. However, the adoption of this concept will be considered.”

From the Department’s response in paragraph 4.9, it is clear that the most important oversight recommendation from the Department of Health Services has been ignored. The Department maintains that it is still being considered.

The Commission fails to understand how long it takes to set up an oversight body to Health Care Services. There are a number of problems relating to health care issues for the prisoners, which have been highlighted in this report. Those issues perhaps could have been addressed through an earlier review.

With regard to what is stated in paragraph 4.8, once again the inspection of the hospitals twice per annum is inadequate. This may have been taken care of if this peer group had been set up by the Department as recommended.

In paragraphs 4.15 to 4.18,¹⁹ the following recommendations of the investigation are quoted. The Department's response is recorded below each recommendation:

"4.15 The responsibility of health care services in prison should not be given to the Head of the Prison, but to the senior nurse at that prison."

See General Comments above.

"4.16 All nurses, nursing auxiliaries and those solely involved in the administration of health care services should fall under the authority of the proposed Directorate: Health Care Services, in respect of all personnel matters. They should not report to the Head of the Prison or to disciplinary staff."

See General Comments above.

"4.17 The "attitude problem" of nurses in the DCS should be addressed through demilitarisation and the introduction of in-service training, emphasizing that the first duty of the nurse is to his or her patient."

See General Comments above.

4.18 Prisoners should consult nurses as their first contact with the health team, and the registered nurse should treat those complaints that are within his or her scope of practice. However, the nurse should not refuse a prisoner's request to see a doctor, unless abuse of the system is clear.

¹⁹ See the Report of Brigadier Gordon.

Registered nurses in Correctional Centres are the first level contact within the health team and they treat offenders' complaints in terms of their independent professional knowledge based on their scope of practice.

Once again, the Commission has difficulty accepting and understanding such vague responses from the Department as “*See General Comments above.*”

As regards the responsibility for health care services in prison, the Commission's investigations have revealed that health care staff are still being dictated to by members of the Department, notwithstanding what is being said in the Department's response. These recommendations have either not been implemented or are not being adhered to.

The current situation contributes to tension between the uniformed members of the Department and the health professionals. The health professionals feel that they are being side-lined when it comes to issues like promotions because their work is not understood or considered important in the prison environment by the uniformed members. Furthermore, they feel that it is improper for them to be reporting to uniformed members who do not understand what their job entails. Many of them end up being subservient to the Heads of Prisons and the members.

The erosion of the independence of the health care staff impacts on the attitude of prisoners towards medical officials. If medical staff are not seen as independent, prisoners will to a large extent lose confidence in them as they will regard them as part of the “punishers” in our prisons and not as the people who are supposed to help them with their health problems.

These issues results in general demotivation in the ranks of health and medical professionals, which ultimately results in them leaving the Department for better opportunities where their given the proper recognition and status.

The Work Group also recommended that :

“4.43 In an addition to the present complaints procedure, complaints (“Post”) boxes for the delivery of medical complaints should be installed in all sections in every prison. Time standards for verbal and written response to such complaints should also be established.

In paragraph 4.43²⁰ the Department responded as follows:

Boxes for complaints have been installed in sections of the Correctional Centre nonetheless complaints with regard to ill-health or medical complaints are attended to at an earliest opportunity in order to preserve life.

The Commission is not aware of the aforesaid “boxes” which are put in various management areas for purposes of putting complaints of health care therein. However, the Commission did come across boxes in management areas for putting complaints addressed to the Inspecting Judge. However, the problems relating thereto have been dealt with in the Chapter on Judicial Inspectorate.

The Department was also investigated by one of the most important institutions in public service namely,

- the Public Service Commission, and,
- the Department of Public Service and Administration.

²⁰ See Pages 22-23 of the annexed Appendix.

Despite the importance of these two institutions in South Africa, it is interesting to see the Department's response to recommendations made by these two (2) constitutional structures.

7.5 Public Service Commission

As regards this investigation, the Department's report at Paragraph 16 simply states:

"The report of this investigation has given rise to the President appointing a commission led by Judge Thabane Jali. Several reports submitted to date enable the department to deal decisively with many of the issues identified."

The Department on its own has managed a process of re-structuring successfully in terms of its project called 'Gearing DCS for Rehabilitation' in accordance with PSCBC Resolution 7 and 8 of 2002.²¹

7.6 Department of Public Administration and Service

Regarding this report, the Department's report simply refers the Commission back to paragraph 16, which deals with the Public Service Commission's investigation.

The Department's response to these important investigations is alarming.

²¹ Paragraph 16 on page 42 of the Department's response

The Public Service Commission and the Department of Public Service and Administration made a number of important recommendations regarding the Department. Some of the recommendations were so important that the Commission believes that if they had been implemented there would not have been any need for this Commission to receive the complaints, which are dealt with under the recruitment chapter and some other chapters within this report.

It is clear from the reading of this report that the Department ignored the Public Service Commission and the Department of Public Service and Administration's recommendations.

The Department has once more refused to take heed of the recommendations which emanated from outsiders.

What the Commission finds significant also is the absence from paragraphs 16-20 of the Department's response of a frank admission that the recommendations of the DPSA and the PSC reports, insofar as it deals with specific irregularities were not implemented.

More concerning, however, is that no reasons are proffered by the Department for the lack of implementation. The only reasonable inference to be drawn from the Department's response is that it had no intention of ever implementing such recommendations. Had the Department furnished reasons to the Commission for the no-implementation of the recommendations, the Commission would have been in a position to judge the reasonableness of the Department's decisions.

8. CONSEQUENCES OF NON-IMPLEMENTATION

The failure by the Department to implement important and sound recommendations of investigating agencies has had serious financial

consequences for the Department. When one examines the question of overtime in the Department,²² it is clear that substantial savings could have been made by the Department if it had moved quickly to implement previous recommendations of the Public Service Commission.

During the 2003/2004 financial year, the Department spent an amount of R733 627 835,00 on overtime. However, when it is considered that the Public Service Commission had already, in September 2002, made recommendations to improve the management of overtime in the Department the large financial wastage of resources is grasped.

The important recommendation made by the Public Service Commission of the phasing out of weekend overtime and replacement thereof with a seven (7) day working week establishment, similar to that found in the medical profession amongst doctors and nurses.

The failure to implement this recommendation has also resulted in several employment opportunities being taken away from young South Africans seeking employment.

The evidence presented before the Commission clearly indicates that if the amount spent on overtime was utilised for the payment of salaries of new recruits, numerous people could have been employed, all of which would have assisted in the government's job creation programme.

Furthermore, the evidence indicates that the recommendations of the Public Service Commission recommending a seven (7) day week were stalled by the Department's top management at the Bargaining Council. In fact, the

²² See the Chapter dealing with Non-Adherence to Overtime Policy for further details.

implementation of these recommendations was not due to the resistance by the union, but by management itself.

Even the Task Team created by the Department to deal with the Public Service Commission recommendations was only established approximately three (3) years after these recommendations had been made.

In the areas of recruitment, the Department of Public Service Association (DPSA) and the Public Service Commission identified numerous irregularities in the area of recruitment. Several detailed recommendations were made to address the recruitment problems of the Department.²³ Despite these recommendations, this Commission has also found that the problems relating to recruitment have persisted as numerous complaints regarding recruitment had been received.

All the above clearly indicates that the Department is dragging its feet in implementing the recommendations of the Public Service Commission or has no intention of implementing such recommendations.

Whilst it is clearly the prerogative of management to make decisions regarding which recommendations are to be implemented, the Commission finds it extremely difficult to comprehend why such recommendations which could result in enormous savings to the Department have not been implemented.

The Commission's confusion is compounded by the fact that the Department has not furnished the Commission with any reasons for the lack of the implementation of these recommendations.

²³ See the Chapter on Recruitment for more details.

9. CONCLUSION

The Department's approach to the reports of investigations is a cause for serious concern for this Commission.

It serves no purpose whatsoever if Commissions are established at great expense to the South African tax payer, only for the recommendations formulated by such Commissions, to be totally ignored or swept under the carpet by the relevant Departments. If this trend continues there will be deep cynicism about all such investigations with the resultant reluctance by members of the public and employees of those departments to co-operate in the future with any investigating authority. This very Commission's report may very well also be dealt with in the same manner.

The Terms of Reference of this Commission dictate that the Commission is to investigate and report fully on the extent to which the Department has implemented or failed to implement the recommendations of previous investigations or Commission's of Inquiry into the Department. In order for the Commission to fully comply with this mandate, it is of importance that the Department respond in detail on the actions it has taken to implement each and every one of the recommendations of the investigations.

The Commission has not lost sight of the fact that post 1994, the Correctional Services inherited a Department which had an organisational culture and operational environment which promoted total disregard for human rights, military ethos and suppressed inmate population. The Commission also agrees with the Department's view that many of the recommendations made by previous investigations into the Department had no application or place in the new democratic order which came into being after 1994.

It is for this very reason that the Commission chose to confine its inquiry only to those investigations that were conducted in the period when all South Africans had become part of a new democratic order.

Having accepted the fact that many of the recommendations could not be meaningfully implemented in the new order, the Commission is of the opinion that this does not however explain the failure of the Department in not implementing certain recommendations, particularly those emanating from important agencies such as the Department of Public Service and Administration and from the Public Service Commission.

The Department of Service and Public Administration, the Public Service Commission and the Management Audit, which were conducted in 2000, gave serious and well considered recommendations which had to be implemented by the Department with regard to various issues, amongst others:

- recruitment,
- overcrowding,
- merit awards,
- parole system, and
- general corruption.

However, it is apparent from the Department's response generally to investigations which have been conducted by the Commission that the Department has not heeded any of the recommendations which came from these agencies. In the Commissioner's own words:

*"it is important to indicate that the Department did not in all instances subscribe to the recommendations in some of these investigations"*²⁴

²⁴ See page 3 of the Department's Report.

It is also of concern to the Commission that the Department in its response has chosen to selectively deal with certain reports and not to comment on others. It is the Commission's view that the Department should have commented equally on each and every one of the reports of the previous investigations and not merely replied by means of a paragraph or two to certain of the investigations.

10. RECOMMENDATIONS

In order to ensure that the recommendations of the investigations conducted by Commissions into the Department, including this Commission, are not ignored, this Commission recommends that:

1. The Department be called upon to fully explain to the Parliamentary Portfolio Committee as to why the recommendations, particularly of the Department of Public Service Administration and the Public Service Commission reports insofar as they dealt with specific irregularities, were not implemented by the Department of Correctional Services.
2. An Oversight Committee made up of either the Director Generals of the Security Cluster or the Portfolio Committee on Correctional Services itself be established to ensure that the implementation of recommendations of this Commission and other previous Commissions is monitored. The Department should also be required to furnish reasons to this Oversight Committee before electing not to implement recommendations of any independent investigation or Commission.
3. The Department should establish a dedicated section at Head Office to supervise the collation of all data and information of the Department. This section will also be responsible for the supervision of all reports of investigations and Commission conducted into the Department.

CHAPTER 20

THE IMPLEMENTATION OF THE COMMISSION'S INTERIM REPORTS

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IMPLEMENTATION OF
COMMISSION'S INTERIM REPORTS

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CHAPTER 20

IMPLEMENTATION OF THE COMMISSION'S INTERIM REPORTS

1. INTRODUCTION

This report deals with the implementation of the Commission's interim reports. It is, at this stage, appropriate to set out the Commission's observations as to the manner in which the Department has dealt with the Commission's interim reports. To a large extent, the manner in which the previous reports of investigations into the Department were dealt with by the Department¹ is no different from the manner in which some of the interim reports have been dealt with. For purposes of clarity, this aspect will be dealt with before the Commission considers the rest of its findings with regard to this investigation.

The Commission submitted eleven (11) interim reports to the Department of Correctional Services. The Commission has been informed that the Department has endeavoured to implement the recommendations made in these reports. The same information has been conveyed to the Parliament of the Republic of South Africa and the citizens of this country through the media.²

However, on closer scrutiny, it is clear that not all the recommendations have been implemented, and indeed the most crucial recommendations have been ignored. This has led to the low success rate of the disciplinary inquiries against certain members.

¹ For more details, see the Chapter dealing with Previous Investigations into the Department, where recommendations were not implemented.

² See the *Business Day* dated 4 October 2004, in which it was reported that the Commissioner indicated that most of the Commission's recommendations have been implemented.

The eleven (11) interim reports recommended that one hundred and seven (107) people be charged with various transgressions the Commission had identified. These were divided, amongst the Management Areas and reports as follows:

Number of Recommended Charges per Prison

First Interim Report	Durban-Westville	6
Second Interim Report	Durban-Westville	8
Third Interim Report	Durban-Westville	4
Fourth Interim Report	Pietermaritzburg	14
Fifth Interim Report	Bloemfontein	33
Sixth Interim Report	St Albans	1
Seventh Interim Report	Pollsmoor	1
Eighth Interim Report	Leeuwkop	19
Ninth Interim Report	Johannesburg	10
Tenth Interim Report	Pretoria	5
Eleventh Interim Report	Pretoria	6
Total		107

The majority of the people were to be charged both in terms of the Disciplinary Code and criminally, as they had committed certain criminal offences. Only one person was solely to be charged criminally, because he had resigned from the Department.³

The Commission requested that the Department furnish a report on the progress that has been made regarding the Commission's interim reports. In response, the Department reported that disciplinary inquiries had delivered the following results:

³ That is the former Provincial Commissioner Mr Nxumalo – See the Tenth Interim Report.

TABLE : Disciplinary Outcomes

DETAILS	TOTAL
Dismissed	26
Re-instated	7
Warnings	3
Final Written Warnings	14
Part Heard/Pending	3
Awaiting Arbitration Date/Disciplinary Hearing	5
Referred to SIU/DSO Investigation	8
Still to be investigated	6
On review	3
Members resigned	8
Cases not proceeded with	11
Matter still under discussion /Time frame problem	5
Passed away	1
Non co-operation from witness	3
Criminally prosecuted, found not guilty	3
Restructuring transfer	1
TOTAL	107

Some of the implicated members passed away and one resigned. The outcome of the various inquiries is in the report from the Chief Deputy Commissioner: Central Services, Ms J.A. Schreiner, dated 31 August 2005, which was submitted to the Commission.⁴

We will now deal with our comments regarding each of the reports, which were submitted to the Department.

⁴ See Head Office Exhibit 'H'.

2. FIRST INTERIM REPORT

The re-instatement of the members, despite the clear evidence against them, was due to the unforeseen circumstance that the main witness emigrated, as is apparent from the annexed report.

Nevertheless, the Commission has the following observations to make on the manner in which the disciplinary inquiries were conducted.

In the First Interim Report the Commission recommended that a Special Task Team should be appointed to deal with the disciplinary inquiries. It was further recommended that such a Special Task Team should consist of independent people who are experienced. The experience referred to was in respect of labour relations and/or labour law. That is the reason why the independent Labour Arbitration Organisations were suggested, in the said report. However, the reports, which have been received by the Commission, state that contrary to these recommendations the very first hearings were chaired by a person who was not familiar with either labour relations or disciplinary procedures in labour law. As a result, a number of technical mistakes were made, which may have led to the eventual acquittal of offenders.

The Department also disregarded the recommendations that disciplinary inquiries should be attended to by experienced, independent people. This led to unsuccessful prosecutions in circumstances where there was cogent evidence of transgressions having been committed.

3. SECOND INTERIM REPORT

3.1. Medical Aid Fraud

As is clear from the Commission's Second Interim Report, during the course of the Commission's investigations into the Durban-Westville Management

Area, evidence was presented by members of the Department and by the medical aid company that medical aid fraud was rampant in the Department. After following up leads and interviewing numerous witnesses the Commission's investigators were able to confirm that a large number of members in various prisons in KwaZulu-Natal were defrauding the medical aid company, Medcor, of millions of rands.

The sheer number of leads received by the Commission made it clear that this would be a massive investigation far beyond the limited resources of the Commission or even the Department itself.

One of the recommendations in this interim report was that the matter should be referred to the Scorpions⁵ and the Asset Forfeiture Unit. The Commission held a meeting with the Director of Public Prosecutions of KwaZulu-Natal (who previously headed the Scorpions in KwaZulu-Natal) and alerted her of the widespread medical aid fraud in the Department. The Scorpions then took over all investigations and eventually a Special Task Team was put in place at national level to co-ordinate all medical aid investigations. Members of this task team met with the Commission in Cape Town and provided a full briefing of the plan of action for the operation.

The Department head office also took steps to broaden its efforts to stamp out medical aid fraud by appointing forensic auditors KPMG. Furthermore, as the problem affected several government departments, the Commission has been reliably informed that the offices of the Auditor-General became involved.

Since the Commission's initial referral of the matter to the Scorpions, they, together with the Asset Forfeiture Unit, have moved against the main parties implicated and Mr Moonsamy Soobramoney and Mr Maliga Pillay have been charged with 75 383 counts of fraud. Assets worth R31 million were apparently also seized, which included houses in Umhlanga, La Lucia and

⁵ The Directorate of Special Operations within the National Prosecution Authority.

Zimbali, motor vehicles and bank accounts. Forensic auditors KPMG carried out an audit of the 75 383 claims made by the two (2), who are also alleged to have defrauded other medical aid schemes in the same way.⁶ The prosecution authorities have added charges of racketeering to those of fraud already laid against Mr Soobramoney and Mr Pillay.⁷

The Scorpions have also taken action against members of the Department. According to reports, about seven hundred (700) warders face action for participating in these medical aid scams.⁸ These warders are apparently scattered across KwaZulu-Natal and to ensure that the security of the prisons was not compromised, they were arrested in small groups at different times. The first group of thirty (30) warders have appeared in court and been charged with fraud. KMPG have compiled files on the thirty (30) members arrested.⁹

The Special Investigations Unit has also become involved and according to the Department there were savings in medical aid claims of R492.8 million in two financial years (R122.8 million in 2002/03 and R370 million in 2003/04) due to a sharp decline in claims made after fraudsters were caught.¹⁰

The outcome of the various investigations into medical aid fraud, which were referred to the Scorpions and/or the SIU by the Commission, will become apparent at a later stage.

The response of the various government agencies in this regard is commended by the Commission.

⁶ See Tania Broughton: “R31 million assets seized in swoop on doctor”, *The Mercury*, Thursday, 24 March 2005.

⁷ See Latoya Newman, “KZN doctor accused of fraud faces charges of racketeering”, *The Mercury*, 4 July 2005.

⁸ See Latoya Newman “Scorpions to sting 700 KZN warders for fraud”, *The Mercury*, 9 December 2004.

⁹ See Nathi Olifant, “Warders arrest prison warders for graft”, *Weekend Witness*, 12 December 2004.

¹⁰ “Minister Balfour vows to intensify the anti-fraud and corruption fight in Correctional Services”, dated 2 March 2005 – see www.gov.za, accessed 3 March 2005.

In the said interim report the Commission had also recommended the prosecution of Mr I.S. Zulu. The Commission would like to comment on the disciplinary hearings relating to Mr I.S. Zulu as follows:

3.2. Mr I.S. Zulu's Disciplinary Inquiry

The disciplinary inquiry emanating from the First and Second Interim Reports against Mr Zulu was held at the Durban-Westville Management Area on or about 23-25 October 2002. The disciplinary inquiry was chaired by a senior official employed by the Eastern Cape Provincial government.

The reports the Commission received show that, notwithstanding the seniority of the chairperson, he lacked the necessary experience and skills in chairing disciplinary inquiries and committed a number of procedural irregularities, which would have vitiated the proceedings in any event.

During May 2003, the matter was taken on appeal. The appeal was chaired by a former magistrate, currently employed as a Chief Director in the Department of Justice and Constitutional Development. At this stage, obviously, the aforesaid irregularities and other substantive mistakes could not be rectified. Mr Zulu was then bound to be re-instated, which eventually happened. It was in anticipation of such problems that the Commission recommended in its First Interim Report that properly qualified and experienced people be appointed as a Special Task Team to deal with all disciplinary inquiries emanating from its recommendations.

Whilst disciplinary inquiries might, to the lay person, seem simple, their procedures and the rules of the law of evidence are very complicated, even for experts in the field. It is clear that there was a problem in the presentation of evidence and in the cross-examination of witnesses, which would have vitiated the finding.

Furthermore, labour law is a specialised area of the law, practised by specialist lawyers, with its own specialist tribunal and court, in which non-labour law practitioners hardly appear and do not preside as Commissioners or Judges, as the case might be. Unless a person has experience in labour law, it is fairly difficult to appreciate some of the finer points and nuances relating to Labour Law. It was these finer points, nuances and issues which led to the Commission recommending to the Department that serious consideration be given to appointing people who are experienced in labour law. They need not be experienced lawyers, although even experienced lawyers, unless they have practised labour law, still encounter problems because labour law is not only about labour related issues but also about “Law and Equity”. The constitutional rights enshrined in our Bill of Rights lead to an even greater complexity of the labour matters.

3.3. Mr Zulu’s Appeal

The difficulty or uniqueness of labour law became apparent in the manner in which the fairly experienced magistrate dealt with the appeal. In reading his findings, it is clear that he was using criminal law concepts in dealing with labour law. He was looking for “proof beyond reasonable doubt”, when the standard of proof should be on a “balance of probabilities”. The probabilities based on proven facts were overwhelming. There was a failure on the part of the chairperson to appreciate the nature of the misconduct and sometimes the provisions of the General Amendment Act No. 45 of 1988 regarding hearsay evidence. He also misdirected himself regarding the evidence that was led.

The failure of the Department to follow the recommendations regarding disciplinary hearings resulted in a very senior employee, who had been dismissed for corruption, having to be re-instated due to several irregularities during his disciplinary hearing.

The same thing happened in the other matters referred to in the Second Interim Report, and people who were implicated in it were also found not guilty and re-instated despite overwhelming evidence implicating them.

The same recommendation to form a Special Task Team was repeated in the Third and Fifth Interim Reports, and was reiterated by the Chairperson of the Commission when he was addressing the Correctional Services Portfolio Committee in Parliament.¹¹ The Department's officials did not act as recommended by the Commission.

It is clear that whatever successes the Commission might have achieved in the investigations have been undermined by the Department officials disregarding this crucial recommendation by the Commission, and because people or organisations who have the relevant experience were ignored.¹²

Accordingly, it cannot be ignored that the Department's own failure to comply with the Commission's recommendations has led to a low conviction rate in the disciplinary inquiries.

4. THIRD INTERIM REPORT

The hearings with regard to this report have been finalised and members who were identified in it were predominantly given final written warnings. In the circumstances, the Commission does not have any comments on these hearings as it does not have any evidence to indicate how they were conducted.

¹¹ In response to the Portfolio Committee presentation by the Chairman on 20 August 2002, the then Minister also gave an undertaking that the disciplinary inquiries emanating from the Commission would be dealt with by independent people from outside the Department as recommended by the Commission.

¹² See the Chapter dealing with Disciplinary Inquiries, which deals in detail with the problem encountered by the Commission with regard to disciplinary inquiries in the Department.

5. FOURTH INTERIM REPORT

The hearings with regard to this report have been finalised and members who were identified in it were predominantly dismissed and some arbitration hearings are still pending. Most of these matters have been referred to the South African Police Service for investigation and criminal prosecution.

6. FIFTH INTERIM REPORT (GROOTVLEI REPORT)

It also appears that most of the hearings have been finalised in this matter. However, there was no report as to what has happened with regard to the various criminal charges. In addition, the Special Task Team, which had been sent by the Commissioner of the South African Police Service, also undertook to investigate the criminal charges against the various members who had been implicated. There is no report on this either.

The one person who has not been dealt with as recommended by the Commission in this report, is the former Provincial Commissioner of the Free State, Mr W. Damons. This is a matter of concern because he attempted to defeat the ends of justice, which is a very serious offence.¹³

In Chapter six (on page 85) of the Fifth Interim Report, the Commission seeks to deal with the issue of outside interference by Departmental officials in the Commission's work. The recommendations of the Commission in this regard are clearly set out in the interim report, which is an Appendix to this Final Report.

Subsequent to the submission of this report, the office of the Commissioner prepared a memorandum, which states:

¹³ See the Fifth Interim Report – pages 28 and 123.

“3. DISCUSSION

The Commissioner respected the Presidential authorising of the Jali Commission to deal with the video, and as such did not take action immediately after he saw the video. However, the public showing of the video on national TV altered the dynamics and set up volatility in the prison of Grootvlei and the Provincial Management that required in the Commissioner’s estimation exercise of his responsibility for the management of the Department. He crafted terms of reference to ensure that the Task Team was not focus on the situation in the prison management, to stabilise the situation in the prison, to complement the investigation of the Jali Commission.

- Since the Task Team was intended to ensure that the Department fulfilled its responsibility to stabilise the prison management the Task Team could not and should not have consisted of non-departmental members*
- The terms of reference specifically indicate that the Task Team should complement the work of the Commission, and that the focus should be on the “circumstances that made it possible and led to the production of the video”. The Task Team was sent to Grootvlei in relation to the Management responsibility to stabilise the prison and to address prison management, and not to investigate the allegations made in the video.*
- The Commissioner’s concern in relation to the making of the video relates to the importance for evidentiary purposes of involving the appropriate investigative and law enforcement agencies of the country in such an operation. The Department of Correctional Services does not have a legal mandate to conduct secret surveillance investigations, and where such methods are required, co-operates with the appropriate state institutions.*

- *The Department remains fully committed to the terms of reference of the Jali Commission, and has no and did not have any intention of establishing a team to work with the Jali Commission. The Department remains committed to ensure that DCS members provide full co-operation to the Jali Commission, and accepts that all staff, even those required to provide such support to the Commission, may themselves be subject to investigation by the Commission if their actions have warranted such investigation.*
- *The Commission Report indicates that there is a misunderstanding as to the nature of the Task Team. The Task Team was a temporary task team sent to intervene to stabilise a situation and to make managerial recommendations to the Commission. It is a manifestation of the management tool that is utilised in DCS in relation to “crisis” situations that develop in the operational arena of the Department, and similar Task Teams with different compositions have been utilised in relation to the mass escape in Bizana prison, the burning of a cell in Rustenburg prison, etc.*
- *Personnel from outside the Department have chaired the disciplinary hearings that have emanated from the Grootvlei Interim Report as well as from other reports from the Jali Commission. In this respect the recommendation of the Jali Commission about the importance of the independence of the disciplinary hearings has been meticulously acted on.*

CONCLUSION:

The Jali Commission recommendation that ‘The sending of a Task Team to a prison whilst the Commission is busy with investigations at such prison should be avoided in future. If there is a need to do so, every attempt should be made to ensure that interference with the work of the Commission is avoided’, is noted. It is hoped that the above

response to the Interim Report will assist in establishing clarity with the Jali Commission that no interference was intended, and that the purpose of any Task Team sent to a prison in which the Jali Commission may be busy would only be to address the management dimension of the situation and not to investigate any allegations.

CDC FUNCTIONAL SERVICES.”¹⁴

The Commission has considered the response of the Department. It is clear that the Department has not fully understood the Commission’s concerns as set out in the interim report. The Department seeks to address issues that have not been raised by the Commission and thus the Commission regards them as not being relevant for purposes of dealing with the issue of outside interference.

The question of what role the Task Team had to perform at Grootvlei and its terms of reference was clearly defined by Mr Mohoje in his testimony. In his own words, he indicated that this was the Task Team that had been recommended by the Commission in its First Interim Report and was intended to work with the Commission in dealing with the various disciplinary measures. This is clearly incorrect.

According to paragraph 2.2.1 of the Task Team Report to the Commissioner dated 31 July 2002, the mandate given to the Task Team on 19 June 2002 was as follows:

“2.2.1 The mandate given to the Task Team by yourself (Commissioner) was as follows:

- *Set up/establish the disciplinary process against the officials implicated in the video. (Including suspension).*

¹⁴ See Head Office Exhibit “N”.

- *Investigate circumstances that made it possible and led to the production of the video.*
- *Ensure that criminal charges (members and prisoners) are referred to the SAPS.*
- *Establish the need to transfer the four (4) prisoners from Grootvlei for their own safety.*
- *Ensure that the Management of the prison is stabilised and that the Prison is operated according to departmental policies.*
- *Ensure that the Task Team work in close cooperation with the Jali Commission and complement their work.”*

The Department’s response cannot undo the evidence, which has already been led, as to the reason for the establishment and dispatching of the Task Team to Grootvlei and the documentary evidence¹⁵ before the Commission.

The Commission does not intend dealing with this any further other than to say the facts speak for themselves. The Commission hopes this will bring this matter to finality. In the light of the above, the Commission reiterates its views as expressed in the Fifth Interim Report regarding interference.

6.1 Whistle-Blowers : Mr T. Setlai

The Department’s approach to the entire Grootvlei video incident demonstrated vindictiveness against whistle-blowers, although the Department would still like the Commission to believe that its action was justified. This was demonstrated by a memorandum that was sent to the Commission by the Commissioner which is referred to above.¹⁶ It has always been the Department’s position that those who made the video would have to be punished. In particular, there was a concerted effort throughout to victimise

¹⁵ In particular, the Task Team’s Terms of Reference as quoted above.

¹⁶ See Head Office Exhibit ‘N’.

Mr Setlai, the then Head of Prison at Grootvlei at the time of the video hearings at the Bloemfontein Management Area.

The proven facts showed that allegations in various newspaper articles about Mr Setlai being victimised were not false. The manner in which Mr Setlai was subsequently treated corroborates the views of the Commission, the Commission investigators, the Commission evidence leader and the general public that Mr Setlai was being specifically targeted by the Department.

These views are in stark contrast to the the statements made by or on behalf of the Department, which are:

“ANOTHER PERSPECTIVE ON THE GROOTVLEI PRISON MEDIA DEBATE – Department of Correctional Services, 9 July 2002:

Some of the many insinuations, allegations and concerns publicly expressed are: the ‘victimisation’ of Mr Setlai, cover-ups, intimidation of potential whistle-blowers, and the protection of the corrupt lot within the correctional services Department.

As a Department we do understand in principle the importance of these concerns: we acknowledge the need to protect whistle-blowers, to expose and uproot corruption and to employ whatever means at our disposal to meet these objectives.

In so doing, however, we have real responsibilities that we simply cannot jettison. There is the constitution and there are imperatives of the prison management policy, which guide us in terms of what we can and cannot do.”¹⁷

When the Commission was sitting at Bloemfontein, the members of the Special Task Team, which was sent by the Commissioner to Bloemfontein,

¹⁷ See the media statement by the Department dated 9 July 2002. (Head Office Exhibit ‘W’).

made every effort to deny that their mission was to punish or victimise Mr Setlai. However, less than six (6) months after the Commission had left Bloemfontein, Mr Setlai was charged with a number of charges, which did not survive judicial scrutiny in a court of law.

It could be argued that the action taken against Mr Setlai was an independent action by the Special Investigation Unit (SIU). However, all the evidence points to the Department being the driving force behind the action because Mr Setlai dared, together with the prisoners, to expose corruption within the Department. The actions taken against him included transfer, demotion, disciplinary actions and eventually criminal charges.¹⁸

The Special Investigation Unit took a number of affidavits from various witnesses, which were subsequently repudiated by those who made them because they alleged that they had been either “unduly influenced” or “threatened” to make the statements. Obviously, evidence obtained in this manner would not be admissible in a court of law.

The question that has to be asked is why the Special Investigation Unit took such a keen interest in the matter of Mr Setlai?

The Special Investigation Unit is tasked to investigate corruption in the Department, as well as the entire Public Service. The Unit is aware of the fact that for it to succeed it needs whistle-blowers and cannot afford to victimise them. The Commission believes that it is very likely that the SIU acted on instructions rather than on its own initiative. The only other role player that remains is the Department, which suffered embarrassment when Mr Setlai emerged as a whistle-blower of corruption. This leaves one with the view that there was a concerted effort by the Department officials to victimise the whistle-blower, contrary to all the provisions of the law that seek to protect

¹⁸ See “Call for more support for whistle-blowers,” *Business Day*, 20 October 2005, wherein T. Devine, a legal director, says “a whistle-blower” might find himself being forced to choose between being loyal to his co-workers, who might lose their jobs because of the disclosure, and being loyal to the law”.

whistle-blowers.¹⁹ In section one of the Protected Disclosures Act, a protected disclosure by an employee is defined and Mr Setlai's actions fall within the ambit of the definition.

It is this Commission's view that the actions by the Department against Mr Setlai did a great deal of damage to the image of the Department as an institution that seeks to uphold the Government's vision to fight against corruption.²⁰

These actions also impacted negatively on the work of the Commission because after the Setlai incident, other whistle-blowers were no longer willing to take the risk to come forward to expose corruption lest they be victimised too.²¹

¹⁹ See section 3 of the Protected Disclosures Act No. 26 of 2000, which provides as follows:

“3. Employee making protected disclosure not to be subjected to occupational detriment. – No employee may be subjected to any *occupational detriment* by his or her *employer* on account, or partly on account, of having made a *protected disclosure*.

²⁰ The effect of the Department's actions in this regard can also be illustrated by the manner in which civil society has perceived the approach the Department took towards Mr Setlai. According to the *Business Day*, 20 October 2005, reporting on the conference, organised by the “Open Democracy Advice Centre”, it reported as follows:

“A number of people who exposed corruption in the workplace have found themselves at risk of losing their jobs, facing charges of insubordination or being isolated.

These include former Grootvlei prison head Tatolo Setlai, who exposed corruption at the prison by allowing prisoners to film warders engaging in illicit activities.

After the exposure, Setlai was charged with unrelated offences by prison authorities and spent two years on suspension.

The need for protecting whistle-blowers was important because reprisals by employers would not end, said Tom Devine, legal director of US whistle-blower protection organization Government Accountability Project.”

²¹ See the Fifth Interim Report for more detailed findings regarding the Bloemfontein Management Area and the views of the Commission.

It was also clear to members of this Commission that at all times when the Department was conducting its campaign against Mr Setlai, every attempt was made to make it look like it was the Commission that was victimising him. The Commission has always maintained that Mr Setlai showed courage and did good work by exposing corruption and rendering assistance to the Commission against so many odds.

The allegations of victimisation can be corroborated by the various statements numerous people filed.

The role of the SIU investigators was also, rightly or wrongly, a subject of controversy. There were also allegations of irregularities by some of the witnesses against the investigators, who had come to obtain statements from them in preparation for the prosecution of Mr Setlai.²²

For example, Mr Jen-Chih Huang, in his founding affidavit, in paragraph 46, alleged that:

“The question of my release on parole is being used as leverage in an attempt to force me to testify against Mr SETLAI.”

²² See affidavit filed by Marthinus Hermanus van Rooyen in the matter of *Jen-Chih Huang (Applicant) v Provincial Commissioner for Correctional Services (Respondent)*, Orange Free State Provincial Division, Case No. 992/03. Paragraphs 25-27 of the abovementioned affidavit of Mr M. H. van Rooyen, which was deposed in Afrikaans, can be translated as follows:

- “25. On the 16th January 2003, I was requested by Messrs Herman Espach and Peet Nell, members of the SIU, attached to the Jali Commission, and who were tasked with investigating the matter of Mr Setlai, as well as his arrest, regarding the possibility that I would testify against Mr Setlai. I was told that his parole would be more easily processed if he would be prepared to testify against Mr Setlai.
26. The applicant declined to make a statement since he had no knowledge of anything to testify about against Mr Setlai.
27. I am convinced that the Department of Correctional Services had granted the parole of the applicant and the date was set for it, but because of the problems between Mr Damons and Mr Setlai, whose revelations gave impetus to the Jali Commission, they (the Department) wanted to victimise him because he didn't want to testify against Mr Setlai.”

It is clear from the Jen-Chih Huang affidavit, (paragraphs 42-46) that he alleges that there was a degree of duress and undue influence on him to testify against Mr Setlai. This was denied. However, the outcome of the hearing against Mr Setlai, leaves one with more questions.

Not only was Mr Setlai hauled before a criminal court by the investigators, he was also charged internally by the Department. There were nineteen (19) charges brought against Mr Setlai in the internal disciplinary inquiry and some related to the video incident or matters that had been aired directly or indirectly before the Commission in Bloemfontein.²³ Mr Setlai was charged contrary to the promise by Mr Damons, the then Provincial Commissioner of the Free State, that he would neither be charged nor victimised as a whistleblower.

The charges contained in Appendix 'G' to this report were clearly an attempt by members of the Department to get rid of Mr Setlai. Scrutiny of the internal charges shows that they are all charges that could have led to his dismissal. Mr Setlai ended up being found guilty on two (2) minor offences, which resulted in written warnings.²⁴ There was no conviction on the serious corruption, sabotage, gross negligence (or serious maladministration) and bribery charges.

This then goes back to the comments, which the Commission had raised in its interim report, that there was a concerted effort to interfere with the Commission's investigations.²⁵ The attempt by the Department to dispute this

²³ See Appendix 'G' hereto. In particular, charges 12, 13 and 14. Charge 15 may also be related to the video matter. However, further particulars are needed.

²⁴ "Mr Setlai was charged for misconduct on several charges and he pleaded guilty on 2 charges, i.e.

1. DCS disciplinary code paragraph A 2.1 – Negligence in the execution of his duties during the period December 2001 to January 2003, at Grootvlei by allowing prisoner Mr McKenzie to utilise the official telephone contrary to departmental policies.
2. DCS Disciplinary Code paragraph A 5.10 – In that he breached internal security arrangements during the period 2001-2003 at Grootvlei in that he allowed prisoner Mr Robert Wong to receive visits without custodial supervision." (See Head Office Exhibit "L").

²⁵ See the Commission's Fifth Interim Report.

in its memorandum is not convincing. This attitude was not confined to Mr Setlai.

Other Commission witnesses have also alleged victimisation by the Department.²⁶

The Commission took very strong exception to this attitude which was displayed towards its work. If the Department felt that the Commission was not performing its mandate in accordance with the terms of reference, it could simply have requested that the mandate of the Commission be terminated by the State President. It should not have attempted to interfere with the work of the Commission or to try to undermine the Commission's work and to bring the Commission into disrepute by victimising those who assisted it in its task.

The Department's approach to Mr Setlai is totally different from that which they adopted towards the former Provincial Commissioner of the Free State, Mr Damons.

²⁶ Mr Baxter, the Area Manager of Middeldrift, testified before the Commission at Port Elizabeth. After he testified, a number of charges were preferred against him. Such charges were serious charges, which could have led to his dismissal. The Commission is not aware of the circumstances surrounding the said charges or the veracity of the allegations against him. Mr Baxter has also complained about the manner in which the Department dealt with his promotion. Mr Baxter has, however, reported to the Commission that he was being victimised by the Department, because he testified before the Commission. The Commission does not have the full facts regarding the transgressions or the disciplinary inquiry or the aforesaid promotions. In the premises, the Commission would strongly recommend that this matter should be investigated by an independent person or the Public Service Commission to ensure that the question of whether the Department's disciplinary process was being abused to victimise whoever had testified before the Commission does not arise again in future with other investigations or Commissions of Inquiry.

Mr Damons, according to the evidence before the Commission, sought to destroy evidence of corruption, which the whistle-blowers had obtained. This evidence was brought to the attention of the Department. Even though he had committed a serious offence, he was merely redeployed and “placed at the post of DC: Facilities and Security in terms of the restructuring of the Department”.²⁷

The Commission hopes that its comments will be taken seriously within the Department. The role played by the various officials should be investigated and those who were responsible for the wrongdoing should be dealt with accordingly.

7. SIXTH INTERIM REPORT

The Sixth Interim Report dealt with the charges against the former Provincial Commissioner of the Eastern Cape, Mr R.E. Mataka. The report was submitted during December 2002.

The Department’s Disciplinary Code is clear with regard to the fact that all disciplinary inquiries are to be finalised within three (3) months after concluding the investigation. In the Commission’s view, this investigation was finalised by the Commission, at the latest, when the report was submitted during December 2002. Accordingly, the disciplinary inquiry should have been held during or before the end of March 2003. However, notwithstanding the fact that the Department is aware of such provisions of the Disciplinary Code, nothing was done to initiate the disciplinary inquiry until intervention by the Commission during April 2003.

The only conclusion the Commission could arrive at was that there was a lack of willingness on the part of the Department to discipline Mr Mataka.

²⁷ See the Report by the Chief Deputy Commissioner: Central Services dated 31 August 2005. Head Office Exhibit ‘H’.

Even when he was being disciplined, he was afforded a lot of latitude, including being given an opportunity to lead evidence in an appeal and also to be legally represented.²⁸ As a result, the entire disciplinary process was only finalised on or about 30 September 2004.

Eighteen (18) months elapsed between the report being submitted to the Department and him being dismissed. During this time, he continued to earn his full salary although the State could have been saved a substantial sum of money had there been a clear commitment from the Department to discipline him. Instead, the Department, for reasons unknown, decided to conduct a further investigation into this matter. Furthermore, the Department collected evidence from Mr Mataka in which he was trying to exculpate himself from having committed these crimes. This was notwithstanding the fact that he ignored the Commission's subpoena to appear before it, choosing instead to travel out of the Port Elizabeth Magisterial District. This was dealt with in detail in the Commission's report and the Department was well aware of the details.

In the Commission's view, the Department was trying to give him a second chance when no other employee had been given such an opportunity. The impression that was given to the Commission was that every attempt was being made to avoid the disciplinary inquiry. Moreover, every attempt was made to give him preferential treatment so that in the end he would not be disciplined and dismissed from the Department. Obviously, any delay of more than three (3) months after the report was submitted in December 2002, would have given him a defence, namely, that the matter had lapsed.²⁹

This view is confirmed by a press release,³⁰ which sought to indicate that people should not expect that he would be dismissed after the Commission hearings and that everybody should wait for the report before anything could

²⁸ See the report by Mr Paxton in this regard.

²⁹ See the Chapter on Disciplinary Inquiries for an analysis of the time frame clause in the Department's Disciplinary Code.

³⁰ See press statement by Mr Luzuko Jacobs dated 25 October 2002.

be done because Commission reports can, in their view, be either useful or immaterial.

In a press release the Department's Mr Luzuko Jacobs³¹ stated:

...“Our concern notwithstanding, as a department, we have a responsibility to respect the protocols of an investigation of this nature. This is crucial, taking into account that outcomes sometimes cannot be accurately predicted. Evidence led in any investigation can either be useful or immaterial to the nature of the final decision in the adjudication of matters. That is why it might be crucial to resist any temptation to prejudge matters.

When the Commission makes its recommendations formally to the Department, these will be acted upon. So far this approach has worked well. In line with the recommendations of the Commission, suspensions were effected and disciplinary hearings against our members have commenced in KwaZulu-Natal and will start next week in the Free State.

Our commitment is to do all in our power to create Zero Space for corruption in our department. This we are going to do. Our reaction to instances of corruption has no regard for rank and applies equally to all members. Seniority is not an issue, corrupt tendencies are our target. It is important, however, to do things right and to do things properly.”
(Own emphasis).

Notwithstanding this assurance, the disciplinary inquiry only took place more than four (4) months after the report had been submitted and this only happened after the Commission approached the Office of the President to inquire about developments. Thus the above quoted statements about equality of employees were not adhered to.

³¹ See Head Office Exhibit '0'.

The urgency, which the Department showed in respect of the Grootvlei investigations, was no longer necessary in this matter. Even though the charges were as serious as the Grootvlei charges, if not more serious. There is a view amongst junior members that the Department is only keen to discipline the foot soldiers and not the senior officials.

It is this approach to discipline that concerns the Commission about the Department's commitment to root out corrupt officials from its ranks. Whilst certain people within the Department might be committed, it is clear that there are still certain officials who will try to frustrate whatever is being done to discipline certain individuals, in particular those who happen to be powerful within the union movement or the Department.

The Provincial Commissioner's general behaviour and attitude was inconsistent with certain aspects of the law, Public Service Regulations, Public Service Code of Conduct and Treasury Instructions. He was not a good example to the other employees. Accordingly, the senior officials within the Department should have disciplined him speedily and make an example of him. A speedy disciplinary inquiry would have served as a strong message to the personnel corps that dishonesty and fraudulent conduct will not be tolerated by the Department.

The recommendations that are made later in this report with regard to disciplinary inquiries should be seen in the context of these observations.

8. SEVENTH INTERIM REPORT

The matter has been dealt with and finalised so the Commission has no comments to make with regard to the disciplinary inquiry as the Commission has not received any evidence in that regard.

9. EIGHTH INTERIM REPORT

The Eighth, Ninth, Tenth and Eleventh Interim Reports were submitted to the Department at the same time, during February 2004. As at the date of writing, namely September 2005, it is clear from the report, which the Commission received from the Department, that the Department had not attended to the recommendations contained in these reports timeously, if at all. The Commission will deal with these reports individually.

With regard to the Eighth Interim Report, the Department has advised the Commission that it is investigating these matters further. The report had three (3) chapters, which dealt with three (3) different transgressions by various members. Chapter One dealt with "Irregular Contact visits". Chapter Two dealt with "Illicit Relationships". Chapter Three dealt with "Hospital Malpractices".

The Commission is of the view that very little has been done since the report was submitted for the following reasons:

9.1 Chapter One

This chapter deals with irregular contact visits, which were expressly authorised by members of the Department at the Leeuwkop Management Area. These members granted special privileges to prisoners incarcerated in the Maximum Security Prison (Block C). The said prisoners were not entitled to the said privileges. The special privileges afforded to these prisoners included, amongst others, the opportunity to have contact visits with their wives and/or girlfriends, whilst these prisoners did not belong to the 'A' group of prisoners. In some of these contact visits, they were given an opportunity to have sexual intercourse with their aforesaid partners.

The Commission recommended that Messrs Sithole, Maseko Matikinca and Rakgotho should be charged in terms of the Internal Disciplinary Procedure.

Furthermore, that Messrs Sithole and Matikinca also to be charged in terms of the Correctional Services Act 111 of 1998. Mr Rakgotho was also to be charged criminally in terms of the Corruption Act 94 of 1992.

The Department's response has been as follows:

EIGHTH INTERIM REPORT : LEEUWKOP

NO.	OFFICIAL	TRANSGRESSION	SANCTION	COMMENT
1	Mr Sithole	Smuggling	---	Witness unco-operative. Testified <i>in camera</i> at Commission
2	Mr Maseko	Unsatisfactory work	Warning	
3	Mr Matikinca	Corruption	---	Witness unco-operative. Testified <i>in camera</i> at Commission
4	Mr Rakgotho	Bribery		

Firstly, dealing with Mr Sithole, the Commission fails to understand the relevance of the fact that the witness testified *in camera* at the Commission. The witness who testified *in camera* only testified in the absence of members of the public. The people who were implicated were present at all times. One witness who testified *in camera* was Mr Mputhi's wife or girlfriend. There were other witnesses who testified regarding these contact visits who were prisoners at Leeuwkop Prison, namely, Messrs Binca, Mills and Mputhi. Mrs Mills (Senior) also testified about the fact that she unlawfully brought a radio into prison and she had to pay a warder Fifty Rand (R50,00) to do so.

The evidence of transgressions in regard to the aforesaid chapter is overwhelming. The testifying *in camera* has nothing to do with the evidence, which is before the Department and the people who transgressed the departmental rules should have been accordingly disciplined.

Secondly, the Department does not say what it did about the criminal recommendations. It is clear that to date no criminal charges have been laid.

The evidence of bribery against Mr Rakgotho is clear and cogent. There is documentary evidence to corroborate Mr Mputhi's evidence insofar as the payment of a Three Thousand Rand (R3000,00) bribe is concerned. The Department does not give an explanation as to why Mr Rakgotho has not been prosecuted in this regard, both criminally and in terms of the internal disciplinary code.

9.2 Chapter Two

This chapter deals with the illicit relationships between a warder and a prisoner incarcerated at Leeuwkop. In this matter the warder purchased a motor vehicle from a prisoner, notwithstanding the clear provisions of the Correctional Services Act, which stipulates that warders should not have any pecuniary relations with prisoners. The provisions of the Act are also contained in the Departmental regulations. The Commission's recommendations were as follows:

- (a) Mr Shongwe should be suspended immediately from his position in the Institutional Committee to another position so that he will not have any contact with prisoners;
- (b) Mr Shongwe should be charged for contravening provisions of section 118 (2) (b) of the Correctional Services Act 111 of 1998; and
- (c) Mr Shongwe should be charged internally in terms of clause 4.7 (Column A) of the Disciplinary Code for having dealings with a prisoner or a relative of a prisoner.

The Department's report insofar as Mr Shongwe is concerned stipulates that:

EIGHTH INTERIM REPORT : LEEUWKOP

NO.	OFFICIAL	TRANSGRESSION	SANCTION	COMMENT
1	Mr Shongwe	Section 118 Act 111/1998	Final written warning	

It is clear that the Department ignored the recommendations of the Commission. The Department in its own report indicated that Mr Shongwe was supposed to be charged in terms of the Correctional Services Act. However, he was only given a written warning in an internal disciplinary inquiry. The Department does not say what it did with regard to the criminal charges against Mr Shongwe, who committed a criminal offence in terms of the Act. It is clear that all criminal transgressions are being ignored.

This was a serious offence, especially because Mr Shongwe, as a member of the Institutional Committee, is also in charge of prisoner's discipline. He, in fact, prosecutes in their tribunal.

9.3 Chapter Three

This chapter deals with hospital malpractices at the Leeuwkop Management Area. Sentenced prisoners, who were totally untrained or unsupervised, were made to perform medical duties, which are reserved for qualified nurses and medical doctors. The said malpractice is not only in contravention of the Correctional Services Act and Regulations, but also in contravention of the Health Professions Act No 56 of 1974, which reserves the aforesaid duties for qualified medical personnel. This matter was reported and a number of charges were recommended against Sister Molobi. There were also recommendations that proceedings be instituted against Messrs Nyambi,

Shongwe and Bokweni, for allowing a prisoner, Mr Masopha to perform nursing functions on a Mr Dinokwe.

The Department has stated that it is still investigating cases against Messrs Nyambi and Bokweni.

Firstly, there is no mention as to why the Department is not proceeding against Mr Shongwe. The Commission recommended that he should be charged as well.

Secondly, the Commission fails to understand what is being investigated because there was overwhelming evidence against them. The Commission had finished its own investigation and it was clear that there was strong evidence that supports the contravention of various provisions.

Thirdly, the witnesses are mostly prisoners serving long sentences. It is not clear why all these matters need to be investigated as the statements, Exhibits, and the transcripts are readily available. It is the Commission's view that this is yet again a reaction to its request for a progress report on the disciplinary inquiries, when very little had been done.

The Commission also recommended that proceedings should be instituted against Messrs Kekane, Phiyega, Mduzulwane and Kotze. The aforesaid were to be charged for allowing the prisoner, Mr Masopha to treat them as patients for various ailments in contravention of the B-Orders of the Department. This was also in contravention of the Departmental Rules and Regulations.

The Department's response in this regard is that the matters are still being investigated. The Commission fails to understand what is still being investigated after more than a year when the evidence was all before the Department and the witness, Mr Masopha had testified and was always willing to testify in this regard.

The Commission also recommended that proceedings should be instituted against Sister Biyela and Messrs. Gama, Dikotsi, Buthelezi, Biyela, as well as Mrs Mhlongo and Sister Britz. The aforesaid officials are no longer in the employ of Correctional Services. As the Department will no longer be able to discipline the aforesaid nurses, it was recommended that the Department should report these members to the South African Nursing Council, so that proceedings could be instituted by them, wherever the nurses might be.

According to the South African Nursing Council, these matters were reported to them on 11 May 2004. A letter was received from Mr K.G. Mapotse, Professional Practice Section for Registrar and Chief Executive Officer, South African Nursing Council, dated 15 October 2005, (received by fax on 15 September 2005),³² which states:

“The Jali commission top secret report was forwarded to the Council on 11 May 2004 and went to Preliminary Investigation Committee in June 2004 which resolved to seek further information in the form of duty rosters, medical file and proper identification of personnel from the department of Correctional Services Legal Division in Pretoria.

The Department’s legal services indicated to the Council that it will take some time to gather all the documents required because they are housed in different division in the Department and finally they managed to provide us with all required documents by July 2005 and the matter is scheduled to be discussed on 27 to 28 September 2005, for final deliberation by Preliminary Investigation Committee and your office will be notified about their decision.”

It is evident that the Department did comply with the recommendation in respect of these nurses, who were no longer employed by the Department and also in respect of Sister Molobi.

³² See Head Office Exhibit ‘H(1)’.

If one takes into account the cumulative effect of everything, which has been done since the aforesaid reports were submitted, it is clear that the Department has done very little to discipline these members. People who have committed criminal offences are still in the Department and are being protected by senior departmental officials who do not pursue the charges. In the end, they will raise the defence that the proceedings have lapsed in terms of Clause 7.4 of the Disciplinary Code.

The investigations referred to are merely going to delay matters and are similar to the delays, which are referred to in the section dealing with the Sixth Interim Report.

10. NINTH INTERIM REPORT

The comments received from the Department about the Ninth Interim Report once again indicated the problems with disciplinary inquiries. They are not confined to the hearings of people but also to the investigations. The Commission had collected evidence regarding the assaults and presented it to the Department for it to prosecute the implicated members. However, the comments, which the Commission received from the Department, were that there was lack of evidence against all the people who were implicated. Furthermore, the complainant was also not co-operative.

It needs to be stated that the Commission not only recommended that those warders who assaulted the prisoner be charged, but that the warders who were blatantly negligent in guarding the prisoner at the hospital also be charged. (Evidence was submitted to the Commission that the prisoner received a bolt cutter and private clothing from a friend whilst he was being guarded by a certain warder). Given the Department's commitment to safe custody of prisoners, the Commission is surprised that no disciplinary action was taken against the warder involved.

The Commission has to report that it not only dealt with a matter of assault in its Ninth Interim Report. It also dealt with a matter of smuggling in scheduled medicines; another matter wherein a warder, in a fraudulent manner, received monies from prisoners and their relatives on thirteen (13) occasions, arranged unauthorised visits for a fee, smuggled goods into the prison and asked a prisoner for money for assisting her with an appeal. The fourth chapter of the said report deals with the corruption in granting privileges (illegal granting of visits by various members).

The evidence in all these matters not only consists of complaints from witnesses but is corroborated by documentary and real evidence.

The Commission is therefore surprised by the Department's standard response of "a lack of evidence". Any legally qualified person would know that the burden of proof in disciplinary matters is not beyond a reasonable doubt, but on a balance of probabilities. The evidence against the warders was cogent, truthful and most certainly would pass the civil burden of proof with ease. Even the comment of the Department in the case of assault, shows that the recommendations of the Commission in its Ninth Interim Report were considered irrelevant. The Commission recommended that the record of the proceedings implicating the warders be sent to the Gauteng Director of Public Prosecutions for consideration of instituting criminal charges against them. The complainant could at all times be subpoenaed in terms of section 205 of the Criminal Procedure Act, should he not be spontaneous in laying a charge.

In not pursuing what was recommended in the assault matter, the Department shows a lack of commitment to take action against members who assault a prisoner and disregard his basic right to be detained in a humane manner.³³

³³ See chapter on Treatment of Prisoners for more details.

11. TENTH INTERIM REPORT

The comment, which has been given by the Department with regard to the five (5) people who were to be charged according to this report, is as follows:

*“Recommendations were made as to who should be disciplined and who should be exonerated in order to testify against the other implicated members. Matter still under discussion. Time frame is also a particular problem”.*³⁴

Clearly, this is a confirmation of the observation, which was made by the Commission earlier on, that nothing was done about these matters until there was a query from the Commission. The investigation was concluded at the time that the Commission filed its report in February 2003. Those officials who were supposed to prosecute the implicated members should have been aware of the fact that unless they started the prosecutions within three (3) months of the report being filed there would be problems with the time frames.

This issue has been highlighted to the Department by the Commission on a number of occasions. Once again, this is evidence of disciplinary inquiries not being handled properly by the Department and of people who should be prosecuted being left untouched.

This matter relates to another former Provincial Commissioner, who has since resigned. The recommendation that was made was that he should be charged criminally for his actions. From the report received from the Department, it is clear that nothing has been done. The fact that he resigned does not pose a problem to the Department laying criminal charges if there was a transgression. At the time of submitting the report he had already resigned and the report brought to the attention of the Department the fact that the only

³⁴ See Head Office Exhibit ‘H’.

action, which the Department could take against him, was to lay criminal charges.³⁵

Accordingly, there has been a degree of negligence on the part of the Department officials who are supposed to handle these matters.

In the circumstances, the Commission strongly recommends that the Department conduct a thorough investigation as to what progress was made with regard to these reports. Those who were negligent in doing their work with regard to the Eighth to the Eleventh Interim Reports should be charged with negligence.

12. ELEVENTH INTERIM REPORT

The matter has been dealt with and finalised so the Commission has no comments to make on the disciplinary inquiry as the Commission has not received any evidence in that regard.

13. CONCLUDING REMARKS

Evidently the Department is having difficulty in complying with the recommendations emanating from the various investigations. It is this state of affairs that needs to be attended to by senior officials as a matter of urgency, as it reinforces the perception that members of the Department disregard any form of authority.

Furthermore, it confirms the view, which the Commission has come across in the prisons, that the members of the Department of Correctional Services believe that no outsider can tell them how to run the prisons if that particular

³⁵ See paragraph 4 of the Tenth Interim Report at page 42.

person has never worked in a prison. This attitude of the members in the Department is definitely self-defeating.

This is not a new phenomenon. The Department's resistance to the opinions of outsiders is well documented. See for example the dissertation of Chris Gifford, "Out of Step", University of Leicester, February 1997, page 35:

"While the Minister blew cold about the Transformation Forum, the Department's response was not much more than luke-warm. In general, the 'interference' of the Forum was resented. 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 centralized 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". (Own emphasis.)

Also see the evidence of Mr Knoesen³⁶ before the Commission who explained that help was offered to the Department to address fears of homophobia free of charge but that the Department was not keen to accept such offers.

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 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.

³⁶ Mr Knoesen, Chairperson of the Gay and Lesbian Equality Project, testified before the Commission in Pretoria. See proceedings of Louis Karp (a.k.a. Louisa Karp) referred to in the Chapter on Sexual Violence in this report.

NCOME

CHAPTER 29

THE ARSENAL

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CHAPTER 29

THE ARSENAL

1. INTRODUCTION

The Commission's investigations into the arsenal maintained at Ncome Prison revealed that the various registers that should be in place in an armoury in the Department were in a total state of disarray with the rules and regulations governing the control and maintenance of the arsenal not being followed.

The members implicated in this Chapter are:

- 1.1 Mr Msweli, a prison warder and assistant armoury controller;
- 1.2 Mr Sibusiso Ernest Khanyile, the Assistant Head of Prison; and
- 1.3 Mr Funokwakhe Wilmot Khumalo, who is the Head of Prison at Ncome Medium 'B' Prison.

2. EVIDENCE LED

2.1 Mr Funokwakhe David Goqo

Mr Goqo, an investigator with the Commission, testified that he had looked into the keeping of arsenal registers at Ncome Prison and had found that such registers were in total disarray with controls being non-existent. Naturally, this evidence is of great concern to the Commission as the absence of controls and the resultant loss of the firearms has the potentially disastrous consequence of such firearms being used in all sorts of criminal activities.

2.2 Mr Msweli

Mr Msweli confirmed in his evidence that he was the armoury controller, having been appointed as such to Medium 'A' Prison after a certain Mr Mtshali, who was previously responsible for the armoury, had been transferred. Mr Msweli testified that it was Mr Mtshali who had shown him the procedures to be followed at the armoury but stated that no formal training was given to him on how to control the arms and ammunition.

Mr Msweli's letter of appointment clearly sets out his responsibilities as armoury controller, in that he was:

- (a) Appointed to control all the firearms and ammunition on a rotation basis issued to the members.
- (b) Personally responsible for the safety of firearms and ammunitions issued to members on a rotation basis.
- (c) Responsible for the issuing and receiving of firearms and ammunition on rotation basis issued to members.
- (d) Informed that he will be held responsible for any shortage that may result from the loss of any firearm and ammunition from the armoury and that he must keep the armoury keys safely.
- (e) Required to ensure that all firearms in the armoury are in good working condition and that the firearms and ammunition are never be kept together but are kept in such a way that they can be easily accessible in times of emergencies.

The letter is signed by the Head of Prison, Mr F.B. Buthelezi.

2.3 Missing Firearm

Mr Gogo testified that he had inspected the arsenal register and discovered that ten (10) firearms were not in the register and that members had booked them out. However, there was one firearm, Z88 with serial number TQ125260, that was not accounted for. He then enquired from Mr Msweli about the whereabouts of the firearm. Mr Msweli did not know what had happened to it. Mr Msweli conducted his own inspection and confirmed that the firearm was indeed missing. The firearms register clearly reflects that one, Mr W. Howard was the last person to book out the firearm on the 16 April 2004 and that it was returned to Mr Msweli on the 17 April 2004. There was no evidence of this firearm having been booked out at any stage after that. Inspection of the weekly certificates, which are issued and compiled by the firearm controller, provided no evidence of the firearm having been issued to any other member.

Although in his testimony before the Commission Mr Msweli confirmed that he was responsible for the issuing of firearms, it is clear that during the relevant period when the firearm went missing, the people who had keys to the armoury were the following:

- Mr Msweli;
- Mr Zulu;
- Mr Khumalo; the Acting Head Of Prison;
- Mr Khanyile, the Assistant head of Prison.

Astoundingly, neither Mr Khanyile nor Mr Khumalo, as the senior members, could offer an explanation as to how the firearm could have gone missing. Furthermore, neither was able to recall any incident of break-in at the armoury. Mr Msweli testified that he did not know how this firearm went missing, in that:

- (i) When he issues firearms, he is very careful to ensure that there is no possibility of a firearm being taken without being properly registered.
- (ii) There had been no incident reported of a break-in into the armoury.
- (iii) The door of the armoury was a steel double door, which was safe and secured.
- (iv) There had been no reports, as far as he knew, of the key being lost.

2.4 Head Office Inspection - Mr A. Somaru

However, what became evident was that the arsenal register and the weekly and monthly certificates that were supposed to be kept were in total disarray. This was evidenced by the unsuccessful National Office attempt to inspect the armoury. Mr Annuplalal Somaru from Head Office had visited the prison prior to the Commission's arrival at Ncome and was informed at the time that there were no registers available for inspection. Mr Somaru testified that he was responsible for inspections, implementation of policy and to provide feedback to the Department. When he arrived at Ncome Prison, he could not conduct the inspection as the armoury controller and the Head of Prison could not furnish him with the appointment letter for the armoury controller nor could they provide the duty sheet for the armoury. He also requested certificates and registers that deal with the armoury but none were forthcoming.

Mr Somaru testified before the Commission that he had expected to receive the following certificates at the time of his inspection:

- (a) A daily certification certificate signed by the armoury controller and his superior, who would have been the Head of Security/Prison.
- (b) Weekly certificates, which required that the Head of Prison physically inspect the armoury, a function that could also be delegated to the manager of security.
- (c) Monthly certificates, which have to be completed by the Head of Prison, a task that may not be delegated.

Mr Somaru also expected to inspect the following registers:

- (i) The issue of firearm register.
- (ii) Loan basis register, which is often used by the Emergency Support Team (EST).
- (iii) Private firearm safekeeping in the armoury register.
- (iv) Emergency firearms and ammunition, which are separated from daily use armoury.

Mr Somaru was informed that he could not get any of these registers. Mr Somaru believed that Mr Khumalo, who is the Head of the Prison, lacked the ability to manage the institution as a whole. When Mr Khumalo testified, he explained that if the policies had been followed properly, he would have been able to detect that a firearm was missing and that the armoury controller would have known immediately that a firearm was missing.

The armoury controller, Mr Msweli, had informed Mr Somaru that he was new to the establishment, that he did not know how to maintain the registers of the armoury and had requested to go for training. This lack of training of members of the Department holding responsible positions appears to be a recurring theme the Commission encountered during its investigations at Ncome.

The Commission was also surprised to hear during the testimony of Mr Somaru that when he arrived at Ncome prison to conduct his inspection, he found very junior officials on night duty at Medium 'A' Prison in Ncome. In fact only three (3) prison warders were present. This glaring absence of adequate security caused the Chairperson of the Commission to make a request for copies of the duty list for the date in question, 1 July 2003, to verify what the situation was on that particular day and who was on duty and who did not turn up for duty.

It was interesting to note that Mr Somaru had been to Ncome Prison to conduct an inspection on the 1 July 2004 and was not furnished with any of the documentation. However, Mr Goqo, an investigator with the Commission, who conducted an inspection there only six (6) days later, was furnished with the relevant documentation. Although there could be any number of explanations for this, a plausible explanation would be that the registers were available but due to the fact that they were in a state of disarray, the officials at Ncome Prison were not willing to give them to Mr Somaru.

2.5 Mr S.E. Khanyile

Mr Sibusiso Ernest Khanyile, who is the Assistant Head of Prison, stated that he is also Assistant Head of Security in that he assists the Head of Prison. Mr Khanyile conceded that the arsenal is in a mess, that this has been the position for some time, that the registers are not in good order and that he had spoken to the Head of Logistics, Mr Shabangu, about this problem. He acknowledged that it is his duty but stated that the final responsibility lay with the arsenal controller. Mr Khanyile testified that they had not been able to comply with the regulations for the firearms and in particular, regulation 5.6.4, which sets out the duties of the arsenal controller and attributed this mainly to the unavailability of registers from the logistics office. He stated that he is certain that as the registers had now become available, all things would be back to normal.

Mr Khanyile further stated that the last time he had conducted a physical check in the armoury was in about February/March 2004. However, this visit had not been documented anywhere. He said he understood the firearms control regulations and that he had them in his office, in particular regulations 5.6.4 and 5.8. Mr Khanyile had not completed any of the certificates, which were placed before court and are required for the Head of Prison to sign and he had not done that for some years.

Mr Khanyile informed the Commission that he is now going to enforce some precautionary measures, including that no one may be found in the arsenal who should not be there and that he would keep the arsenal keys as always since the arsenal is just opposite his office. Mr Msweli, Mr Khumalo, the Head of Prison and himself, Mr Khanyile the Assistant Head of Prison, would implement this by the following week Wednesday. Mr Khanyile conceded that Mr Msweli should not be signing certificates on his behalf. He (Mr Khanyile) had never authorised Mr Msweli to sign on his behalf. He only became aware that Mr Msweli was signing some of the certificates on his behalf when Mr Goqo approached him.

2.6 Mr Funokwakhe Wilmot Khumalo

Mr Khumalo, who is presently the Acting Head of Prison at Medium 'A', testified that he had some experience in the keeping of firearms and that while he was an armoury controller at Nongoma, where had worked previously, no firearms went missing. Mr Khumalo confirmed that the armoury controller is answerable to him. Mr Khumalo stated that he had never checked the armoury physically and he did not know he was required to inspect it. He only knew of the registration of arms on rotation that are working day to day and the firearm register, which are the arms taken out with the escorts. He also knew about the G20B card. He did not know about any other registers.

Lack of training as a recurring theme was again evident when Mr Khumalo complained that his position overwhelmed him. He also pointed out that he is working as an Acting Head of Prison without remuneration and feels he has had enough of this position, as he is ill equipped to perform the duties that are required of him. He wants to go back to his original post and would like to be relieved of his position. He had made a request to the Area Commissioner that he should revert to his post and the Area Commissioner had informed him that he could do so once they have a replacement. Mr Khumalo stated that he relied heavily on information he received from the arsenal controller and he felt that the arsenal controller was the person responsible. If the arsenal controller had checked the arsenal and said

that the things were in order, he was satisfied with the report received. Mr Khumalo confirmed that he, as the Head of Prison, kept the keys to the safe. In his absence, Mr Khanyile, the Assistant Head of Prison, took control of the keys. Mr Khumalo added that Mr Zulu, Co-ordinator Corrections, also looks after the control keys. Mr Khumalo stated that he had no idea how the firearm could have disappeared.

Mr Khumalo also could not understand why it was that Mr Msweli had signed the weekly reports on his behalf. He also indicated that he had never instructed Mr Msweli to do so. Mr Msweli stated that he had a problem in that on Fridays Messrs Khanyile and Khumalo are unavailable as they attend meetings and he would, therefore, sign as he was under pressure from the Offender Controls to have the forms handed in and sent to the Area Commissioner's office.

Mr Khumalo has claimed that he had discovered that the inventory was in a mess after Mr Somaru's visit but that he would from the day after he had testified before the Commission put some measures in place to ensure that the regulations are followed and that a relief arsenal controller is appointed. Mr Khumalo stated that he had not reported the problem to the Area Commissioner, as the latter is new to the prison and that he does not know many things.

3. FINDINGS

In considering all the evidence, the Commission finds that:

- 3.1 There was no proper arsenal control at Ncome Medium 'A' Prison and that explains why the firearm went missing. It is manifestly evident that the rules and regulations as set out in Regulation 5 of the Control of Firearms are not being followed at all.

3.2 Mr Msweli, despite his claim of not having been trained, had not kept to the procedures explained to him by Mr Mtshali, the previous Arsenal Controller. He seemed to have no difficulty, however, in signing documents that he had no authority to sign.

3.3 Messrs Khanyile and Khumalo were also not performing their duties in that they did not countersign or check whether Mr Msweli was doing his job properly. It was evident that these officials in their respective capacities as the Head of Prison and the Assistant Head of Prison relied heavily on the information supplied by the arsenal controller and that they did not conduct physical checks as is required.

Mr Msweli had free reign. He would complete the forms and the registers, countersign and check everything himself and pass this on to the Area Commissioner's Office, which in turn never queried obvious irregularities in the firearms control and which explains why a firearm went missing. In fact, with the current state of disarray, a possibility exists that there may be more firearms missing that have not been detected due to the poor record keeping of the arsenal inventory and the registers.

4. RECOMMENDATIONS

The Commission makes the following recommendations regarding the implicated members stationed at Ncome.

4.1 Mr Msweli

Mr Msweli should be charged with the contravention of clause 2.1 of Column A of the Disciplinary Code, in that he was grossly negligent in the execution of his duties.

4.2 Messrs Khanyile and Khumalo

4.2.1 Messrs Khanyile and Khumalo should be charged internally with:

- (a) contravening clause 4.3 Column A of the Disciplinary Code in that they signed the certificates stating that they had conducted physical searches on the armoury whereas, in fact, they had not done so.
- (b) contravening clause 4.3 Column B of the Disciplinary Code in that they failed to account for government property.
- (c) contravening clause 2.1 Column B of the Disciplinary Code in that they failed to comply with the Department's regulations and directives.

4.2.2 Messrs Khanyile and Khumalo should also be charged criminally in terms of Section 120(8)(b) the Firearms Control Act 60 of 2000 in that they failed to take reasonable steps to prevent the loss or theft of the firearm.

CHAPTER 30

UNLAWFUL PECUNIARY DEALINGS **WITH PRISONERS**

CHAPTER 30
UNLAWFUL PECUNIARY DEALINGS
WITH PRISONERS

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CHAPTER 30

UNLAWFUL PECUNIARY DEALINGS WITH PRISONERS

1. INTRODUCTION

This section shows that in spite of clear regulations being in place prohibiting pecuniary dealings between prisoners and warders¹ and in spite of the cashless system having been introduced into the Department,² some members at Ncome Prison showed a blatant disregard for the provisions of the Act and the rules of the cashless system.

The cashless system was introduced by the Department on 31 December 2002.

The system provides a mechanism for prisoners to make purchases or pass-on monies to their families without the prisoner physically handling the money. The system was obviously designed to quell corruption in prisons where the exchange of cash promotes numerous incidents of bribery and abuse of power by the members, such transactions being unrecorded and therefore untraceable.

The evidence of pecuniary dealings in the Ncome Management Area, however, showed that unless the rules and regulations regarding the cashless system are strictly enforced, the system will not achieve the objective of rooting out corruption in our prisons.

¹ Section 1182(b) of the Correctional Services Act No. 111 of 1998 specifically provides that no Correctional Custodian Official may directly or indirectly have any pecuniary dealings with a prisoner.

² The system was introduced in the Department on the 31 December 2002.

During the evidence of the illegal pecuniary dealings, the Commission also heard of the lack of diligence on the part of the Head of Prison, who in many instances became aware of the offences and yet took no action against the offenders.

The Commission cannot emphasize enough the need for the Department to begin to enforce its own laws, rules and regulations. It is the Commission's view that no matter how good legislation is, it becomes ineffective if it is neither respected nor enforced.³

The evidence implicated the following three (3) members in pecuniary dealings with prisoners:

- Mr T.P. Mbatha,
- Mr Mandla Nkosi Lawrence Thusi,
- Mr P.B. Mncwango

The Commission will now deal with each implicated member and the evidence that was led against them.

2. MR T.P. MBATHA

2.1 Mr. Wellington Desini Zungu

The evidence of the inmate Wellington Zungu, who is currently serving a thirty (30) year term of imprisonment for murder and theft, directly implicated Mr Mbatha. Mr Zungu alleged that he had heard from fellow inmates that Mr Mbatha could arrange for him to purchase a television set to place in his cell for private use. When he

³ The lack of discipline is dealt with in greater detail by the Commission, inter alia, the Chapters on Historical Background, Trade Unionism, Sexual Violence, Abuse of Power, Treatment of Prisoners and Disciplinary Inquiries.

made inquiries with Mr Mbatha, he was advised that the cost of the television set would be R1500-00 and that the set would be obtained from a friend of Mr Mbatha's. Mr Zungu had then given Mr Mbatha R1500-00 to purchase him the television set on or about January 2003. Mr Mbatha, however, never delivered the television set as promised but over time advanced a number of excuses as to why he was not able to deliver on his promise, one of which was that his friend had changed his mind about selling him the television set. Mr Zungu realizing eventually that he was not going to get the television set demanded his money back from Mr Zungu.

In the interim, the Head of Prison, Mr Buthelezi, had come to hear about this unlawful transaction but when he enquired from Mr Zungu as to the veracity of the allegations, Mr Zungu denied them in an effort to protect Mr Mbatha. Following this confrontation with the Head of Prison, Mr Zungu informed Mr Mbatha that he would rather have his money back as the Head of Prison was now aware of the transaction and he would forego the television set. Mr Mbatha agreed to this arrangement.

However, six (6) months passed without Mr Zungu receiving his money. Mr Zungu then, in desperation approached the Head of Prison, Mr Buthelezi to inform him that despite his earlier denial, there had indeed been an agreement to purchase a television set, which he had never received and that Mr Mbatha had failed to return his money. The Head of Prison refused to assist him as Mr Zungu had earlier denied the transaction.

Mr Zungu informed the Commission that he then approached the Assistant Head of Prison, Mr S.E. Khanyile to inform him about the transaction between himself and Mr Mbatha and that Mr Mbatha was unwilling to repay the money. Mr Khanyile intervened and approached Mr Mbatha who made an undertaking to repay the money. Mr Mbatha, however, approached Mr Zungu and was very angry about the fact that he had informed Mr Khanyile about the transaction. Mr Zungu became increasingly concerned that the matter was not being finalised and yet he was due for transfer to Kokstad Prison on the 30 September 2003. Therefore, on the 22 September 2003, he again approached Mr Mbatha and the latter promised to

deposit the money into Mr Zungu's bank account, the details of which were furnished to him.

On the 29 September 2003, Mr Zungu showed Mr Mbatha a bank deposit slip as proof of deposit of a sum of R200-00 into his bank account. Mr Mbatha informed Mr Zungu that his wife would deposit the balance of R1 300-00 by the 30 September 2003. On the 30 September 2003, Mr Zungu was transferred to Kokstad and he had still not received the balance of the amount due to him from Mr Mbatha. Mr Zungu was making a plea to the Commission to ensure that Mr Mbatha repays him his money.

Mr Zungu also reported to the Commission that he had always had a close relationship with Mr Mbatha and that he had requested Mr Mbatha on a number of occasions to withdraw money from Mr Zungu's bank account on Mr Zungu's behalf. He had also requested Mr Mbatha to pay school fees for his children and that he, in fact, had loaned Mr Mbatha R150-00 on another occasion.

According to Mr Zungu it was common practice to use prison warders with whom one was on good terms to assist one with one's financial affairs. He testified that the withdrawals were at a cost that ranged from R30-00 to R100-00. On one occasion when Mr Mbatha was attending a wedding, he had requested him to withdraw R1 000-00 for which Mr Mbatha had requested R150-00 for providing the service.

In his defence, Mr Mbatha denied the allegation that he owed Mr Zungu any money. He conceded, however, that he had received a sum of R1 000-00 from Mr Zungu and had only agreed to the transaction when Mr Zungu had shown him proof of an application and approval of the Assistant Head of Prison to purchase a television set. He claimed that he had repaid Mr Zungu by first paying R800-00 in cash and then by depositing R200-00 into Mr Zungu's account being the balance due to Mr Zungu. Mr Mbatha, however, could not recall the date or the time on which the R800-00 had been paid to Mr Zungu, except to say that he had returned the money

to Mr Zungu in his cell. He was also unable to produce before the Commission any proof of the alleged deposit of the balance into Mr Zungu's banking account.

2.2 Findings

The Commission finds Mr Zungu's version to be the more plausible of the two. Mr Mbatha was unable to state when or how he had paid the R800-00. He was clearly an untruthful witness who was evasive. Mr Zungu, on the other hand, gave clear and concise evidence and made no attempt to embellish the case against Mr Mbatha. Furthermore, it is evident that there had been a relationship of trust between Mr Mbatha and Mr Zungu due to the previous financial transaction that had occurred between the two. Mr Mbatha failed to adequately challenge Mr Zungu allegations but merely dismissed them as untrue.

The Commission therefore finds that Mr Mbatha did contravene Section 118(2)(b) of the Correctional Services Act No. 111 of 1998 and also clause 4.7 of the Disciplinary Code in that he received money from a prisoner.

3. MR M. L. THUSI

The Commission heard evidence to the effect that Mr. Mandlenkosi Lawrence Thusi, a prison warder, had also been deeply engaged in financial dealings with prisoners and had abused his position as a prison warder in so doing. Mr Zungu implicated Mr Thusi in his evidence as being involved in the following financial dealings:

3.1 Mr Thembinkosi Mvubu

Mr Thusi allegedly borrowed money from prisoner Mr Thembinkosi Mvubu, who has since been transferred from Ncome Prison to Waterval.

On this charge, Mr Thusi admitted that he had borrowed R200-00 from Mr Mvubu but stated that he had needed this money due to bereavement. He admitted that he knew he was not allowed to borrow the money from the prisoner but stated that he had had no option but to do so as his colleagues were not able to assist him.

3.2 Mr Christian Mandlenkosi Mntambo

Mr Thusi had also allegedly acted as a middleman between Mr Zungu and Mr Christian Mandlenkosi Mntambo, an adult male teacher who is teaching at Ntswalakahla Primary School in Dalton. Mr Mntambo had been the driver of the motor vehicle when a fatal accident resulted in the death of Mr Zungu's son. Mr Mntambo had sought to rectify this by approaching Mr Zungu in prison and performing certain rituals according to Zulu custom. Mr Mntambo, who is also Mr Thusi's brother-in-law, had approached Mr Thusi to support him in discussions with Mr Zungu and to arrange the ritual. Messrs Zungu, Mntambo, Thusi and other members of the family had subsequently met and agreed that Mr Mntambo should *inter alia*, pay a contribution of R3 000-00 to the Zungu family in damages. To this end Mr Mntambo gave Mr Thusi a sum of R1 500-00 to pass on to Mr Zungu, which Mr Zungu said never reached him.

Mr Mntambo confirmed in his testimony that Mr Thusi had promised to pass on the money to Mr Zungu's family. Mr Thusi, however, failed to pass this money on to Mr Zungu who, after contacting Mr Mntambo during June 2004, confronted Mr Thusi. Mr Thusi had then confirmed that he had received the money but that he did not have the money at the time. At around this time, Mr Zungu was transferred to Kokstad and Mr Mntambo had promised that he would send the money through to him at Kokstad but he did not do so. It was only during September 2004 about two weeks prior to the Commission arriving at Dundee for hearings that Mr Thusi deposited the money into Mr Zungu's account.

Mr Thusi admitted that he had received the money and that he had failed to pass on the money to its rightful owner. He denied, however, that he had done so with any

malicious intent but made up numerous contrived stories as to why the money was not paid to Mr Zungu.

3.3 Findings

The Commission finds that Mr Thusi acted in breach of trust between himself and his brother-in-law and clearly used the money for his own personal benefit. He only paid it back when he realized that the Jali Commission was “in town” and that he would be in trouble. The payment was also most likely only done after he had received the subpoena.

The Commission also finds that Mr Thusi contravened Section 118(2)(b) of the Correctional Services Act No. 111 of 1998 and also clause 4.7 Column A of the Disciplinary Code in that he received money from a prisoner.

4. MR P.B. MNCWANGO

4.1 Mr M.J. Ndabeni

Mr Mshimane John Ndabeni, a male prisoner at Ncome Medium 'B' Prison and employed in the kitchen section, testified about unlawful dealings with Mr Mncwango, a member at Ncome Prison. Mr Ndabeni is presently serving a 20 year sentence for murder and robbery. The Commission heard evidence to the effect that Mr Mncwango and Mr Ndabeni had several financial dealings, beginning from the 27 December 2001. During that period, Mr Mncwango had borrowed various sums of money from Mr Ndabeni: R300-00, R20-00, R50-00 and R150-00. Mr Mncwango would often pay this money back in installments.

Mr Ndabeni further informed the Commission that around November 2002 he had given Mr Mncwango a sum of R446-00 to purchase him a compact disc radio. Mr

Mncwango had promised to bring the radio on the following Monday but had instead disappeared for up to three to four weeks. The next time he saw Mr Mncwango, the latter promised to repay him the money as he had used it for his own personal use. However, he disappeared again and they did not meet for about a year.

On 2 February 2004 the Head of Prison, Mr Ngcobo, addressed prisoners at the dining hall and informed them that the Jali Commission of Inquiry was coming to Ncome Prison. He also informed them that if they had any complaints they should lodge them with the Jali Commission of Inquiry.

Mr Ndabeni then approached Mr Ngcobo and informed him that Mr Mncwango owed him money. Mr Ngcobo called Mr Mncwango to the dining hall and asked if Mr Ndabeni's allegations were true. Mr Mncwango confirmed that he did owe him the money and he promised to repay it by the 13 February 2004. Mr Ngcobo then advised Mr Mncwango to report the matter to the Commission, which he did. Mr Mncwango continued to make promises that the money would be paid on the 16 February but that did not happen. Mr Ndabeni requested the Commission of Inquiry to please request Mr Mncwango to repay his money.

4.2 Findings

As Mr Mncwango did not deny any of the allegations made against him by Mr Ndabeni, the Commission finds Mr Mncwango has indeed contravened Section 118 (2)(b) of the Correctional Services Act No. 111 of 1998.

A concluding observation is that the Commission noticed from the disciplinary records that Mr Mncwango is often absent from work and he has been charged for such absence on a number of occasions. Although there was evidence to the effect that he had a drinking problem, he denied this. On the record it was clear that he had been absent from duty on no less than ten (10) occasions and it appeared to the Commission that he had a drinking problem. He admitted that he drinks alcohol but denied he had a problem when the Chairperson of the Commission suggested he

seek professional counselling. Suspicions of his drinking problem are evidenced by the sum of monies he borrows all the time from prisoners ranging from R10 to R50 at any one time. It is clear that the inability to manage his financial affairs is caused by his apparent addiction to alcohol.

5. RECOMMENDATIONS

The Commission makes the following recommendations regarding the members implicated in this Chapter of the report

5.1 Mr T.P. Mbatha

He should be charged for contravening Section 118(2)(b) of the Correctional Services Act No. 111 of 1998 and also clause 4.7 Column A of the Disciplinary Code in that he received money from a prisoner.

5.2 Mr. M. L. Thusi

He should be charged for contravening Section 118(2)(b) of the Correctional Services Act No. 111 of 1998 and clause 4.7 of the Disciplinary Code in that he received money from a prisoner.

5.3 Mr. P. B. Mncwango

He should also be charged for contravening Section 118(2)(b) of the Correctional Services Act No. 111 of 1998 and also clause 4.7 clause A of the Disciplinary Code in that he received money from a prisoner.

CHAPTER 31

THE MAVUNDLA MATTER

CHAPTER 31

THE MAVUNDLA MATTER

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CHAPTER 31

THE MAVUNDLA MATTER

1. INTRODUCTION

The facts forming the basis of this matter occurred at the Pietermaritzburg Prison Management Area but because the complainant is presently incarcerated at the Ncome Prison, the Commission, for the sake of expediency, heard the matter along with the other Ncome Prison matters.

2. MR N. MAVUNDLA

On the 3 August 2004 the Commission heard the evidence of Mr Nhlanhla Mavundla, an inmate who has been serving a ten-year prison term since 2001 for murder. Mr Mavundla stated that while imprisoned at Pietermaritzburg Prison he befriended a fellow inmate, Mr Msane Hadebe who informed him that he could assist in getting his prison term shortened by bringing his parole date forward. Mr Hadebe stated that he knew of an inmate, “Gonondo”¹, who could assist him in that regard. “Gonondo” in turn introduced him to Mr Gwala, the prison warder, whom it was alleged could assist with the early parole.

At a meeting with “Gonondo” and Mr Gwala, it was arranged that the money for the parole could be paid in installments of R750-00. Mr Mavundla then informed his mother, Mrs Regina Ntombiyakhe Mavundla, who brought the money requested on a number of occasions concealed either on her person, her clothes or in food. Mr

¹ “Gonondo” was a well-known inyanga who practices traditional medicine and who has been incarcerated in many prisons. Evidence led before the Commission was that he treated both warders and prisoners.

Mavundla recalls the first meetings between the parties when Mr Gwala informed him that all communication would be through "Gonondo" and that he would hear of progress in his parole through "Gonondo". On one occasion he actually gave the money to "Gonondo" who passed it on to Mr Gwala in his presence.

The procedure that was followed was that each time he received money from his mother he would communicate this fact to "Gonondo" who in turn would inform Mr Gwala. Mr Gwala would come to the window of his cell and take the money. Mr Mavundla witnessed this and testified that on one occasion Mr Gwala had requested his residential address, which he had stated was necessary in processing the parole and to verify where he would be living when he was released on parole. Mr Mavundla furnished him with the information requested.

Mr Mavundla then asked Mr Gwala to provide him with his bank account as it was becoming increasingly difficult for his mother to come to prison to bring the money having to travel all the way from Port Shepstone. Mr Mavundla could not recall how it was that his mother received the details but he believed that Mr Gwala had telephoned her and furnished her with the details of his bank account. Subsequently a further sum of R750-00 was paid into Mr Gwala's account.

Mr Mavundla testified that he then became concerned as the months were rolling by and he was not receiving any information or feedback from either Mr Gwala or "Gonondo" as to the progress of his parole. He had also discussed the matter with his mother who advised him to wait. Mr Mavundla then asked "Gonondo" what was happening and "Gonondo" informed him that they were still processing the release but Mr Mavundla was not convinced. Mr Mavundla further testified that he did not approach the Commission at the time that it was in Pietermaritzburg as he feared that "Gonondo" would kill him with his traditional medicines.

3. MR L.M.E. HLABISA

Mr Lucky Mthokosizi Elliot Hlabisa, an investigator with the Commission, testified that he had met with Mrs Mavundla and had proceeded to the Natal Building Society to verify the authenticity of the deposit slip Mrs Mavundla had given him as proof of payment of money into the account of Mr Gwala. At the bank he found that indeed money had been deposited into Mr Gwala's account number on the 3 January 2002 at 09h18. The deposit slip had a bank teller's stamp on it and was dated. He requested Mr Gwala's bank statement and indeed it reflected the first deposit of R750-00, which matched with the deposit slip he received from Mrs Mavundla. Mr Hlabisa then approached Mr Gwala with this information. Mr Gwala denied all knowledge of Mrs Mavundla and stated that the deposit was a transfer from one cheque account to another.

4. MR M.P. GWALA

In the witness box, he implicated Mr Mtotile Petros Gwala, who is a Correctional Officer based at Pietermaritzburg Prison, and denied all allegations presented to him.

He confirmed, however that he knew "Gonondo" and that he knew him only as an *inyanga*.² He denied also that he had any knowledge of how "Gonondo" ran his practice from prison, the allegations that "Gonondo" treated prison warders and prisoners and that warders would let him out of prison to dig for herbs.

² Regarding this he informed the Commission that he had approached "Gonondo" and "Gonondo" had prescribed some medication for his child and he had proceeded to a chemist to obtain the herbs as prescribed by "Gonondo". He stated that he did not pay "Gonondo" for these services. He says that he only went back to thank him later on when his child was healed as a result.

Mr Gwala furthermore stated that he did not have a special relationship with “Gonondo” and had been in fact been surprised when the Head of Prison, Mr Mchunu, had gone out of his way to inform him that “Gonondo” was being transferred. He admitted that he did not have a good relationship with the then Head of Prison, Mr Mchunu, and that Mr Mchunu had believed that he was a supporter of his predecessor Mr Ngcobo.³ However, he stated that there was a misconception amongst other members that he was very close to “Gonondo” and that the members feared Mr Gwala believing he would use “Gonondo”’s medicines on them. He denied that he had ever been requested to desist from his relationship with “Gonondo”.

When questioned about the deposit slip obtained from Mrs Mavundla, Mr Gwala acknowledged that the address on the account was his but could not recall whether or not that was his account number. However, he conceded that he did at some stage have an account with the NBS but had since lost the book. For the rest, he denied all knowledge of this transaction with Mrs Mavundla claiming that he could recall nothing of the incident. He denied also that he had called Mrs Mavundla, that she had informed him that the money was deposited and that that was why he had eventually gone to the bank. He stated that he could not understand why she would come before the Commission and lie about him and that she had no business depositing money into his account.

Mr Gwala also could not recall whether he had at any stage queried this deposit with the bank nor could he explain why he had immediately the day after Mrs Mavundla deposited the money withdrawn the R750-00 from the very bank account that the money had been deposited into. He claimed that he had a Saambou bank account but he could not recall the account number. He could also not explain how it was that Mrs Mavundla knew about the NBS account.

³ The Commission found that at Pietermaritzburg Prison there was a split between those warders who supported the previous Head of Prison, Mr Ngcobo, and others who supported the present Head of Prison, Mr Mchunu. The tensions that existed at the Pietermaritzburg Prison are dealt with in greater detail in other Chapters in this report.

He denied that he could have in any manner made any promise to Mr Mavundla regarding his early release on parole claiming that he had never worked at the parole board office and he would not have been able to do this even if he had wanted to.

5. MRS N. MAVUNDLA

Mrs Ntombiyakhe Mavundla testified and confirmed that she is the mother of the inmate Mr Nhlanhla Mavundla, whose testimony is referred to above, and that she resides in Port Shepstone on the South Coast. She stated that shortly after her son was incarcerated he had telephoned her and informed her that a prisoner had said he could assist him with an early release. The member, whose name she could not recall, had informed her son that he required money to do this. She then organized money from loan sharks in order to save her son from a lengthy sentence. She testified that she gave her son seven hundred and fifty rand (R750-00) in four (4) instalments, which she had hidden in her underwear on one occasion and on another occasion in his food.

Mrs Mavundla further testified that on one occasion a member who identified himself as Mr Gwala, a warder from Pietermaritzburg Prison, telephoned her at her house and informed her that he wanted to help her son. He also called Mrs Mavundla on a number of other occasions. By the time he called her to give her the details of the Saambou bank account, he did not need to identify himself as she knew his voice well by then. She then went personally to deposit the money into the account and presented to the Commission proof of the deposit slip of the money she had paid into Mr Gwala's account.⁴ The following day he called to confirm that he had received the money and he thanked her, promising that her son would be released soon. She informed the Commission that she would like Mr Gwala to pay back her money and for the law to take its course thereafter.

6. MR. S.E. DHLOMO (“GONONDO”)

Mr Gwala called Mr Sipho Elton Dhlomo, known by the name “Gonondo”, who is an inmate at Barberton prison, as a witness. He was therefore led by Mr Gwala. He testified that between 2001 and 2003 he was at Pietermaritzburg Prison before being transferred in March 2003 to Barberton Prison.

Mr Dhlomo testified that he knew Mr Gwala from Pietermaritzburg Prison and that he had helped Mr Gwala with the traditional medicines. For example, he prepared what is known as *imbiza* or the pot, which is a mixture of herbs for Mr Gwala. He also prescribed medication to Mr Gwala personally and when Mr Gwala’s child was sick. He did not charge for these services but Mr Gwala would give him fifty rand (R50-00) in ten rand (R10-00) notes depending on what was available in Mr Gwala’s pocket at the time. He further testified that Mr Gwala had never informed him that he was not allowed to give him money.

When questioned about Mr Gwala’s relationship with Mr Mavundla, Mr Dhlomo stated that all he knew was that a family member of Mr Mavundla had deposited a sum of between R600-00 and R800-00 but he could not recall the amount exactly as this had happened a long time ago. He confirmed that money had been deposited into Mr Gwala’s account.

Mr Dhlomo’s explanation for these transactions was that inmates such as Mr Mavundla needed money and required the assistance of Mr Gwala to get money from their families. As far as Mr Dhlomo was concerned, the money was to help Mr Mavundla with traditional medicine and part of the money was also for Mr Mavundla’s own personal use. He denied that he knew anything about Mr Gwala’s ability to decrease or bring forward parole stating that he was unaware that Mr

⁴ See Ncome Exhibit M1.

Gwala was organizing parole for any inmates. Accordingly, he did not know that Mr Gwala had promised to arrange for an early release for Mr Mavundla.

Mr Dhlomo stated that he knew Mr Mavundla as an inmate at Pietermaritzburg Prison who had come to him for assistance when he had problems sleeping at night caused by dreaming about the woman he had murdered. Mr Dhlomo also consulted with him on a number of occasions to assist with other minor problems and he had performed certain rituals on Mr Mavundla. He gave him traditional herbs, which he had obtained from his box that was kept in the storeroom of the prison and contained all his herbs. Mr Mavundla had paid him R450-00 for the treatment and he was to pay the balance once his appeal was successful. According to Mr Dhlomo, the money was paid in cash and a balance of R1000-00 was outstanding.

Regarding the money deposited into Mr Gwala's account, Mr Dhlomo stated that as Mr Mavundla had owed him R1 450-00, he had solicited the assistance of Mr Gwala as a means of getting his money back. Mr Dhlomo explained that he was in Mr Mavundla's cell when Mr Gwala came to stand at the window, the place where they often met with Mr Gwala. He then informed Mr Gwala that people wanted to give him money and that he needed to use Mr Gwala's account. Mr Gwala then gave him an account number. He was not certain whether it was an account number for NBS or Saambou bank. However, he wrote the numbers down and gave them to Mr Mavundla. The money was deposited into Mr Gwala's account but he does not know when, how or by whom this was done but only that he did receive his share of the money, which was R450-00.

Mr Dhlomo testified that as far as Mr Gwala was concerned there was a very close relationship of trust between the two of them. He said Mr Gwala not only assisted him on this one occasion with Mr Mavundla's money problem but had also on a number of occasions received money deposited from Waterval and Port Shepstone and he was satisfied that Mr Gwala had on each occasion given him the money that was due to him.

7. FINDINGS

The Commission finds that Mr Gwala was indeed involved in illegal financial dealings with prisoners as Mrs Mavundla provided clear proof that she deposited money into his bank account.

Even though it is obvious that Mr Mavundla along with Mr Gwala were involved in some scheme, there appears to be insufficient evidence before the Commission to support the allegations against Mr Gwala that he extracted money from the inmate Mavundla for the purposes of securing Mr Mavundla's early release on parole.

8. RECOMMENDATION

It is recommended that Mr Gwala be charged criminally with a contravention of Section 118(2)(b) of the Correctional Services Act No. 111 of 1998 and contravening clause 4.7 Column A of the Disciplinary Code in that he received money from a prisoner.

CHAPTER 32

THE “GONONDO” MATTER

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THE “GONONDO” MATTER
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CHAPTER 32

THE “GONONDO” MATTER

1. INTRODUCTION

As stated above, the prisoner Mr Siphon Elton Dhlomo, known as “Gonondo”, is currently serving a life sentence for murder at Barberton Prison. His circumstances in prison are a prime example of how members surrender their authority to an inmate and allow lawlessness to prevail in our prisons. “Gonondo”, who is also an inyanga,¹ has been transferred from many prisons around the country, including Ncome Prison. He seems to have been given free access in and out of the prison by the implicated members at Ncome, who appeared to fear his medicinal powers and were unable or unwilling to apply the laws of the Department against him.

2. INMATE “GONONDO”

From the evidence placed before the Commission it is clear that “Gonondo” was a prisoner only in name in that, according to him, he was also running his inyanga practice from Ncome Prison with the full knowledge of the prison authorities. He had a suitcase where he kept his traditional medicines and he also kept medication in a storeroom to which he had keys in order for him to have easy access to his medication.

According to “Gonondo”, members of the public would come to consult him in prison² and on occasion certain prison warders would take “Gonondo” out to dig

¹ A traditional healer.

² The Commission heard evidence from a Mrs Kunene who confirmed that “Gonondo” assisted her greatly when she had a number of personal problems.

for his herbs. Prison warders also took him out of the prison to treat them in their prison accommodation or their residential homes. The Commission also heard evidence to the effect that members of the public as well as prison warders paid “Gonondo” for his services.

“Gonondo” also showed the Commission a number of photographs depicting him fraternising with members and enjoying braais and alcoholic beverages with them. He also allegedly had a cell phone in prison that one of the prison warders had supplied to him.

From the above it is evident that there was no longer a distinction between prisoner and the members of the Department as far as “Gonondo” was concerned.

In his testimony, “Gonondo” implicated the following members:

- Mr S. Luthuli
- Mr J.E. Ngubane
- Mr E.D. Magagula
- Mr J.M. Khumalo
- Mr X.P. Maphumulo

Of the four other members implicated, Messrs Qiniso and Magwaza have been dismissed and Mr Nkwanyana and Mr Mhlongo are deceased. The Commission will therefore deal only with the evidence relating to those still in the service of the Department.³

³ Although the Commission has no intention of dealing with those cases of members who are deceased, the close relationship that “Gonondo” had with the deceased member Mr Mhlongo warrants mentioning as it emphasises the complete lack of proper authority at the time over “Gonondo” by members in positions of authority at Ncome. The two apparently went on drinking sprees. On one occasion “Gonondo” was taken out of prison at about 10 o'clock and drank brandy in Mr Mhlongo's room. They both returned drunk at about 13h30 and the Head of Prison at that time, Mr Khumalo, instructed that they go to the doctor in Vryheid. An interesting feature of this whole unlawful saga is that “Gonondo” was the only

3. MR S. LUTHULI

“Gonondo” testified about his relationship with prison warder Mr Luthuli, whose nickname is Mahlathula. According to “Gonondo”, Mr Luthuli consulted him because he had problems with his feet and his ancestors. “Gonondo” then started to treat Mr Luthuli to assist him with these problems.

“Gonondo” described how he was taken out of prison and how he would administer Mr Luthuli’s treatment. Mr Luthuli would simply escort “Gonondo” to the gate, write something down and remove “Gonondo” from prison, without explaining to the other warders what he was taking him out for. Mr Luthuli took “Gonondo” to his single quarters many times for treatment but there was no standard arrangement. Mr Luthuli would just arrive and take “Gonondo” out, sometimes for the whole day. “Gonondo” could not recall the rates he charged Mr Luthuli but he did confirm that Mr Luthuli had paid him on a number of occasions for the treatment. He recalls that once Mr Luthuli paid R150-00.

“Gonondo” mentioned that he also treated members of the public from Mr Luthuli's house. In particular he mentioned one Mr Ndwandwe, who is a fellow inyanga from Coronation who wanted “Gonondo”'s assistance with administering “muthi” and divination. He also mentioned a Mr Zulu whom he taught to treat certain ailments. When outsiders arrived at the prison, “Gonondo” would contact Mr Luthuli who would then take “Gonondo” out of the prison and escort him to his own house. The patients paid “Gonondo” directly and according to “Gonondo” he did not pay Mr Luthuli for these services.

“Gonondo” testified that it was in fact Mr Luthuli who had purchased a cell phone for him as part payment for the treatment he had been receiving from “Gonondo”.

one whose blood was taken and tested. According to “Gonondo” Mr Mhlongo was never charged.

The phone was for him to keep contact with Mr Luthuli and “Gonondo” gave this phone number to his other patients who would contact him by cellphone.⁴ “Gonondo” produced photographs before the Commission depicting him speaking on a cell phone, and according to him Mr Mhlongo⁵ took these pictures. “Gonondo” said he carried this cell phone openly and other warders, in particular Messrs Magagula, Maphumulo and Ngubane, were aware that he had a cell phone. He said he used the cell phone in their presence and these warders had never objected or questioned him about it even though it was well known that prisoners are not permitted to possess cell phones in prison.

4. MR J.E. NGUBANE

Mr Ngubane, another prison warder at Ncome, was also one of “Gonondo”'s patients. Mr Ngubane, according to “Gonondo”, had problems with his feet and “Gonondo” used to administer treatment at Mr Ngubane's quarters and in prison. The arrangement had been that Mr Ngubane was to pay R75-00 for the first treatment and then pay an unspecified amount thereafter. Mr Ngubane also took “Gonondo” out, along with Mr Xulu, for him to dig for herbs and treat various patients.

In 1999, “Gonondo” was transferred to Waterval before he completed his treatment of Mr Ngubane. “Gonondo”, however, felt that he had been "chased away" by Mr Mngadi, the Head of Prison, because it was alleged that he was seen going out of prison with members. Mr Ngubane was also transferred to Waterval and “Gonondo” continued to treat him there. He testified that he was never taken out of prison at Waterval to treat people or for any other reason.

Of great concern to the Commission is the lack of will on the part of prison management to take action against errant members. Indeed, when members take

⁴ In fact, Ms Kunene who testified that she communicated with “Gonondo” via cell phone.

⁵ The deceased member mentioned earlier.

a prisoner out without authorisation it is the prisoner who is transferred. There is no evidence of any action having been taken against the errant prison warder.

5. MR E. D. MAGAGULA

Mr Magagula was another prison warder whom “Gonondo” treated, and “Gonondo” testified that he went to Mr Magagula's house many times, leaving the prison in the same manner as already described. “Gonondo” claims also to have treated a member of the South African Police Service, Mr Mbongeni Xulu, at Mr Magagula's house. He further stated that on another occasion the prison warders Messrs Magagula and Nkwanyana took him out to Mr Xulu's house for him to perform certain rituals on the house. Another inmate, Mr Clement Mbatha, was also present on this occasion. He testified that as he performed this ritual he needed certain medicines and sent some prison warders to obtain the medication for him. He was paid R300-00 for the ritual at this house.

“Gonondo” testified that at any one time in prison he would have between R1 800-00 and R2 000-00 in cash on his person and he would ask prison warders to purchase meat and brandy for him, a service for which he paid the warders R50-00. The meat would then be prepared at the prison quarters with the warders and he would drink the brandy in the presence of the warders. He also testified that he would purchase flour and rice and cook it in prison on a single plate electric stove, which he claimed he had found in the prison. “Gonondo” testified that he and a fellow inmate, Mr Clement Mbatha, could obtain dagga from people in the neighbourhood, who would bring it to Mr Magagula's premises. Mr Mbatha would sell the dagga to the other inmates and use the money for his own personal requirements.

Mr Magagula denied that he was at all involved with “Gonondo” at any stage or that he had a particular relationship with him. However, “Gonondo” told the Commission that he had treated Mr Magagula in many ways, including the placing of traditional marks on his body. He also indicated where the marks were. It was

coincidental indeed that Mr Magugula possessed the marks “Gonondo” described. Mr Magagula claimed in his defence that “Gonondo” was merely guessing as many Zulus have these marks on the same parts of the body.

6. LINONYANE CELTICS FOOTBALL CLUB

The Commission heard evidence to effect that “Gonondo” was also the inyanga for Linonyane Celtics, which was a football club owned by Mr Khumalo and Mr Myeni, who were prison warders at Ncome. According to “Gonondo” the Linonyane Celtics had suffered a crushing defeat against Bloemfontein Celtic, losing eight - one. Thereafter, Messrs Mnyeni and Khumalo had approached him and requested him to be the inyanga for the team. If he could help the team win three matches, he would then be contracted as the inyanga for the team. He gave them various herbs and instructions on how to administer them to the players. As he did not have all the medicines, he requested that they be brought from Durban. The initial payment that they agreed upon was R3 200-00, but he left Ncome Prison before the full amount was paid.

“Gonondo” testified that Linonyane Celtics won all three matches. A cow was slaughtered to celebrate the victories, and there was a big braai on the prison premises where the whole soccer team was present. He drank Mellowood Brandy and was also given meat. “Gonondo” further testified that at the time he left, Linonyane Celtics owed him R2 000-00 and he had informed the Head of Prison that he was owed this money. The Head of Prison informed him that he would receive the balance of the money in Waterval. However, he never received the money as promised.

7. MEMBERS OF THE PUBLIC

As has already been mentioned elsewhere in this report, “Gonondo” treated a number of persons outside the prison community. The following people testified before the Commission and confirmed that “Gonondo” treated them with the full knowledge and consent of the prison warders.

7.1 Mr Alpheus Tikila Magubane

“Gonondo” testified that Mr Magubane, a businessman whom he knew prior to his incarceration, had come to him at the visitors’ section at Medium B where “Gonondo” was housed and had requested some treatment to improve his luck. “Gonondo” testified that he treated him at the prison on one or two occasions but that the major treatment was done at Mr Ngubane's house. Mr Magubane did not know Mr Ngubane, who was not paid for the use of the house. However, he did pay “Gonondo” the sum of R450-00 for his troubles.

“Gonondo” recounted that on one occasion he performed a cleansing ceremony at a dam outside the prison and that Mr Ngubane, Mr Magubane and inmate Mr Mbatha⁶ also went along with “Gonondo” to this cleansing session. They were driven to the venue in a Toyota Venture, which he believed belonged to the prison.

Mr Magubane, in his evidence, confirmed what “Gonondo” stated, adding that he would go to Ncome Prison alone and would often have a contact visit. On his arrival, he merely requested to see “Gonondo” and was never questioned further. He confirmed having been attended to in the warder’s quarters but that he did not

⁶ According to “Gonondo”, the inmate Mr Mbatha was his "bag carrier" who would carry the muthi bag for “Gonondo” on the occasions when he left the prison. Mr Mbatha was also useful in that he was from around the Ncome area and he assisted him with digging for herbs.

know the warder's name. He also recalled the visit to the dam in the Toyota Venture but could not recall the name of the warder who accompanied him.

7.2 Ms Almera Busisiwe Kunene

Ms Almera Busisiwe Kunene, a receptionist at a medical doctor's surgery in Vryheid, testified that she had contacted "Gonondo" when her child went missing. At Ncome Prison she had asked to see "Gonondo" and had easily gained access to him. She went on the pretext that he was her cousin. Ms Kunene further testified that one Nkwanyane had referred her to "Gonondo". On the first consultation she gave "Gonondo" all the particulars of the missing child. On another occasion she met "Gonondo" at Mr Qiniso's house where she had brought the ingredients he had advised her to bring. "Gonondo" at the time was dressed in his prison attire. She testified that she had no problem consulting "Gonondo" at Ncome and she also consulted him at Waterval. The warders always gave her free access to him.

7.3 Mr Jobindaba Paul Zulu

"Gonondo" was also running a training school, so to speak, at Ncome Prison, as Mr Jobindaba Paul Zulu informed the Commission. Mr Zulu testified that he himself was an inyanga who practiced at Vryheid. He had heard about "Gonondo", who is a very famous inyanga, and sought help from him with divination. Mr Zulu testified that they met at the prison under the trees and on subsequent occasions they met at the warders' quarters. He could not tell at which member's quarters they met but one, Mr Ndwandwe, would always be present and was dressed in what Mr Zulu described to be similar to the prison warders' uniforms. He recalled that on one occasion, when he was bathed in hot water and certain herbs were poured into the water, the prison warder Mr Ndwandwe was present all the time. He testified that he went many times to visit "Gonondo" at Ncome Prison.

8. FINDINGS

The Commission will now make its findings regarding the members whom “Gonondo” implicated in this report. However, as a number of them have already been either dismissed or are deceased, the Commission can only make conclusive findings against the following:

8.1 Mr S. Luthuli

The Commission finds that Mr F. Luthuli unlawfully removed the prisoner without the necessary authority, thereby breaching security arrangements. This is in clear contravention of paragraph 5.10 of the Disciplinary Code. Mr Luthuli also admitted that he paid “Gonondo” an amount of R150-00, which is in contravention of paragraph 4.7 Column A of the Disciplinary Code, and both offences are dismissible offences. Although Mr Luthuli denied having given “Gonondo” the cell phone, claiming that he merely promised to give him one, it is clear from the evidence presented that he is not telling the truth because he realises the consequences thereof. He clearly contravened clause 5.10 Column A of the Disciplinary Code to wit, breaching security by allowing the prisoner to use a cell phone.

8.2 Mr J.E. Ngubane

Mr J.E. Ngubane is found to be guilty of the unauthorised removal of a prisoner and therefore of a breach in internal security, particularly considering that “Gonondo”, who is serving a life sentence, is a flight risk due to the length of his sentence. Mr Ngubane also admitted that he gave R75-00 to “Gonondo”. Their unique relationship resulted in numerous breaches of the Disciplinary Code by Mr Ngubane. The prisoner was removed from prison numerous times and allowed to leave prison to take trips to dig for roots and herbs. All these activities are in breach of clauses 4.7 and 5.10 of Column A of the Disciplinary Code.

8.3 Mr E.D. Magagula

Mr E.D Magagula testified that he too had removed “Gonondo” from prison when he took “Gonondo” and Mr Mbatha to Nkondlo location for a ceremony or ritual. The evidence in this regard was clear and unchallenged. He accordingly breached clause 5.10 Column A of the Disciplinary Code.

Mr Magagula was also aware that “Gonondo” was in possession of a cell phone and did not challenge this. That too is in contravention of clause 5.10 Column A of the Disciplinary Code, which is a breach of internal security arrangements. The Commission also finds that Mr Magagula drank alcohol with “Gonondo” in clear contravention of clause 6.5 Column A of the Disciplinary Code.

8.4 Mr J.M. Khumalo.

Mr J.M Khumalo should be charged with contravention of clause 4.6 of the Disciplinary Code. Mr Khumalo admitted that he consulted with “Gonondo”, but he claimed he never agreed on payments for “Gonondo”'s services. He had no further defence except a bare denial of “Gonondo”'s allegations.

8.5 Mr X.P. Maphumulo

Mr X.P Maphumulo was in breach of the Disciplinary Code in that he was aware that “Gonondo” had a cell phone and took no action in removing the cell phone from him. He was therefore in breach of internal security arrangements and contravened Clause 5.10 Column A of the Disciplinary Code.

9. RECOMMENDATIONS

The Commission recommends that Mr Luthuli and Mr Ngubane be charged for having contravened:

- (a) clause 5.10 Column A of the Disciplinary Code, which is a breach of security arrangements;
- (b) clause 4.7 Column A of the Disciplinary Code, which is the receipt of monies from prisoners;
- (c) Mr E D Magagula be charged with contravening clause 5.10 Column A of the Disciplinary Code, which is breaching security arrangements. That he also be charged with a contravention of clause 6.5 Column A of the Code, consuming alcohol whilst on duty.
- (d) Mr X P Maphumulo be charged with contravening clause 5.10 Column A of the Code, breaching the security arrangements.

CHAPTER 33

WITHDRAWAL OF ASSAULT CHARGES

CHAPTER 33

WITHDRAWAL OF ASSAULT CHARGES

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CHAPTER 33

WITHDRAWAL OF ASSAULT CHARGES

1. INTRODUCTION

It emerged during the formal presentations that charges against prison warders who were involved in the assault of prisoners on 4 January 2003 had been withdrawn. A disturbing feature of this incident was the number of prisoners assaulted, the number of warders who were involved in the assault as well as the reason for the withdrawal of the charges. At least three prisoners were seriously injured and several had broken ribs, scores more were taken to hospital at Ncome Prison or were taken to hospital in Durban.

A team of six investigators was duly appointed, with Mr Mthunzi Petros Jiyane as the chief investigator. The Commission heard evidence to the effect that investigators were only given two weeks in which to conduct the investigation and to compile and formulate a report. Furthermore, the evidence was that the investigators appointed were too inexperienced to cope with the magnitude of the investigation itself. The investigators also complained that the warders did not cooperate and that it was therefore difficult to collect sufficient evidence for the investigation report. To date, there is uncertainty as to whether there is in existence a formally completed report. Instead, it emerged that there were various reports, that the investigators themselves had different reports in their possession and that the signatory, Mrs M. Mthembu, who was at the time the Area Commissioner as well as the Provincial Commissioner, did not properly sign the report and that therefore the report was incomplete. The investigators contend that the report was finalised on 21 January and handed to the Area Commissioner who was to pass it on to the Provincial Commissioner.

The Commission heard evidence to the effect that the Provincial Office then tasked the Area Commissioner with the appointment of initiators, assistant initiators and chairpersons in the process of initiating disciplinary proceedings. Due to the large number of warders to be charged, the Area Commissioner enlisted assistance from Area Commissioners in Northern KwaZulu-Natal and these commissioners suggested the persons who were to be appointed initiators, assistant initiators and chairpersons. This process in itself proved to be a comedy of errors.

It was evident that there was no commitment on the part of Ncome Management to get the process off the ground. Initiators and assistant initiators also had their own problems, such as poor communication and assistance from management, which made it virtually impossible for the disciplinary process to take off. Initiators who had questions were passed on from one person to the next with no one knowing what was supposed to happen. The Area Commissioner, having appointed the initiators and assistant initiators, made no follow-up as to the progress of the disciplinary proceedings, nor did she try to assist in any way with the problems encountered. The human resources section was also of no assistance and instead referred initiators constantly to the investigators for any information they required. The initiators were also located far from assistant initiators and from Ncome Prison itself. In some instances there were hundreds of kilometres between initiators and assistants, making it difficult to convene meaningful meetings. The initiators also had problems with the report in that they were required to charge specific warders, but the report itself made no mention of the involvement of any specific warder and therefore the initiators felt that there was insufficient evidence. When they made inquiries about the matter, they were pushed from pillar to post.

2. BACKGROUND TO THE ASSAULT

Mr F.B. Buthelezi, who at the time of the assault was Acting Head of Medium A Prison, played a great role in the events leading up to and during the assault. According to the evidence heard by the Commission, Mr Buthelezi had gone on leave during the Christmas holidays and returned to Ncome Prison on 3 January 2003. The assault took place the following day, on 4 January.

Mr Zwane, an inmate at the prison, alleged that Mr Buthelezi's subsequent actions were motivated by revenge against certain prisoners who had insulted him before he went on leave. Mr Buthelezi testified that prior to his going on leave in December or the beginning of January 2003, he had received an anonymous letter stating that there were prisoners sharpening objects and preparing to assault other prisoners as well as the warders. Mr Buthelezi alleged that despite having received this letter he went on leave without paying particular attention to the issues raised.

Mr Buthelezi claimed that he received a second letter when he came back from leave, although he cannot recall the date. He said the letter came from Mr Mtshali or Mr Nkabinde because the letter was found at C-section. He claimed that this letter came from the isolation cells and was issued by one Joseph, an inmate, on the instructions of Mr Nkabinde. Mr Buthelezi further testified that prior to the incident he placed Mr Sibusiso Nkabinde and one "Mzi" in isolation cells because he believed that they were the persons referred to in the letter and he therefore took them to C-section to stabilise the situation. Mr Buthelezi then instructed all warders to conduct a search throughout the prison. On this particular day, 4 January, two searches had already been conducted prior to the assault on the instruction of Mr Buthelezi.

Neither search had yielded any result. The searches were conducted especially at C-section. Mr Buthelezi testified that at about 19h15 he received a phone call

from Mr V.S.M. Mabuya, who was working on first watch at C-section, to inform him that prisoners in C-section were busy sharpening weapons. Mr Buthelezi then went to the Head of Security, Mr Vusi Sithole, to discuss the matter. Since it was over a weekend, he decided to raise the alarm in order to get additional members from Medium B to assist in conducting a search throughout the prison. It had been necessary for Mr Buthelezi to request Mr Ndzukula, who was the Head of Prison, Medium B, to raise his alarm as the alarm at Medium A was out of order. Mr Buthelezi also requested the presence of Mr F.F. Ndzukula during the search.

In response to the alarm, members converged on the parade ground where Mr Buthelezi addressed them and gave them instructions on the search to be conducted. It is alleged that during the briefing one of the prison warders, Mr S.P. Mdhuli, asked Mr Buthelezi if they would be protected if an assault occurred, and that Mr Buthelezi stated that he would cover the prison warders 100% and that they must go and do what they have to do. Mr Buthelezi, however, denies this and states that when Mr Mdhuli asked the question his response had been that members should ensure that they search the prisoners in ways that would not result in any assault. He claims to have stated to the members that he would not be happy if they were to assault prisoners.

Mr S.B. Mnyandu issued warders with batons that came from the armoury.

3. THE ASSAULT

Mr Buthelezi testified that he instructed the various teams to go to certain sections and then he followed the team that went to C-section. He said that before he got there he met Mr Ndzukula in the passage and asked him if things were in order. Mr Buthelezi said that he heard a lot of noise and it sounded as if the prisoners were being beaten. Mr Ndzukula advised him to go back as the

prisoners were being interrogated and the interrogation was yielding the desired results on the whereabouts of the weapons. Mr Buthelezi said that when the members entered C-section, prisoners assaulted them and turned off the lights and the members were therefore compelled to use the necessary force in order to conduct the search.

Mr Ndzukula assured Mr Buthelezi that he would keep the situation under control. Mr Buthelezi alleges that he tried to peep through a certain hole but he could not see clearly because of the number of people moving around. However, at that stage, according to him, there were no assaults because he did not hear anyone screaming. Mr Buthelezi's statement is in stark contrast to the statement dated 14 January 2003 that Mr Ndzukula made to the Commission's investigators.

Mr Ndzukula stated that he heard Mr Buthelezi address his members and he heard one member whom he did not see ask whether they would be protected if the prisoners who are "cheeky" assaulted them. Mr Buthelezi responded that he would cover the members 100%. Mr Buthelezi further commented that the prisoners undermined members' authority by calling them "i'inkabi", meaning that they are hitmen. Members were instructed to start searching at C-section. Mr Buthelezi further informed the members that they should pay particular attention to a prisoner known as Nkabinde. According to Mr Ndzukula's sworn statement, about 150 members, most of whom carried batons, conducted the search at C-section. There was a lot of commotion and noise and Mr Buthelezi looked in and commented to Mr Ndzukula that "kuyabheda", meaning "things are bad". Mr Buthelezi just shook his head and turned away. Mr Ndzukula then followed Mr Buthelezi and asked him to explain his previous statement. Mr Buthelezi assured him that he should not worry because they knew what they were looking for. As Mr Ndzukula did not testify, his evidence was not tested against that of Mr Buthelezi.

Mr Buthelezi, however, denied all that was stated by Mr Ndzukula. He said he had never made any of the statements attributed to him. Mr Buthelezi said Mr Ndzukula's statement was a cover-up as he realised the seriousness of the matter and the possible ramifications thereof.

Mr Victor Siphamandla Mabuya, a prison warder at C-section at the time (and who was apparently Mr Buthelezi's informant), testified that he arrived at work at about 16h00 to be told by Mr Shange, another prison warder, that three inmates had been sharpening weapons. Mr Shange stated that these prisoners were moved from one section to another.

Mr Mabuya informed the Commission that between 16h00 and 17h00 he heard some squeaking sounds at the isolation section in which these prisoners were housed. He did not go inside the cell to investigate. He only reported to another prison warder, Mr W.T. Sibiyi, that he suspected that the inmates were sharpening objects. The member-in-charge opened the passage and they stood at the cell window. He then saw Mr Nkabinde and asked him what he was doing. Mr Nkabinde informed him that he was sharpening his pencil. Mr Sibiyi noticed a wedge on the windowsill and asked Mr Nkabinde what it was. Mr Nkabinde responded saying he did not know what had caused the wedge. He then reported to Mr Buthelezi that the prisoners in one cell were busy sharpening objects. Mr Mabuya, however, testified that he did not say it was the whole section but made reference only to that particular cell. Mr Mabuya testified that he did not point out any cell to Mr Buthelezi but that Mr Buthelezi went on his own to the cell. Under cross-examination by Mr Nkabinde, it was evident that the sounds Mr Mabuya claimed to have heard were the sharpening of a pencil and that, in fact, Mr Mabuya had seen a pencil in Mr Nkabinde's hand at the time.

The Commission did not investigate the merits and demerits of the assault itself, how it was conducted or who was responsible as the Commission felt that the matter had been fully investigated in previous investigations.

4. THE AFTERMATH

It emerged that warders assaulted about 150 inmates. At least two inmates were hospitalised and others were treated for minor ailments and discharged. However, while the Department was issuing statements in an attempt to reassure the public, the Area Commissioner's reaction was one of total indifference. She testified that she was off-duty when the assault occurred and that Mr Buthelezi had telephoned her in order to get authority, as he is required to do, to conduct an extensive search. However, having heard the news about the assaults on the following day, a Sunday, she did not go to the prison to see the prisoners. In fact, she did not make any inquiries as to the extent of the injuries of the prisoners, nor did she make any direct inquiry as to why the search was conducted. She stated simply that she trusted Mr Buthelezi, who had telephonically informed her about the search.

It should be noted that it was irregular for the Area Commissioner to authorise Mr Buthelezi to conduct the search. According to members of the Emergency Support Team (EST) who testified before the Commission, extensive searches such as these are their exclusive domain. Due to the potential danger such searches can cause, it is important that they are carried out under the auspices of the EST. The Head of the EST, Mr Mafika Elliot Phakathi, testified that he was around at the time but neither Mr Buthelezi nor the Area Commissioner had approached him to assist in conducting this search.

Mr Phakathi had headed the EST at Ncome since he arrived in 1995. The team is made up of 25 members who are trained in crowd management, control of hostages, control of riots, fire-fighting, evacuating members and the use of force.

According to Mr Phakathi, searches and surprise searches such as the one conducted on 4 January 2003 are the exclusive domain of the EST and that if a search is to be conducted, the Head of Prison must make a written request to the Area Manager and the Area Manager will instruct the EST. The duty of the EST is to see that no unauthorised articles are present in prisons.

No evidence was led before the Commission referring to the involvement of the EST during searches conducted on 4 January 2003 and it is evident that they were ignored and that the procedure Mr Phakathi described was not followed. Mrs Mthembu apparently saw nothing wrong with authorising the search on the strength of Mr Buthelezi's phone call and did not inquire about the involvement or otherwise of the EST. This lends weight to the allegation by the various prison organisations that Mr Buthelezi was pursuing a personal vendetta against certain prisoners and the search was conducted solely in order to "sort them out" as he had promised to do previously.

5. THE INVESTIGATION

The Provincial Office appointed a team of investigators under Mr Vusumuzi Petros Jiyane's leadership to conduct the investigation. None of the team was connected to Ncome Prison. The investigative team also consisted of Mr Maphanga and the rest of the assistance would come from members within Ncome Prison. The initial evidence heard by the Commission was that the investigators were inexperienced, that the investigation itself was not properly conducted and that therefore it was difficult on the basis of the investigation to take disciplinary action against the prisoners. However, it emerged that Mr Jiyane was in fact a very experienced investigator, as was Mr Maphanga.

Mr Jiyane testified before the Commission that he was a member of Correctional Services and currently based at Ncome, He said he had been with the Department of Correctional Services since 1980 and that he was the chief

investigator in the investigation of the assaults at Ncome. At the time of the investigations, he was a Provincial Head at the Pietermaritzburg office. The Provincial Commissioner, Mr Patrick O'Connor Gillingham, appointed him to conduct the investigation and in this he was assisted by five other members who came from various Management Areas, except for Mr Grundlingh, who was from Ncome. The brief was to investigate the assault of prisoners on 4 January 2003. The investigation commenced on 8 January 2003 and ended on 23 January 2003.

Mr Jiyane further testified that their findings were that the members responded to a call by Mr Buthelezi to conduct a search for weapons in the prison, that Messrs Ndzukula and Sithole led the search and that prisoners were assaulted during the search. Mr Sithole, in particular, was identified as being responsible for opening the cells to enable the juniors to enter, after which the juniors assaulted the prisoners. No dangerous weapons were found. As far as injuries were concerned, one prisoner was assaulted in the eye and another in his private parts. Those were the two most serious injuries he recalled from the investigation. He also said the assault took place in full view of senior officers and other prisoners.

Mr Jiyane further testified that the main problem they encountered was that members would not speak up against fellow members. For example, a member would claim to have been present during the assaults but would deny seeing any warder assault any prisoners. It was evidently a cover-up but the investigators had a problem in that they could not force the members to implicate each other. The only way they were able to establish who was actually present at the time was by looking at the duty list to see who had claimed a danger allowance after the incident. The investigators had recommended that 54 members be charged and that this should include Mr Buthelezi, the Head of Prison, as well as Messrs Ndzukula and Sithole.

Mr Jiyane informed the Commission that upon completion of the report it was handed over to the Area Commissioner, Mrs Mthembu, in order for her to make comments. That, as far as he knew, was the procedure. Thereafter, Mrs Mthembu was to pass the report onto the Provincial Commissioner's Office for the Provincial Commissioner's final decision. Mrs Mthembu herself would have made her own comments on the investigator's recommendations.

Most disturbing for the Commission was the involvement of Mrs Mthembu, the Area Commissioner, who it can be seen throughout the saga, was totally derelict in the conduct of her duties. In this instance, having received the report, which had recommended inter alia that Mr Buthelezi and Mr Sithole be moved from their positions as they were incompetent, she approved all the recommendations except the one that required the charging of the two officials. Furthermore, although she signed the report, she did not date this action.

Mrs Mthembu stated that when she received the report, she only read the summary, appended her signature to it and passed it on to the Provincial Commissioner. She did not know when this report was sent to the Provincial Commissioner but she says she received the report back from the Provincial Commissioner's Office in July 2003. However, she returned the report as it was incomplete, in that the Provincial Commissioner had not approved the recommendations of the Regional Commissioner and the statements were not signed. She had, however, not raised the problem of the statements previously, with the investigators. The handwritten statements were signed but the typed statements were not. She stated that she did not raise this with the investigators, as her task was merely to facilitate the investigation and provide support staff.

Mr Gillingham, who was at the relevant time from 10 August 2000 to 31 July 2003 the Provincial Commissioner of KwaZulu-Natal and is currently based at headquarters in Pretoria, stated that he had instructed the inspectorate at the Provincial Office to look into the investigation. This was done in order to use

people with knowledge of the provisions that had been transgressed and to ensure objectivity. This is why Mr Jiyane was appointed. Mr Gillingham stressed that the policy is that the disciplinary process of members is a line management function, vested with the Area Manager of the concerned member. According to Mr Gillingham, the authority to take the decisions once finalised lay with the Area Commissioner and it would have been the duty of Mr Smit, the Human Resources Manager at Ncome Prison, to assist. The policy requires that after an investigation a copy be forwarded to the Provincial Commissioner to see if there is full compliance in order to:

- (a) Make recommendations to Head Office.
- (b) Investigate whether the functional procedures had been satisfied.
- (c) See if the process needs to be changed.
- (d) Advise the Area Commissioner on how to prevent a recurrence.

Mr Gillingham testified that there would, therefore, have been no need for the Provincial Commissioner to approve the investigation or to sign the report before Mrs Mthembu took further action. It also emerged during Mr Gillingham's testimony that Mrs Mthembu had actually made a request on 24 and 25 March 2003 for assistance from the Board to initiate the proceedings. She had done so without Mr Gillingham having signed the report.

Mr Jacob Cornelius Taljaard, who was at the Provincial Commissioner's Office at the time, also stated that the duty to implement after an investigation has been completed lies with the Area Commissioner. He stated that the fact that a Provincial Commissioner may not have signed an investigation report should not hinder progress in instituting disciplinary action against the offending members and that the only reason the investigation is taken to the Provincial Office is to ensure that the recommendations are implemented, and for no other reason beyond that.

6. THE DISCIPLINARY PROCESS

According to Mr Gillingham, Mrs Mthembu solicited assistance from the Provincial Office in the appointment of initiators to assist with the task of getting the disciplinary process underway. This, according to Mr Gillingham, was on 24 or 25 March at the Regional Board meeting. This, in fact, is contrary to Mrs Mthembu's assertion that she could not proceed with the disciplinary process due to the fact that the record was incomplete. It should also be noted that Mrs Mthembu's request for assistance was made more than eight weeks after the report was compiled and completed, which meant the report had been on her desk for this period without her taking action. This failure to act with urgency obviously caused further delays in getting the process going.

According to Mr Smit, a request was made in May 2003 of the various Area Commissioners for names of initiators and chairpersons and a reminder was sent out in June 2003. The Area Commissioners only submitted names in July 2003. From the evidence, it was clear that the initiators and assistant initiators as well as the chairpersons to all the matters were appointed in August 2003, which is more than three months after the completion of the report. Initiators and assistant initiators were appointed for the various matters and the Commission heard the evidence of some of them. However, the Commission found that while the Ncome management was in part to blame for the lack of progress, responsibility for the delays could also be partially attributed to the initiators.

7. THE INITIATORS

7.1 Mr C.W. Maphanga

Mr Churchill Winston Maphanga is a member of the Department of Correctional Services currently employed as a Division Head at the Prison Administration in Glencoe Prison. He was appointed as an initiator on 29 July 2003 to take action

against ten (10) members. Mr Maphanga informed the Commission that he had a problem in that he found that there were no statements in the investigation report that implicated the members except for one that implicated Mr B.V. Mkhumani. He stated that because of this problem he contacted Mr G.G. Smit and informed him that there was a problem with the case as most of the people against whom he was appointed to initiate were not implicated. Mr Smit advised Mr Maphanga to contact Mr Jiyane, the chief investigator. Mr Maphanga stated that he contacted Mr Jiyane but was even then not able to get the statements he required.

Having been appointed on 29 July, Mr Maphanga only raised a query with Mr Smit on 12 November 2003, which is five months later. When asked the reasons for the delay, he stated he had been busy with another matter. However, he also stated that prior to writing the letter he had made other endeavours to progress with the disciplinary inquiry in that on 13 August 2003 he went to Umzinto and met with his assistant initiator, Mr Gawie Smit, who was 100 kilometres away from Glencoe. It was Mr Smit who informed him on 23 August 2003 he had a case set down for 29 September, but the matter did not proceed. On 1 October 2003, Mr Maphanga sought an explanation for why the matter was postponed and the Area Commissioner was informed about the following problems:

- a) The Human Resources representative was absent.
- b) The previous records of the member were not available.
- c) The prisoners arrived two hours late for the hearing.

The members' representative requested a postponement to 7 October 2003. On that date, the employees' representative requested another postponement. The prisoners had on this occasion arrived on time. He consulted with them and they had informed him that they were not willing to testify. The prisoners remained at Ncome from 29 September 2003 to 7 October 2003. According to Mr Maphanga, the prisoners were willing to proceed with the matter on the previous occasion

that he had spoken to them. By 7 October 2003, however, they had changed their minds. The prisoners were then hastily made to sign sworn affidavits stating that they had freely and voluntarily withdrawn their previous statements and were not willing to proceed with the matter. The prisoners were Mr Thembinkosi Zondo and Mr Sibusiso Nkabinde.

Mr Maphanga denied any knowledge of any possible bribery as alleged by the prisoners and stated that it often happened that prisoners changed their minds about proceeding with such matters. When questioned as to why he kept the prisoners at Ncome and not at Waterval, given that they would be vulnerable at Ncome and could easily withdraw the complaint, he indicated that it did not occur to him at that stage to do so. Indeed, Mr Maphanga was not aware exactly where the accused member, Mr Mkhumani, was based, nor was he certain of where the witnesses themselves were based.

The Commission heard evidence to the effect that on 7 October a full discussion on the record of proceedings showed that the member, Mr Mkhumani, had been asked to plead and having done so the charges against him were withdrawn. Mr Mkhumani therefore cannot be charged again as the withdrawal of charges after a plea is tantamount to an acquittal. However, Mr Maphanga claimed that he did not know why it was that things were done in this way. Mr Maphanga did not take any further action with regard to the nine other members. He did not know any of the other charged members personally.

7.2 Mr M.C. Gamede

Mr Muzikayifani Caswell Gamede was also appointed an initiator. He is currently the Head: Corporate Services at Estcourt. The Area Manager, Mrs Mthembu, appointed him an assistant initiator on 29 July 2003. He stated that he received the letter of appointment on 1 August 2003. Mr Botes contacted him to inform him that he had been appointed as an initiator. He indicated that he could not be

an initiator as he was busy and he then contacted Mr Winchester at Ncome and informed him of his discussion with Mr Botes. He was in fact, appointed an assistant initiator with Mr Botes as the initiator. Mr Gamede stated that it was difficult to work together with Mr Botes, who was based at Eshowe, as they were about 600 kilometres apart. Later on he was informed that he would no longer be the assistant initiator but the initiator. He therefore requested the investigation report and a list of the members he was to initiate against.

On 4 September, he received the documents and arranged a date that was suitable to both himself and the chairperson. On October 8, Mr Gamede went to Ncome as he could not find some of the members. The objective of the visit was to attend a pre-hearing. He met with the union representatives on behalf of the transgressors, who argued that the matter should be postponed due to the time frame, as three months had elapsed since the commission of the offence in January 2003. They said it was nine months after the incident. Mr Gamede, at that stage, did not know the date when the investigation was finalised and he said that he would rather postpone argument on the matter until the next date once he had been able to ascertain the date on which the investigation was finalised.

Mr Gamede testified that he then approached Mr Winchester to inquire about the finalisation date but he did not get any response from him. On 20 October 2003 he wrote a letter to Mr Taljaard, who was in the Provincial Office, but did not get a response from him. He followed up with Mr Taljaard's secretary, who said they did not have a copy of the letter. On 11 November 2003 he re-faxed the letter and there was no response. Shortly thereafter he received a letter of withdrawal from Ncome. According to Mr Gamede, there had been no consultation with him prior to the withdrawal of the matters and Mr Gamede believed that as the matter was already part heard it could have been finalised. Mr Gamede further testified that there were four prisoners who were complainants who were all transferred to

Kokstad, Ebongweni and Waterval. The matter was withdrawn before he could pursue the matters relating to these other prisoners.

7.3 Mr J.G. Taljaard

Mr Jakobus Gerhardus Taljaard was also appointed an initiator. He was appointed on 5 July 2003 and received the letter on 29 July 2003. He arranged to meet with Mr Winchester, who was the secretary at Ncome Prison, in order to make further arrangements to meet with the prisoners and the members concerned in the matter. He stated that a return trip to Ncome Prison was about 1 000 kilometres from Umzinto where he was based and that the cost of a single trip would be R1 500.00. He was concerned that he had been appointed as an initiator when he was so far away and communication was poor. Ncome Management Area was not co-operating with him either. Mr Taljaard stated that he would have required at least three weeks to do the consultations and then set up the disciplinary process.

He stated that on 12 August he made an appointment for a preliminary hearing and on 12 September he left Umzinto at 03h00 and arrived at Ncome Prison at 11h00. At the time he could not meet with Mr Smit because Mr Smit was busy in meetings. He indicated that Mr Smit met him at around 14h00 and he discovered that he did not have the full investigation report. He then arranged with the Provincial Commissioner's Office to make the full documents available. On that day he did not see any members or prisoners. On 15 September 2003, he sent letters to all members and informed them that the disciplinary proceedings had been initiated and they could contact him. Mr Taljaard testified that from the investigation report he could only make out a case against four members even though he sent letters to all the listed members.

On 17 September 2003 he received a letter from Ncome informing him that the members he was supposed to initiate proceedings against had been transferred to other areas. He was on study leave for the month of October.

On his return on 3 November 2003, he sent a query to ask members where the prisoners were. He never received a response. On 14 November he sent a reminder and spoke to Mrs Mdlalose telephonically, who said she would get back to him. Having received no response from Mrs Mdlalose, he inquired again on 17 November and again she stated that she was in no position to help. On 1 December, Mr Taljaard wrote a letter to the Area Manager and informed her of the status of the hearings.

Mr Taljaard also stated that it was very difficult to get hold of anyone at Ncome Prison since most of the senior officers were not available. He stated that from December to 15 March 2004 a new Head had been appointed who was trying to minimise movement of prisoners. He stated that there was no response to his letter of January 2003 inquiring as to the whereabouts of the prisoners. Mr Taljaard stated that he got the impression that this investigation was not taken seriously because the team wasn't appointed properly, the initiators were often far from Ncome Prison, prisoners were moved to other prisons, responses to correspondence were tardy, there was a lack of prior consultation with initiators, and on top of it all there was the drought. He also claimed that he never received a complete investigation. He stated that he never received a response to his letter of 15 March 2004. He sent another letter on 2 April 2004 and yet another on 23 April 2004. Finally, on 25 April 2004, he received a response informing him that the matters had been withdrawn.

7.4 Mr J.K. Botes

Mr Johannes Kobus Botes stated that he was based at Melmoth and that he had been appointed an initiator, but he had requested that his appointment be

withdrawn due to pressure of work. He stated that he had not been consulted during the process of appointment and he had not been able to fulfil his duties.

7.5 Miss J.W. Venter

Miss Jakoba Wilhemina Venter, who is currently based at Glencoe, was also appointed an initiator. Mr Winchester, the secretary at Ncome Prison, informed her of her appointment. Miss Venter was to initiate proceedings against Miss Mdledle. The complainant was Mr Sibusiso Banda. Miss Venter testified that she had a problem with the facts of the case as they were presented in the report, in that the inmate Mr Banda was the only person who had implicated Miss Mdledle and that Miss Mdledle was on gate duty at the time of the incident and, according to Miss Venter, could not possibly have left the gate unmanned whilst conducting the search. She also inquired as to whether there were any witnesses to the alleged assault by other prison warders. She wanted to know of any possible witnesses and witness statements on the incident. To this end, she wrote a letter dated 5 August to Miss Mthembu making these inquiries. She did not receive any response to these letters and so she sent a reminder on 21 October 2003. After this, she informed the Area Manager at Ncome that she could not proceed with the disciplinary action against the employee due to the fact that she had not been able to receive the additional information she had requested and that she felt that it would be procedurally unfair to proceed with disciplinary action under these circumstances. Furthermore, according to her, there was no case against the member.

Miss Venter testified that she was surprised that on 5 March 2004, having sent correspondence to Ncome Management Area from 5 August without any response, when she received a letter from Mr Smit inquiring about progress and expressing his disappointment at her failure to update the Ncome Prison on the proceedings. She then informed Mr Smit by way of letter dated 8 March 2004 that she had sent various inquiries and had received no response from him. Mr Smit

then stated that her queries had been forwarded to the investigating team but that it was the investigating team that had not responded to her queries.

Miss Venter decided in this instance to issue a *nolle prosequi* with no authority whatsoever to do so. Her duty and her instructions were simple and all she was supposed to have done was to place whatever available evidence there was before the chairperson and not to make a decision not to proceed on the basis that she did not have sufficient evidence. Furthermore, Miss Venter failed to consult with either the complainant or the member herself and inquire from her exactly what the circumstances were that had resulted in the charge being made. She stated that as she had not had a statement from Miss Mdledle, she felt that the investigation had been incomplete. However, it is submitted that nothing prevented her from obtaining this statement from Miss Mdledle and presenting it to the chairperson. It would then have been for the chairperson to decide whether or not there was a case against the member.

7.6 Mr M.H. Majola

Mr Mboneni Hyback Majola testified that it was the first time he had been appointed as an initiator. He is currently based at Sevontein Correctional Centre and was appointed on 29 July 2003 while he was based at Empangeni. He was to initiate first against Mr Msibi. He stated that in October 2003 he wrote a letter to state that he could not proceed against Mr Msibi as none of the statements in the investigation mentioned his name. It appears that Mr Msibi was not implicated in any of the statements.

There was no evidence led before the Commission that there had been any response from Ncome management to Mr Majola's letter.

7.7 Mr G.K. Venter

Mr Gert Kobus Venter was appointed initiator while he was Area Manager in Newcastle. He was appointed to initiate proceedings against Messrs Ndzukula, Buthelezi and Sithole. He testified that when he was appointed he received an incomplete investigation, namely a summary and some of the statements, and that no chairperson had been appointed. Mr Buthelezi's statement was also incomplete. Mr Venter stated that he phoned Mr Smit and requested the missing pages and that these were sent to him along with medico-legal reports. However, the investigation report was still incomplete and he requested further documentation, which he received on 16 September 2003. He stated that his appointment as initiator coincided with an *imbizo* at Newcastle that he had to coordinate and arrange for the former Minister, Mr Ben Skosana, and the Commissioner, Mr Linda Mti. He stated that this took up a lot of his time, that they were short staffed, there was virtually no management at Glencoe Prison and that his work load was such that he could not attend to the cases at Ncome. He therefore neglected to proceed with these cases and recognises in retrospect that he should have made additional efforts to finalise the hearings.

Mr Venter admits that he was negligent but not in his opinion grossly negligent even though he realises the seriousness of the assault, and that this carries a sanction of dismissal.

The Commission found that Mr Venter had failed to inform the people he was supposed to charge that they were to be charged. He had virtually done nothing and he should accordingly be charged with gross negligence. His role was very important in that he was to initiate proceedings against very senior personnel and against persons who actually spearheaded the assault. Mr Venter's conduct is highly contemptible and is unacceptable from anyone, especially such senior ranking officers. The failure to begin to initiate proceedings against these

members clearly shows the lack of seriousness with which all concerned treated the matter and that without disciplinary action there will be no accountability on the part of the members. They will accordingly flout the rules continually knowing that nothing will be done to them. It is, therefore, very important that such matters are taken seriously.

The Commission found that the initiators play a very important role in disciplinary proceedings, as a matter cannot come to fruition without the action of the initiators. Indeed, the presiding officer cannot begin the process without the action of the initiator. The Commission therefore believes that the initiators could and should have done more to be pro-active in this matter. Many of the initiators seemed to be satisfied with shifting responsibility on to the Ncome management. While Ncome management indeed had a role to play, the initiators nevertheless had a laid back attitude and it is that lack of diligence that causes subordinates to continue to flout the laws.

8. THE DROUGHT

It is common cause that between the years 2003 and 2004 a severe drought hit the Ncome area, resulting in a shortage of water and a depletion of the area's reserves. It was found that the water supply was insufficient to sustain the personnel and prisoners on the premises and as such, urgent action was required to reduce the consumption of water or to find some other means to increase the supply of water for continued daily use at the facility. The former option of reducing the number of people consuming the water was the more cost effective and therefore reasonable option. To this end, Mr Taljaard, at the time the Regional Head: Corporate Services at the Provincial Office, sent a memo to the National Office requesting approval of transfer of 1 050 offenders to the various correctional centres. The memo also suggested that 60 unmarried officials be moved to Empangeni and Qalakabusha.

National Office approved the request and it was accordingly implemented. The Regional Commissioner sent out a memo to the Area Commissioners for compliance at Ncome, Kokstad, Waterval and Ekuseni. The memo outlined that the prisoners would be moved in phases and dealt with the *modus operandi* of how they would be transferred. It detailed the number of prisoners to be transferred, the date on which they were to be transferred and the transport arrangements for both the prisoners and the escorting officials. From the memo, this guideline appears to have been the extent of the Provincial Officers' involvement in the transfer of prisoners.

9. THE TRANSFER OF PRISONERS

In order to alleviate the water problem it was decided at a meeting of the regional board that prisoners should be transferred to prisons around the province. This proved to be a golden opportunity for the prison authorities to get rid of almost all the complainants in the assault of 4 January 2003. Ncome administration denied this and put it down to sheer coincidence, but it was evident that with this drought all the so-called "troublemakers" were immediately transferred. The transfer of the prisoners who were complainants proved to be another stumbling block for the initiators and assistant initiators, as they could not consult properly with the prisoners. It was also logistically difficult to arrange for transferred prisoners to be brought back to Ncome Prison for consultation. Often initiators and assistant initiators had to wait for the prisoners, who would arrive late or not at all due to some miscommunication. It is therefore not surprising that none of the disciplinary proceedings took place and even less surprising that, as evidence emerged, many of the warders did not even receive notification that they had been charged in the disciplinary inquiries.

As stated, the drought necessitated the transfer of prisoners as well as officials from Ncome Prison to other centres. The Department of Correctional Services proposed and approved the following transfers:

- a) Three hundred (300) maximum category offenders were to go to Goedemoed.
- b) One hundred (100) medium category offenders were to be transferred to Kroonstad.
- c) Fifty (50) medium category offenders were to be transferred to Groenpunt.
- d) Three hundred (300) maximum category offenders were to go to Ebongweni in Kokstad.
- e) Three hundred (300) maximum category offenders were to go to Qalakabusha in Empangeni.

This is according to the Mr Taljaard's memo dated 12 September 2003. Prisoners due for transfer in September were moved on 23 September.

10. TIME FRAMES

In terms of Clause 7.4 of the Department of Correctional Services Disciplinary Code, formal disciplinary hearings should be finalised within a period of 30 days from the date of finalisation of the investigation. If the time frame cannot be met, the parties involved must be informed accordingly of the reasons for the delay. If the employer, without good reason, fails to institute disciplinary proceedings within a period of three months after completion of the investigation, disciplinary action falls away. These time frames, like the drought, seemed to be another factor that was used and abused by the authorities in order to frustrate or sabotage the disciplinary process against the warders.

Clause 7.4, as mentioned above, was the reason given for the withdrawal of disciplinary charges against the prison warders. It transpired that the Provincial Commissioner had expressed concerns about the fact that there was generally a problem within the Department of not completing disciplinary hearings in time. He advised that some cases were outstanding for more than two years. The Provincial Office therefore advised that minor offences should be withdrawn but that the more serious offences should proceed. Assault on prisoners is regarded as a serious offence. It is also a dismissible offence. It was evident throughout the proceedings that there had never been an instruction from Head Office for the charges against the warders to be withdrawn. What became evident to the Commission was the fact that this was yet another opportunity for Ncome management to finally sabotage and get rid of the matter without further ado.

The Commission found that Ncome management failed the community at large as well as the prisoners it is supposed to protect against such brutal attacks. The Human Resources Director made a recommendation to a newly appointed Area Commissioner to withdraw charges *en masse* against all the prison warders. It is also evident that the new Area Commissioner was not fully apprised of the facts prior to making the decision. It would seem that Ncome management claimed that the Provincial Office was worried about the time frames and wanted all matters withdrawn that had exceeded time frames. However, the Provincial Office clearly stated that only matters concerning minor offences should be withdrawn. From the reading of the minutes it is clear that there was never an instruction to withdraw the charges.

11. RECOMMENDATIONS

The Commission finds and recommends the following in respect of the members mentioned below:

11.1 Mr F.B. Buthelezi

- (a) He acted irrationally, conducting several fruitless searches in one day. It would seem that the allegations of a vendetta are not far-fetched. Such conduct violated the prisoners' constitutional rights to human dignity and also exposed the warders conducting the searches to danger, as the prisoners were obviously irritated with the continued and unnecessary disturbance.
- (b) He failed to take proper precautions before conducting this massive search, and the ensuing violence bears testimony to that fact. He also failed to oversee the operation.
- (c) During the assault itself, Mr Buthelezi "hears" what sounds like a scuffle or prisoners being beaten but is satisfied with the explanation from Mr Ndzukula that he should not interfere as the prisoners are being interrogated and that the interrogation is yielding the required results.
- (d) He abused his powers by orchestrating the transfer of some of the key complainants.
- (e) He be charged with contravening clause 2.1 Column A, in that he was grossly negligent in the execution of his duties.

11.2 Mr G.G. Smit

The Commission finds that Mr Smit, who is currently the Manager, Human Resources Administration and Acting Head of Corporate Services, had connived in having the matters withdrawn in that:

- (a) He failed properly to furnish the initiators with the required documents and claimed to have no authority over the matter. His inaction resulted in the matters exceeding the stipulated time frames.
- (b) He failed properly to apply his mind to the matters and recommended the withdrawal of the matters.
- (c) He did not follow-up on the recommendations of the investigation.
- (d) He was totally unhelpful to the initiators whose queries he either ignored or referred to the investigators.
- (e) He deliberately misled the new Area Commissioner, Mr V,S, Hlatshwayo, into authorising the withdrawal of the charges against the prison warders.
- (f) He conceded having failed to consider the matter fully. He should therefore be charged with gross negligence and contravention of clause 2.1 of Column A of the Disciplinary Code in that he was grossly negligent in the execution of his duties.

11.3 Mr V.S. Hlatshwayo

The newly appointed Area Commissioner, Mr Hlatshwayo, should be charged with gross negligence or contravention of clause 2.1 Column A of the Disciplinary Code in that:

- (a) He had been newly appointed as Area Commissioner at the time he authorised the withdrawal of the charges and was acting on the advice of Mr Smit.

- (b) He, however, failed to make an informed decision in that he did not seek any clarification from Mr Smit but merely approved the recommendation.
- (c) He was the one who made the decision to withdraw the charges.
- (d) He conceded that he made the recommendation without fully reading the report and acquainting himself with the facts.
- (e) It is recommended that Mr Hlatshwayo should undergo a management training course referred to in the recommendations under the Management Areas below.

11.4 Mrs M. Mthembu

Mrs Mthembu, who was the Area Commissioner during the incident, should be charged for the following:

- (a) Failure to comply with procedure by authorising the search on a large scale without further inquiries and not involving the EST.
- (b) Having been formally advised of the assault on the same evening by Mr Buthelezi, she neither inquired into the number of prisoners injured or the extent of their injuries.
- (c) Failure to take any steps towards the implementation of the report.
- (d) Not dating the report, having signed it.
- (e) Not taking any steps to implement the recommendations in the report, but keeping it in her office for over four (4) months.

- (f) Failure to raise the queries and or concerns she had about the report.
- (g) The Commission recommends that she be charged in terms of clause 2.1 Column A of the Disciplinary Code for each of the above failures to adhere to procedure or to take action. Mrs Mthembu did not follow up the process of initiating the disciplinary inquiry, but claimed before the Commission that she thought the matter was being handled exclusively by the Provincial Office, which the Commission found to be untrue.

11.5 Mr S.S. Ndzukula

Mr Ndzukula was Head of Prison, Medium B, at the relevant time.

- (a) He assisted Mr Buthelezi with conducting the search throughout the prison.
- (b) It is evident he was aware that the prison warders were assaulting prisoners but did nothing to stop further assaults.
- (c) He advised Mr Buthelezi not to interfere with the interrogation of prisoners, thereby indirectly encouraging the assaults.
- (d) Mr Ndzukula should therefore be charged with gross negligence in terms of clause 2.1 Column A of the Disciplinary Code.

Although the Commission cannot deny that the officers mentioned above were guilty of gross negligence, the system itself leaves much to be desired.

It is evident that the disciplinary process is secondary to other duties within the Department. Due to the general problem of under-staffing within the prisons, prison warders have a heavy workload.

Other factors such as the unclear policy on time frames, which is therefore open to abuse, also contributed to the saga.²

² For a detailed discussion of Disciplinary Inquiries, see Volume One, Chapter 15.

CHAPTER 34

PRISONERS' PRIVATE CASH

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PRISONERS' PRIVATE CASH

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CHAPTER 34

PRISONERS' PRIVATE CASH

1. INTRODUCTION

During the course of the evidence presented to the Commission at the Dundee Magistrate's Court, an allegation was made that the prisoners' private cash at Medium B of Ncome Prison did not balance.

This chapter deals with the outcome of the investigation the Commission conducted arising from the allegations mentioned.

2. COMMISSION'S INVESTIGATIONS

After the allegations of a shortfall emerged, the Commission dispatched a group of investigators to conduct an investigation into the prisoners' private cash records at all prisons forming part of the Ncome Management Area to determine whether a shortfall in fact existed.

Although the allegations referred only to Medium B, the Commission thought it prudent to examine the prisoners' cash records of Medium A as well.

2.1 Medium A

An examination of the books and records of Medium A found them to be in an up to date, neat and orderly condition. The Cash Book was up to date and balanced. The whole office had a sense of neatness and order.

The investigators questioned Mr S.D. Zungu who is the official responsible for all the records and books relating to prisoners' cash at Medium A and found him to be fully conversant with all the procedures and regulations relating to prisoners' private cash and he seemed to know precisely what the nature of his duties was. He was of great assistance to the Commission investigators, who quickly grasped how the section dealing with prisoners' private cash was supposed to function.

2.2 Medium B

The Commission's investigators then proceeded to examine the records of Medium B, which were found to be in a complete state of chaos in that:

- a) The Cash Book had last been written up in December 2003.
- b) The Cash Book appeared not to have been balanced after October 2003.
- c) There appeared to be no one in charge of the section to explain anything to the investigators.
- d) The Department last carried out an inspection on 1 December 2002 at which stage the Cash Book had been properly balanced.

3. SHORTFALL

The investigators then attempted to establish whether there was in fact a shortfall. According to the Regulations,³ for every prisoner for whom money appears against his/her name, a G349 Card must be brought into use. The

³ See Regulation 11.3 of the B Orders.

regulations also provide for a limited amount of money to be kept in cash at the prison and for a banking account to be opened for the depositing of any surplus money. At Ncome Medium B such account was opened at ABSA Bank, in Vryheid, under Account Number 132 818 9697.

From the investigators' understanding it would appear therefore that at any given time the sum of the total cash on hand found at Medium B, together with the balance standing to the credit of the banking account held with ABSA in Vryheid, should equal the total standing to the credit of each prisoner in the cards.

The Commission's investigators then chose a particular day to conduct a spot check of the amount standing to the credit in the banking account, the total of the cards and the actual cash in Medium B. This spot check was conducted on 22 September 2004 and established the following:

Credit balance at ABSA Bank in Vryheid:	R 33 189,45
The Cash at Medium B:	R 2 088.70

Total	R 35 278.15
Total standing to the credit of the cards:	R 42 838.93

Apparent Shortfall	R 7 560.78

Pencil notes at the end of the reconciliation of the Cash Book in October 2003 indicate the shortfall to be the sum of R7 703,46.

4. HISTORICAL FACTS

Having confirmed the existence of a shortfall, the Commission's investigators then interviewed various officials and examined documentation relevant to the

matter and the Commission was able to establish the following historical facts relating to the shortfall:

- 4.1 During 2001 the supervisor of Medium B, Mr L.K. Manqele, who was in charge of prisoners' private cash, went on sick leave for a very long time.
- 4.2 A certain Mr L.J. Bloem was then placed in that office to fulfil the functions of Mr Manqele. Proper handing over did not take place as Mr Manqele was already on sick leave.⁴ The Acting Head of Medium B at that time was Mr F.F. Ndzukula.
- 4.3 Mr Bloem advised Mr Ndzukula of the discrepancy in the prisoners' private Cash Book but was advised to continue working until such time as Mr Manqele returned from sick leave. It appears that Mr Manqele must have been on leave for a very long time as during that period Mr Ndzukula vacated the post of Acting Head of Prison and Mr T.N. Ngcobo was then appointed.
- 4.4 Mr Bloem again reported the problem, this time to Mr Ngcobo, who then wrote a memorandum to the Area Manager and an investigative task team was appointed to investigate the matter. A theft case docket was also opened at Mondlo Police Station. A certain Mr Buthelezi, who is currently working in the Area Manager's office, led the investigating task team. The team never produced a report. The Commission's investigators saw Mr Buthelezi at Ncome Prison and were informed that the major reason why the task team never made progress was because the complainant, Mr Bloem, indicated when they interviewed him that there was no problem at Medium B with prisoners' cash. The investigation then appears to have come to an end, which is inexplicable in that it was Mr Bloem who brought

- the matter to the attention of management in the first place and was the one who laid the charge with the SAPS.
- 4.5 The lack of progress in the investigation could have been affected by the fact that Mr Ndzukula, the Acting Head of Prison, to whom the matter had initially been reported, had vacated the post and his replacement, Mr Ngcobo, passed away during 2004.
- 4.6 Mr Y.S. Govender⁵ then informed the new Area Commissioner, Mr V.S Hlatshwayo, about the problem of the private cash. In response Mr Hlatshwayo requested the Provincial Office to intervene but was informed that the matter had to be dealt with locally.
- 4.7 The Area Commissioner established a task team consisting of C.A. Jansen, E.N. Botha, S.A. Thusini and S.G. Dauth.⁶ It appears that this task team commenced its work and a whole host of administrative errors were discovered.⁷ This task team could, however, also not complete its work due to an alleged lack of co-operation from the members of staff at Medium B and due to the fact that some members of the very same task team had been suspended because of their alleged involvement in procurement irregularities at Vryheid Prison.
- 4.8 On 30 August 2004, Mr Govender again appealed to the Provincial Office for assistance to rectify the prisoners' cash at Medium B. Nothing appears to have materialised from such an appeal.

⁴ In terms of the Regulations, the Cash Book must be reconciled on the occasion of another official taking over the task and both officials must countersign the settlement record.

⁵ Who was then occupying the post of Operational Services but who is now the Co-ordinator Corrections.

⁶ See Area Commissioner's letter dated 23 January 2004. (Ncome Exhibit "CCC").

⁷ See Ncome Exhibit "DDD".

4.9 By the time the Commission had completed its hearings in Ncome during September 2004 the prisoners' private cash records were still in a state of chaos, as can be seen from the affidavit of Mr Hlatshwayo, which is annexed hereto.

5 FINDINGS

From the documentation in the Commission's possession,⁸ it clearly appears that the shortfall in the prisoners' private cash at Medium B is a well-known situation that has prevailed for over three years.

When the Commission investigators inquired from the staff working in the office dealing with the prisoners' private cash, no explanation was received as to how the shortfall came about. Every single member working in that department advised that when they arrived to work in that department they found the problem already there and accordingly it is clear that this is an inherited problem.

The official who had been placed in a supervisory position had not taken up his post as he informed the Commission's investigators that he had only agreed to take up the position when the cash shortfall prevailing at Medium B had been sorted out.

What the Commission finds astounding, however, is that during that period neither the management at Ncome nor the Provincial Office had done anything of any substance to rectify the situation or to establish the true facts about who was responsible.

⁸ See Affidavit Exhibit "DDD" Ncome.

The only feeble attempt appears to have been the opening of a criminal case at Mondlo Police Station about the theft of prisoners' cash. The case was opened in 2003 but no trial has ever taken place. It is a reasonable conclusion that the Mondlo SAPS will not proceed with the matter.

The affidavit of the Area Manager, Mr Hlatswayo, contains no evidence of what he, in his position as Area Manager, did to bring normality to the situation. Although it is true that he only commenced his duties as Area Manager in November 2003, one would have expected him to be far more aggressive in seeking a solution to the problem. He appears rather to have shifted the responsibility of sorting the matter out to Mr Govender, the then Head of Medium B. Mr Govender, in turn, has clearly made several appeals to the provincial office for assistance to rectify the situation.

6. RECOMMENDATIONS

The Commission recommends that the Department immediately:

- 6.1 Appoint a task team from outside the Ncome Management Area with the necessary skills and experience relating to prisoners' cash to investigate fully the cash shortfall in the prisoners' private cash at Medium B.
- 6.2 Such task team should attempt in the shortest possible time to determine:
 - (a) the precise extent of the shortfall, and
 - (b) if any member can be held responsible for such shortfall.
- 6.3 Pending the finalisation of the investigation by the task team, the Department should:

- a) Take immediate steps to ensure that sufficient funds are paid into the Medium B ABSA Bank Account in Vryheid, to ensure that prisoners are in not financially prejudiced by the shortfall.
- (b) Ensure that a completely new set of books is put in place at Medium B.
- (c) Place a competent member to take charge of the section.
- (d) To avoid a recurrence of this problem, the Department should always ensure that all members working in this section of Medium B are fully conversant with all the accounting procedures as set out in the regulations. In the event of such skills being found to be lacking, then an intensive training programme must be implemented for such members to acquire the necessary expertise.

CHAPTERS

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MANAGEMENT AREAS

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MANAGEMENT AREAS

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CHAPTER 35

INTRODUCTION

CHAPTER 35

INTRODUCTION

This volume focuses on the nine (9) prison Management Areas investigated by the Commission in its inquiry into allegations of corruption and maladministration within the Department of Correctional Services. They are:

1. Pietermaritzburg Management Area.
2. Durban-Westville Management Area.
3. Ncome Management Area.
4. Johannesburg Management Area.
5. Pollsmoor Management Area.
6. Pretoria Management Area.
7. St Albans Management Area.
8. Leeuwkop Management Area.
9. Bloemfontein Management Area.

The Management Areas are listed as they were constituted on 27 September 2001, the date when the Commission was established.

While there are two hundred and forty (240) Management Areas in South Africa, it is possible to identify general trends in crime and maladministration from the sample of nine (9) Management Areas under consideration.

Complaints received on the Toll Free Number by the Commission from other Management Areas outside the Commission's mandate of investigation are reflected in an Appendix to this report.

South African prisons have the capacity for 110 000 prisoners, but have a population of approximately 185 809. According to official records as at 30

June 2004 there were 71 065 prisoners in the nine Management Areas which were investigated by the Commission, representing approximately 45% of the total number of prisoners. However, notwithstanding the overcrowding there are a number of other prisons in outlying areas, which are virtually empty. The Commission considers this imbalance as a form of maladministration in itself, which also constitutes a violation of prisoners' rights.¹

Against the backdrop of transformation and discrimination that informs evidence brought before the Commission, it is useful to consider the prison population and its racial breakdown in relation to the population of the country as a whole. The total population of South Africa is 44.8 million. The racial profile of the 71 065 prisoners in the nine Management Areas does not correspond with the racial profile of the S.A. population.²

- **REHABILITATION**

The issue of rehabilitation is a very sensitive one with the public, as well as with the Department of Correctional Services. Although rehabilitation does not fall directly within the terms of reference, the Commission believes that it falls within the ambit of the "treatment of prisoners" and the issue of mismanagement in the Department.

The Correctional Services Act of 1998 dictates that rehabilitation should be the main focus of the Department. However, most of the chapters of the 1998 Act, which deal with the issue of rehabilitation, came into operation only in 2004. The Provincial Commissioner of Gauteng³ has submitted before the Commission that the provisions dealing with rehabilitation were not brought

¹ For more details see the chapter on Overcrowding.

² The racial profile in the Management Areas investigated is :

African:	58 947	(83%)
Whites:	2 945	(4.14%)
Coloureds:	8 507	(12.9%)
Asians:	666	(0.93%)

³ See the evidence of the Provincial Commissioner of Gauteng in the Leeuwkop Transcript Vol. 3 page 221.

into operation earlier because the Department was not ready to operate in accordance with the said provisions. Notwithstanding that, there were programmes in place that were designed to rehabilitate prisoners, but which were not effectively implemented.

The majority of prisoners have not undergone adequate rehabilitation, largely because the Department has no effective plan for rehabilitation and because it has failed to provide suitable facilities for rehabilitation in all the Management Areas.⁴

While the Department argues that there are rehabilitation facilities, such as workshops, in the prisons, they are only found in some prisons and can in fact accommodate only a limited number of prisoners. Even then, the Department could ensure that more prisoners are effectively employed in the workshops if it did not selectively allow some prisoners to participate while ignoring others. Some of the reasons prisoners give for being excluded from workshops are the limited number of prisoners who can be accommodated, and favouritism or racism.⁵ While the Commission believes that racism cannot be the main issue, it is a reality that needs to be addressed.

Overcrowding to a large extent affects the issue of rehabilitation. Besides overcrowding and racism the workshops have problems of mismanagement which are not helpful to prisoner rehabilitation.⁶

The Commission believes that in some instances facilities are not used for rehabilitation because the Department intends to become self-sufficient at the expense of rehabilitation. An example of this is the St Albans Prison broiler project, which could be used to rehabilitate a number of prisoners and give

⁴ Refer to Dr Rangaka's views expressed on SAFM on the morning of 14 August 2003, on the John Perlman show regarding the lack of rehabilitation in correctional facilities. Dr Rangaka is a psychiatrist, who at the time was doing work within the Department.

⁵ See the evidence of Mr de Bruin in the Pollsmoor Transcript, Vol. 5 pages 482 – 483.

⁶ For more details on workshop problems see the chapter on Prison Workshops and Stocktaking Systems.

them skills in managing such a project. However, because the Department uses the project to generate income it allows only prisoners who are already skilled to work on it, thus depriving others of learning skills they would benefit from on their release.⁷

The Department's White Paper places a lot of emphasis on the rehabilitation of offenders. That is what the Department would like to focus on in the future. However, if one considers the members' attitude towards the treatment of prisoners, as depicted in this report, it is clear that the rehabilitative goals will not be easily achieved by the Department.

Rehabilitation can best be achieved in an environment where the dignity of the individual is respected at all times. Such approach creates a conducive atmosphere for rehabilitation.

- **SPURIOUS INVESTIGATIONS**

In concluding, the Commission would like to mention that, like all investigating agencies, not all the matters that were referred to the Commission, were meaningful and successfully investigated by the Commission. In this regard, the Commission would like to mention what the Commission has elected to refer to as spurious complaints. This is not a complete list of the spurious investigations but these were the ones on which the Commission investigators spent a lot of time, but which led to no fruitful outcome. These will be dealt with hereinafter.

Whilst the various management areas had problems with corruption and maladministration, the Commission resources were sometimes wasted by prisoners who sent the Commission investigators on a "wild goose chase". As a result, a number of man-hours were wasted pursuing certain investigations,

⁷ For more details on the broiler project see the chapter on St Albans Management Area.

which never led to any conclusive evidence to prove any form of corruption. Some of the matters could not be led at the hearings for lack of evidence and in some of them, it became apparent that the prisoners were merely trying to implicate warders who had done absolutely nothing wrong.

The actions of some of these prisoners have been repeated with some of the agents who are investigating corruption within the Public Service. It is therefore appropriate for the Commission to make brief reference to some of these investigations so that other agents may be wary or cautious of whatever leads they might receive from some of these prisoners:

1. Whilst in Pietermaritzburg, the Commission investigated the issue of a prisoner, Mr Bhekisisa Sibusiso Sibisi, who alleged that he had been taken out of the prison by members of Correctional Services to commit murders, bank robberies and political violence within the KwaZulu-Natal Province.

The investigators spent some time checking the prison records to see whether he had been removed at any stage from the prison. The investigators also checked the various alleged crime scenes and the local police stations to see whether the evidence he had given to the investigators, could be corroborated by any other evidence. In the end, even though there was a suspicion that some allegations might have been truthful, it was decided that it would be difficult to prove that such acts were committed by the members of the Department. Accordingly, this matter was not pursued by the Commission.⁸

2. Mr Salvino Ricardo Hendricks (aka "Queenie"), a prisoner, approached the investigators whilst the Commission was in the Western Cape. He made a number of allegations, relating to crimes that had been committed by members of the Department. These crimes involved money laundering, a bail scheme and illegal financial activities, which

⁸ See Pietermaritzburg Exhibit 'Y'.

had supposedly been committed by members of the Department. These investigations were pursued by the investigators at length, over a number of days, and once again there was no evidence to corroborate the allegations, which the prisoner had made against members of the Department. The Commission therefore did not pursue the matter any further.

In 2003, whilst the Commission was sitting in Johannesburg, it received a communication from the Office of the Public Protector inquiring about this particular prisoner. It transpired that he had approached the Office of the Public Protector to make the same allegations and was also seeking to be placed on a witness protection programme. After advising the Office of the Public Protector of the Commission's experience with this particular witness, they indicated that they may not pursue such an investigation.

3. At the Bloemfontein, Leeuwkop and Ncome Management Areas, the Commission investigators were advised by different prisoners that there were a number of prisoners who had been fatally assaulted by members of the Department. The death of the aforesaid prisoners had not been reported to their next-of-kin. As a result, they had been buried within the precinct of the prisons or the Management Areas. This led the Commission investigators to look for the graves where the prisoners had indicated that the deceased prisoners had been buried. However, after much investigation and/or digging, no remains were discovered.

At the Leeuwkop Management Area, there was even an allegation that some of the prisoners were killed and dropped into the water well.

In the absence of any remains being found, the Commission did not pursue these investigations further.

4. At the Durban-Westville and Pietermaritzburg Management Areas there were also allegations about the fact that the prisoners were being used by warders to repair stolen motor vehicles. Sometimes they are also used to change chassis numbers on stolen motor vehicles. The Commission tried to pursue this evidence without much success.

These particular allegations were pursued in more detail at the Ncome Management Area. However, it transpired that the main person who was allegedly responsible for the changing of chassis numbers on stolen motor vehicles, had been released from prison. He was now a civilian and he refused outright to co-operate. He denied any involvement in such actions.

Whilst there were indications of the fact that there was a ring of truth in the version given to the Commission by the prisoners at Ncome, it was clear that even if the evidence were to be led, it would not be sustainable in a court of law, especially because it would have been a criminal matter and the proof would have had to be beyond reasonable doubt.

Once again, this investigation had to be abandoned by the Commission after pursuing it for a number of days.

The Director of Special Operations (the Scorpions), or the Special Investigation Unit, was also advised of bodies, which were buried at the Bloemfontein Management Area. This information was conveyed to some members of the Commission and the Scorpions also sought to carry out the investigations in that regard. The outcome of those investigations is not known to the Commission.

The Commission will proceed to deal with the evidence from each of the Management Areas, in the order in which they are set out in the Proclamation establishing this Commission.

CHAPTER 36

PIETERMARITZBURG **MANAGEMENT AREA**

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CHAPTER 36

PIETERMARITZBURG MANAGEMENT AREA

1. INTRODUCTION

The Pietermaritzburg Management Area consists of two (2) prisons, Medium A and Medium B. Medium A is sometimes referred to by witnesses as the “New Prison”.

The Female Prison, Medium B, is a building on its own. It is about three (3) kilometres away from the Main Prison (New Prison). The Female Prison receives its cooked meals from the Main Prison.

2. POPULATION

Evidence put before the Commission showed that there were 2 984 prisoners at Pietermaritzburg Prison as at 19 March 2002. The approved accommodation for the prison is 1 399, which means the prison was overpopulated by 113%.

According to the official records, the average population of the two prisons during March 2002 was:

Medium A:	2 952 (224.96% full)
Medium B:	53 (42,40% full)

The records show that Medium A stood at an average of 230% during the period from February 2002 to June 2003, while Medium B was on average about 68% full during the same period, but on average 115% during the first three months of 2003. On 1 April 2002 there were four (4) babies in the Female Prison.

The Commission heard evidence that unit management requires that only two (2) to three (3) inmates be held in a cell, but this is not achievable and in some cases five (5) to ten (10) prisoners are held in one (1) cell due to the unavailability of space. The communal cells designed to accommodate nineteen (19) prisoners sometimes hold fifty (50).

3. STAFFING

The staff complement of the Management Area is 1 367 and is made up as follows:

Pietermaritzburg Area Commissioner:	933 (74 vacant)
Pietermaritzburg Medium A:	409 (16 vacant)
Pietermaritzburg Medium B:	25 (14 vacant)

The Commission heard that there is a great shortage of personnel due to the fact that the prison was restructured so that the operation of the buildings could be carried out by “control panels”. However, personnel to operate the panels have not been provided for. In addition, a significant number of personnel are used to guard prisoners outside the prison during court or hospital visits. It emerged during the hearings that the fully equipped prison hospital was not being used and this placed work pressure on the staff because inmates had to be escorted to provincial hospitals outside the prison premises.

The office of the Provincial Commissioner of KwaZulu-Natal has been located within the precinct of the Pietermaritzburg Management Area since May/June 1999 and the nearest police station that services the Pietermaritzburg Management Area is the Prestbury Police Station.

There has been a high turnover of Provincial Commissioners for KwaZulu-Natal and this to some extent is an indication of the problem in the

Management Area and the Province as a whole. In the circumstances it is appropriate to consider their terms of office, which are as follows:

Name	Term of Office	Previous Place of Appointment
Mr J. Hills	1994 – 31-03-1995	Head Office: Pretoria
Mr P.A. Zandberg	1995-04-01 – 23-06-1995	Gauteng
Mr J.W. Harding	26-06-1995 – 31-03-1997	Durban
Mr M.T. Ntoni	01-04-1997 – 28-02-1999	Director: Regional Office KZN
Mr S.E. Korabie	01-03-1999 – 30-04-1999	Head Office: Pretoria
Mrs.T.S. Kgosidintsi	01-01-1999 – 30-04-1999	Head Office: Pretoria
Mr G .J. Fourie	01-06-1999 – 30-07-1999	Head Office: Pretoria
Mr C.T. Jordaan	10-08-1999 – 30-06-2000	Head Office: Pretoria
Mr P. O’C Gillingham	01-08-2000 – 30-10-2003	Head Office: Pretoria
Mr F. Engelbrecht (Acting)	01-11-2003 – 31-01-2004	DCS – KZN
Mr V.P. Petersen	01-02-2004 – present	External appointment

4. DIVISION BETWEEN MANAGERS

Evidence shows that management at Pietermaritzburg was gravely divided into two (2) camps, to the extent that one group of managers sought to undermine the other group. The situation was further exacerbated by the fact that a key role player, Mr Russell Ngubo, was feared by almost all the managers except for the few who formed part of his clique.¹ Mr Ngubo was a senior member of Popcru and of the Pietermaritzburg Prison management. In

¹ At the time of writing Mr Ngubo was imprisoned and sentenced on charges of murdering Inkatha Freedom Party (IFP) leader Nash Protus Ngubane on 13 September 1995. See Pietermaritzburg High Court case number CC 56/03.

February 1998 he was Head of the Pietermaritzburg Prison² and at the time of the hearings he was Head of Human Resource Management. His clique was referred to by some witnesses as the “A Team”. Its members, at the time of the hearings, included the Supervisor in the Personnel Office, Mr T.O. Memela; Head of Personnel Mr N.C. Ndumo; Section Head of Personnel Mr D.K. Mbanjwa; Ms Mlungisi Dlamini (Mr Ngubo’s fiancée at the time); the Section Head of the Institutional Committee Miss B. Mahaye, and others.

Those in the “B Team” included the Deputy Chairperson of the Institutional Committee, Mr F.A. Mbanjwa; Assistant Head of Prison Mr V.J. Ndlovu; Assistant Head of the Institutional Committee Mr M.E. “Elvis” Nene; former Area Manager Miss F.G. Nkosi; Head of Security Mr N.S. “Snotty” Mkhize, and Pietermaritzburg Area Manager Mr D.J. Makhaye (who subsequently became the Area Manager in Kokstad).

Other witnesses referred to the “A Team” and “B” Team as the Makhulu (“Big One”) and Mancane (“Small One”) camps, respectively. This reference was indicated that the “A Team” was the dominant, more powerful camp.

Mr Alfred Mbanjwa describes the impact of the division in his affidavit to the Commission:

“The people who are part of the A-group or who are deemed to be his [Mr Ngubo’s] followers have not done so voluntarily. They have been forced into that position because they recognise that if they do not dance to his particular tune they will get nowhere in the prison. A prime example of this is me. I have never received any promotions, increments or any advancements because of the fact that I am deemed to be his opposition. Mr Ngubo is known to make life very difficult for those people who do not ascribe to his particular ideology or who do not support him.”³

² See Pietermaritzburg Exhibit ‘X’.

³ As per Pietermaritzburg Exhibit ‘F’.

This division within management was described as part of the reason for the animosity and conflict that existed between members of management. In addition, the Commission heard that it was the “B Team” that did the majority of the work required to run the prison. By the time the Commission held its hearings on Pietermaritzburg, a number of the members of the “A Team” had been arrested on a number of charges and were in custody awaiting trial.

It was clear to the Commission that managing the Pietermaritzburg Prison is a difficult task. This is also reflected in the staff turnover. The current Head of Prison seems to be the one who has stayed the longest after 1994.

The terms of office of the Heads of the Pietermaritzburg Prison are as follows:

Name	Term of Office	Previous Place of Appointment
Mr P.G. Roets	1994 – 31-03-1997	Barberton
Mr C.P. van der Merwe	01-04-1997 – 31-05-1997	Pietermaritzburg Prison
Mr D.S. Mthethwa	01-06-1997 – 31-01-1998	Pietermaritzburg Prison
Mr B.R. Ngubo	01-02-1998 – 02-03-1999	Pietermaritzburg Prison
Mr V.J. Ndlovu	03-03-1999 – 04-04-2002	Pietermaritzburg Prison
Mr B.B. Mchunu	05-04-2000 – present	Pietermaritzburg Prison

According to the initial evidence, Mr Ngubo was appointed as Head of Pietermaritzburg Prison on 1 February 1998 after acting as Head of Prison in Newcastle. This information was supplied on 19 October 2004 by the Regional Commissioner, Mr J. C. Taljaard.⁴

However, according to the Department’s latest letter from the Regional Co-ordinator Human Resource Management and Support, Mr Mzileni, dated 8

⁴ See Pietermaritzburg Exhibit ‘X’.

November 2005, Mr Ngubo was appointed as Head of Prison on 12 January 1998.⁵

Mr Mzileni sent another letter dated 8 November 2005, in which he stated that:

“According to the information available at the Personnel Section Mr Ngubo was appointed as Head of Pietermaritzburg Correctional Centre on 1999-07-01 to 2000-01-01.”⁶ (Own emphasis).

Therefore three (3) separate dates were submitted to the Commission as the date of his appointment, were submitted to the Commission. This once again reflects on the problem with managing information in the Department, which was referred to earlier in this report.⁷

The Terms of Office for the Area Managers are as follows :

	Name	Term of Office
1	Ms F.G. Nkosi	August 1997 to June 1999
2	Mr D. J. Makhaye	July 1999 to June 2002
3	Mr J.M. Mkhabela	June 2002 to May 2003
4	Mr J.E. Joseph	January 2004 to February 2005
5	Mr M.A. Mdletye	May 2005 to date

⁵ See Pietermaritzburg Exhibit ‘X1’.

⁶ See Pietermaritzburg Exhibit ‘X2’.

⁷ See the section dealing with Information Management in Chapter One of this report.

A report compiled by Brite Future Consultants, a team of psychologists, and presented to the Department of Correctional Services in October 1998, highlighted a number of problems relating to management issues, and particularly the division within management.

It states that at the time there was a “high level of tension and dissatisfaction, frustration, anger and mistrust” at the prison, and that there was a general perception by members that management lack the essential leadership qualities required to steer the organisation in the right direction. Examples cited were:

- (a) Political allegiance is the major criterion for appointing personnel to management positions.
- (b) Management does not devolve power to allow people who carry out the day-to-day duties of the Department to have a say in decisions that they will have to carry out.
- (c) No training and development opportunities exist to acquaint staff with the rules and regulations of the Department.
- (d) Leadership fails to implement decisions.
- (e) Recruitment procedures and advertisements for posts apply only to people who are targeted for particular jobs.
- (f) Information is not widely disseminated and as a result members have to rely on hearsay.
- (g) Management and staff lack discipline.
- (h) A general breakdown of organisational norms and standards.⁸

Mrs Thandiwe Kgotsidintsi, who has held several senior positions within the Department, told the Commission that the then Provincial Commissioner, Mr Maxwell Ntoni, attributed many of the problems in the Department of Correctional Services in KwaZulu-Natal to a political division between members aligned to the Inkatha Freedom Party and others to the African National Congress. This allegation was made at a meeting with Mrs

⁸ See Pietermaritzburg hearings, Exhibit ‘A’ at pages 7 – 116.

Kgotsidintsi and the then National Commissioner, Mr Khulekani Sithole, who raised a number of concerns with Mr Ntoni about the way Correctional Services in the province had been operating.⁹ These included:

- (i) The withdrawal by Mr Ntoni of a charge of firearm theft against Mr Ngubo.
- (ii) Allowing Mr N.C. Ndumo to use a Department of Correctional Services minibus to open an ANC branch rally. The vehicle was subsequently “hijacked”.
- (iii) Ncome Prison continuing to be unruly and ungovernable, with frequent escapes and the daily theft of prison cattle.
- (iv) The Area Manager of Westville Prison, Mr I.S. Zulu, being bailed out by Mr Ntoni after allegedly being caught by the police with a boot full of dagga.
- (v) Mr Ngubo, Mr Ndumo and Mr Memela running Correctional Services in KwaZulu-Natal and causing chaos.
- (iv) Mr Ntoni allowing the media too much access to Mr P.M. Ntuli.
- (vii) Mr Ntoni’s defiance in several cases where Mr Sithole had instructed him to take specific actions.

Mrs Kgotsidintsi said that the meeting ended abruptly because the National Commissioner and the Provincial Commissioner were so angry that they began to exchange blows.¹⁰

5. OPERATION QUIET STORM

Operation Quiet Storm was a plan of action conceived by members of Popcru to forcibly transform and restructure the Department of Correctional Services. Sit-ins were organised and unwanted personnel were systematically targeted and hounded out of office either by intimidation or violence. In some cases the unwanted individuals were simply removed by force from their offices and never again allowed to enter the prison premises. Operation Quiet Storm was

⁹ See Pietermaritzburg transcript Volume 13 page 1 169.

¹⁰ See Pietermaritzburg Volume 13 at page 1 172.

vigorously implemented in Pietermaritzburg, which is historically a stronghold of Popcru, and other KwaZulu-Natal prisons.¹¹ However, the Commission heard that it was the intention of Popcru to launch the plan in KwaZulu-Natal initially, and then roll it out nationally.¹²

Mr Philemon Mphikiseni Ntuli, the Provincial Liaison Officer in KwaZulu-Natal and an office bearer of Popcru, testified that the Department of Correctional Services in KwaZulu-Natal was effectively “hijacked” following a meeting at the Pietermaritzburg offices of Popcru. The meeting was attended by Popcru officials, paid up members and sympathisers from various regions around KwaZulu-Natal as well as a representative from the national office of Popcru.¹³

Discussions at the meeting were led by Mr Ngubo, Mr Nhlanhla Ndumo and Mr Nhlanhla Zondi¹⁴ and a plan, which was code-named Operation Quiet Storm, was formulated. Mr Ntuli’s evidence is dealt with in more detail in the Chapter dealing with the Historical Background.

Besides Mr Ntuli’s evidence the Commission received other affidavits, minutes of meetings and press cuttings that supported the evidence about Operation Quiet Storm.¹⁵

Popcru had embarked on Operation Quiet Storm to make sure that before the end of November 1996 they would successfully place members in strategic positions in six (6) prisons.¹⁶

¹¹ See Historical Background and Trade Unionism Chapters for more details.

¹² Evidence heard by the Commission pointed to Operation Quiet Storm being rolled out nationally, or at least in the Eastern Cape, Free State and Gauteng.

¹³ Mr Mataka, who was then the Secretary General of Popcru, tried to deny that they attended such a meeting, for obvious reasons. For more details on the union’s role in this regard refer to the chapter on Historical Background.

¹⁴ Messrs Ndumo and Ngubo appeared before the Commission and also tried to deny the existence of Operation Quiet Storm.

¹⁵ For more details refer to Chapter on Historical Background.

¹⁶ As per Pietermaritzburg Exhibit ‘WWWW8’.

Several newspaper articles also support the evidence about Operation Quiet Storm. Mr Ntuli was quoted as Popcru's provincial spokesman in the *Natal Witness* of 17 October 1996 as saying that the siege of the Ncome Prison by Popcru members was part of a provincial campaign to depose the prison commanders and transform the prisons. The article continues:

“What started out as a gradual process of transforming the prison service early this year turned into a popular revolt by POPCRU. The union confirmed yesterday that prison commanders and their deputies at the Stanger, Empangeni, Sevontein, Westville and Ncome correctional facilities have been removed from their posts over the past month.

Ntuli blamed the revolt on ‘the fact that nothing has been done to visibly change the present racial composition of management since the beginning of the transformation process.’

‘We saw no other viable strategy to transform the prisons other than by force.

‘We therefore opted to elect black staff into management positions to run the prisons,’ he said.” (Own emphasis)

Evidence with regard to meetings held at Newcastle Prison and Port Shepstone Prison revealed that Mr Ngubo, Mr Ndumo and Mr J.B.T. Chaka¹⁷ were not hesitant to involve themselves in the affairs of other areas on behalf of the Department of Correctional Services.

A senior correctional officer and the Deputy National Chairman of the Public Servants Association, Mr Zeblon Mthethwa, told the Commission that the three (3) men visited the Newcastle Prison on 11 September 1998 to discuss a complaint about a member who had been transferred from Ncome

¹⁷ Mr J.B.T. Chaka was in charge of Labour Relations in the Province and he is still employed as such.

Management Area to Newcastle. The three (3) arrived in a minibus that had been hired by the Durban Management Area, but had been used the previous day during a visit by Popcru leadership to the Newcastle Prison.

The Area Manager of the Port Shepstone Area, Mr Thandanani William Siswana, said that Mr Ngubo, Mr Ndumo and Mr Chaka visited him in Port Shepstone on 2 September 1998 to discuss the equity policy according to which seventy per cent (70%) of all posts had to be given to blacks while thirty per cent (30%) had to go to whites. There was also discussion about a Mrs Kruger, the wife of the former Head of the Prison, who worked for the Department of Correctional Services but was still staying in the house allocated to the Head of the Prison with her husband, who had taken a severance package. Mr Siswana said that he was unable to evict Mrs Kruger without finding alternative accommodation for her. However, he testified that he was told that he was just keeping her on because he is “afraid of whites”. Mr Siswana said that when the three men left he did not have as much control over his junior warders because he had been embarrassed in front of them.

Whilst many Commanders, managers and senior officials, who were hounded out of their offices as a result of Operation Quiet Storm, did not testify before the Commission either because of fear or because they might have wanted to put their traumatic experiences behind them, the Commission is of the view that the experiences of Mrs Kgosidintsi and Mr E.P.Claasen, best illustrate the nature of the operation and the traumatic effect it had on its victims.¹⁸

5.1 Key Role Players

5.1.1 Mr Russell Ngubo

A senior official in the Department of Correctional Services in KwaZulu-Natal, Mr Russell Ngubo, has been one of the key role players in activities related to Correctional Services in the Pietermaritzburg area, and even further afield in

¹⁸ Ms Kgosinditsi and Mr Claasen’s evidence will be dealt with hereinafter.

KwaZulu-Natal. The important role that he played in Operation Quiet Storm and in the powerful “A Team” of Correctional Services officials has already been mentioned.

In October 1997, Mr Ngubo was appointed as Acting Commander at Newcastle Prison. According to documents in the Commission’s possession, Mr Ngubo immediately removed a number of non-Popcru members from their posts.¹⁹

During a significant portion of his time as a senior Correctional Services official, Mr Ngubo was also a local government councillor for the ANC in Impendle.

Late in 1997 Mr Ngubo was appointed as the Head of Pietermaritzburg’s New Prison and by 2001 he had been appointed as Head of Human Resources at the Prison.

Mr Ngubo has featured prominently in the media over the years. He was reported to have been out on bail for his alleged involvement in the murder in 1996 of four members of a family at the time of his appointment as Head of the Pietermaritzburg Prison in January 1998. He was also linked to a shooting incident outside a Pietermaritzburg court in 1996 when seven (7) members of the IFP were on trial for the murder of Mr Ngubo’s brother and four (4)

¹⁹ Minutes of meeting between Mr T.D. Ntombela (Member of the KwaZulu-Natal Legislature), Mrs N.C. Mkhize and 21 prison warders at Newcastle Prison on 9 January 1998. The minutes also state that from 10 October 1997, Mr Ngubo used a state vehicle despite the fact that he has no driver’s licence. “He travelled between Newcastle and Pietermaritzburg on a daily basis. A state vehicle, KZN 90301, was drawn by the Area Manager, Mr Dladla, and was later found on the Durban beachfront. From October 1997, Mr Ngubo and his assistant were booked at the Amajuba Lodge for more than two months. They changed their official booking from “sharing” to two double rooms to accommodate their girlfriends. The cost to the state for their accommodation and meals has been R28 000. There was an available house next to the prison where they could have stayed and alternatively Waterval Prison has guest accommodation. In addition to this, Mr Ngubo was claiming R39 a day SNT [sic].”

policemen.²⁰ In 1999 charges relating to the attempted murder of two (2) members of the United Democratic Movement (UDM) were withdrawn against Mr Ngubo.²¹

In early 2002, Mr Ngubo, Mr Ndumo and Mr Memela were arrested and charged with the murder of Impendle Induna Ernest Nzimande (who had defected from the ANC to the IFP) and the attempted murder of three (3) other men, including Nzimande's bodyguard in September 1998. The three (3) men, and two (2) others, were acquitted on the charges in December 2002.²²

The State alleged in the trial that a minibus driven by Mr Nzimande's attackers had been leased to the KwaZulu-Natal government garage and assigned to Westville Prison and then to Pietermaritzburg New Prison. The vehicle was found overturned and set alight not far from the murder scene. Mr Ndumo later reported that he had been hijacked while driving the vehicle. A senior official in the Department of Correctional Services was reported in the *Natal Witness* as saying that the minibus was regularly used by top officials at New Prison to commit criminal offences.²³

In November 2000, the Commission heard, Mr Ngubo and the Area Manager D.J. Makhaye were involved in a physical fight. The Commission heard that Mr Ngubo attacked Mr Makhaye after the Area Manager refused to sign Mr Ngubo's leave form. No disciplinary action was taken against Mr Ngubo but when the Provincial Commissioner recommended the two members and others be transferred from the Management Area, Mr Ngubo and the others lodged grievances. The transfers were never executed.

²⁰ *KwaZulu-Natal Briefing*, No 15 June/July 1999. The publication states that in one case charges were withdrawn after two key witnesses were murdered by unknown gunmen, while in another case no charges were brought.

²¹ *Natal Witness* 19 May 1999 "Charges against Ngubo dropped".

²² *The Mercury* 13 December 2002 "Top prison officials acquitted".

²³ *Natal Witness* 5 April 2002.

An editorial in the *Natal Witness* in 2002 questioned how Mr Ngubo had “led such a charmed life in public office, not only hanging onto his job but being rewarded with promotions time after time”.²⁴

“In the first place, how can any civil servant get away with insubordination towards their minister as Ngubo showed Correctional Services Minister Sipo Mzimela when he wanted to close the New Prison in 1998? His exact words were: ‘This old man is about to die. His days are numbered. He is mad and he is too old. He must go to hell.’

In the second place, how can he admit to having had an argy-bargy with a superior and not at least be suspended pending a disciplinary hearing? After the incident [of assault] with his boss, KwaZulu-Natal prisons area manager Dumisani Makhaye, Ngubo called him a ‘cry-baby’ and was reported as saying: ‘Weak men cannot keep discipline. Besides, Makhaye hardly suffered at all. It was hardly an assault. If I had attacked Makhaye, do you think he would still be here?’

Finally, how could he have held office as a councillor simultaneously with his job as a deputy director in the Department of Correctional Services, in contravention of regulations?’²⁵

The Commission also heard testimony from members who said that State firearms had been removed from the Department’s premises without having been signed for and that on one occasion police found a prison gun at Mr Ngubo’s home. No departmental action was apparently taken against Mr Ngubo in this regard. In addition, State firearms were not handed in despite instructions to that effect.

Ms Melanie Valayathum, who worked as a personnel clerk in 1997, told the Commission that her supervisor, Mr Majola, told her to indicate that the days

²⁴ *Natal Witness* 6 April 2002 “A charmed public life” by Yves Vanderhaeghen.

²⁵ *Ibid* 24.

on which Mr Ngubo was not at work while he was facing criminal charges, should be marked as leave without pay. She testified that after the charges were dropped in December 1997, Mr Ngubo came to her office and said that he wanted his leave payment. When she indicated that she had been carrying out instructions he became upset, refused to leave her office and screamed at her. When she refused to call her supervisor and said that he should go to the supervisor himself, Mr Ngubo pulled her out of her chair. Ms Valayathum provided a statement for a disciplinary inquiry, but heard nothing further about the investigation. She was too scared to lay criminal charges with the police.

Several witnesses testified before the Commission about how the Head of Prison suspended the garden span while an investigation was underway into the cause of several escapes late in 2000. However, Mr Ngubo took fourteen (14) prisoners to the garden on 6 February 2001. When the Area Manager and Head of Prison tried to serve a letter of suspension on Mr Ngubo the same day he swore at them and again took prisoners to the garden the following day. The matter was subsequently reported to the police.²⁶ A disciplinary hearing into the incident was never finalised.

The Area Manager issued a written instruction on 9 February 2001 refusing access to the prison to Mr Ngubo. However, two (2) days later Mr Ngubo defied the instruction and took one hundred and four (104) prisoners from the prison to the soccer field.

Mr Ngubo then attempted to gain access to the prison on 17 February 2001, an incident which caused the South African Police Service to intervene.

The Commission also heard evidence about improper procedures being followed with regard to access control at the prison gates. Mr Funukubusa Mbanjwa said that when people came to the prison to visit Mr Ngubo the

²⁶ A criminal case (Prestbury Police Station CAS 33/02/2001) was opened against Mr Ngubo for contravening Section 48A(a) of the Correctional Services Act No.8 of 1959 for unauthorised removal of prisoners from prison without lawful authority. No arrest had been made at the time of writing this report.

normal procedures were not followed. On several occasions Mr Ngubo reportedly tried to gain access to the prison area in his private vehicle without permission.

Several witnesses testified that a number of Mr Ngubo's relatives were employed at the prison. Many of these were employed at the time of Operation Quiet Storm. Several members were given accommodation at the staff quarters as a result of being close to Mr Ngubo. In addition, Mr Ngubo also used several people who had been employed by the Department of Correctional Services as his bodyguards.²⁷

5.1.2 Mr Thamsanqa Obedient Memela

At the time of writing Mr Thamsanqa (Thami) Memela was sentenced together with Mr Ngubo, for the murder of Impendle IFP leader Nash Protus Ngubane.

Mr Memela submitted to the Department two (2) matric certificates, one in 1997 and the other in 2000. The Commission heard evidence that neither matric certificate of Mr Memela was issued by a recognised Examination Board and they were therefore invalid. The Commission recommended in its Fourth Interim Report that Mr Memela be suspended immediately pending the outcome of the disciplinary inquiry against him, be charged with two counts of fraud in terms of the Department's Disciplinary Code and be charged criminally with two counts of fraud and that the records of the Commission's proceedings in respect of Mr Memela be sent to the Director of Public Prosecutions of KwaZulu-Natal to facilitate criminal proceedings against him.

Mr Memela was dismissed from the Department of Correctional Services on 5 August 2004. At the time of writing he was on suspension pending the finalisation of his appeal.

²⁷ The Assistant Head of Prisons at Pietermaritzburg Prison, Mr Vusumuzi Jeffrey Ndlovu, told the Commission that one of Mr Ngubo's bodyguards who had stayed with Mr Ngubo in his Pietermaritzburg Prison accommodation was subsequently arrested for murder along with Mr Ngubo.

According to the evidence, Mr Memela was one of the most trusted lieutenants of Mr Ngubo.

5.1.3 Mr Nhanhla Charles Ndumo

According to evidence, Mr Nhlanhla Charles Ndumo was appointed as Head of Prison for Pietermaritzburg, but changed his appointment to that of Head of Human Resources in the province. This followed a discussion within Popcru ranks to get him to be appointed as Head of Human Resources as part of a concerted effort to ensure that he be in charge of recruitment and human resource matters to achieve the aims of the union. Mr Ndumo was initially responsible for the recruitment of entry-level staff, but a further delegation of power allowed him to appoint people up to senior correctional officer level.

Mr Ndumo's appointment never followed due process in that the position had not been advertised, there had been no interviews and the appointment had not been sanctioned by Head Office. He still occupies the same position.

Mr Ndumo was regarded by many as Mr Ngubo's right hand man. He is cited in the *Natal Witness* of 5 March 1999 as Provincial Human Resources Manager for the Department of Correctional Services. This is in accordance with the allocation of portfolios by Popcru as testified to by Mr Ntuli. The affidavit prepared by Mr Ntuli and handed to the Commission²⁸ states that Mr Ndumo was chosen to take over personnel and "deal with such sensitive matters as appointments, recruitment and promotions". It was discovered subsequently, however, that Mr Ndumo did not have the necessary qualifications or experience for the position.

²⁸ Durban Exhibit 'QQ'.

5.2 Mrs Thandiwe Kgosidintsi

Mrs Thandiwe Kgosidintsi joined the Department of Correctional Services as Chief Deputy Commissioner in charge of Resource Management based at the National Office with effect from 1 January 1998. The Minister of Correctional Services at the time was Dr Sipo Mzimela and the National Commissioner, Dr Khulekani Sithole. Prior to joining the Department Mrs Kgosidintsi worked as Chief Director Corporate Services in the Department of Land Affairs, and had previously worked for the Constitutional Assembly and the Free State government.

Mrs Kgosidintsi had battles with the Minister and Commissioner relating to which government department should build and pay for prisons and award contracts for the building of prisons and the installation of security systems in prisons. The Minister and Commissioner wanted the Department of Correctional Services to acquire the power rather than the Department of Public Works. Mrs Kgosidintsi disagreed and as a result she fell out of favour.

While in Pretoria Mrs Kgosidintsi compiled a report detailing her concerns with the Department of Correctional Services and sent it to the Office of then Deputy President, Mr Thabo Mbeki. She said that it became obvious within a couple of weeks that Dr Sithole knew she had submitted the report, which was also published in the *Mail & Guardian* under the headline "Jail boss in soccer scam".

Mrs Kgosidintsi told the Commission that the report was concerned with a crisis of leadership in the Department. She said there was no clear political leadership from the Minister and as a result the Commissioner had too much power. She stated that people were hired by the Department but played soccer for a club owned by Commissioner Sithole; people were transferred at whim; and that there was a culture of absenteeism among top management.

As a result she was transferred as Provincial Commissioner to KwaZulu-Natal, where she was humiliated because she was not from the province, because she was a woman and because the people who controlled the province refused to accept her. She was also charged departmentally for submitting the report to the Office of the Deputy President.

Mrs Kgosidintsi told the Commission that the former Provincial Commissioner, Mr Ntoni, did not meet her on the first day of her appointment on 1 December 1998 and no one seemed to be assigned to welcome her. She described her reception as thoroughly hostile. Within a few days of her appointment she met with some members of Popcru and was told that she was not welcome and should go back to Pretoria.

As a result, Mrs Kgosidintsi was put on sick leave for two weeks. On her return she met with management and was again told that she was not wanted in KwaZulu-Natal. Members of the leadership of the ANC in KwaZulu-Natal also met with her and said that she would never be able to manage the province and that she should return to Pretoria. Mrs Kgosidintsi said she found the meeting aggressive, nasty and not very friendly or constructive.

Mrs Kgosidintsi told the Commission that she attended a meeting of senior staff from the Department in KwaZulu-Natal in January 1999 where the discussion was concerned with her appointment. The following day she was in her office when she was confronted by about thirty two (32) people who verbally abused her, spat on her and said that she should go back to Pretoria. She said some of the people were wearing Popcru T-Shirts or insignia. She was pushed out of her chair, made to kneel down and told to be respectful. One person urinated on the carpet in her office and she saw subsequently that someone defaecated on the carpet in the office of Mr M.G. Buthelezi. Some of the people were armed but they did not use their weapons. Ms Kgosidintsi said the hostage situation lasted about three to four hours. As she was leaving the Correctional Services building, one member of the Department shouted through the window that if she did not listen her daughter

Mbali would be raped. Ms Kgosidintsi reported the incident to the police, but was not aware of any criminal prosecution. In addition, the Department did not institute an internal disciplinary hearing.

However, in an application by the Minister of Correctional Services and the Commissioner of Correctional Services, an interdict was sought against Mr Ngubo and thirty three (33) other persons restraining them from assaulting and harassing Mrs Kgosidintsi and other people in the Department. The Commission heard that the interdict had been granted in the first instance on the basis that a *rule nisi* was granted with a return date, but on the return date the Judge ruled that only the Labour Court had jurisdiction in the matter.

After Mrs Kgosidintsi was attacked she was called by Ms Thuthukile Bhengu²⁹ and asked to attend a meeting on a Sunday evening at the guesthouse where Ms Bhengu was staying. Mr Ngubo and Mr Ndumo were also there. Mrs Kgosidintsi said that she was told in no uncertain terms that she was not wanted in KwaZulu-Natal and that she should not try to live on the premises of Correctional Services because her life would be at stake. She was advised to either go back to Pretoria or take six (6) months' stress leave.

The following day when Mrs Kgosidintsi returned to her office she found two members sitting on her desk. She put down her bag and rushed to the boardroom because she was late for the management meeting. There she found Ms Bhengu chairing the meeting and saying that she was the Acting Provincial Commissioner after being appointed by Commissioner Sithole.³⁰ However, Mrs Kgosidintsi continued to return to the office.

On 9 February 1999, the Minister attended a meeting in Newcastle where the management board and union leaders discussed their grievances. The following day Mrs Kgosidintsi held a staff meeting to report back and to

²⁹ Ms Thuthukile Bhengu was in charge of Human Resource Management in the KwaZulu-Natal provincial office of the Department of Correctional Services at the time that Ms Kgosidintsi was appointed as the KwaZulu-Natal Provincial Commissioner.

³⁰ Ms Bhengu was murdered by two colleagues in 2001.

strategise. However, she told the Commission that the Popcru group that had been at Newcastle the previous day arrived and questioned why she was not taking them seriously when they told her repeatedly to leave. They then frog-marched her out of the room. The Commissioner decided that she should stay at home for a week, and then instructed her to work from an office in Durban. However, Popcru members were there when she arrived. After this incident Mrs Kgosidintsi did not return to work and Mr Steven Korabie was subsequently posted to KwaZulu-Natal as Acting Provincial Commissioner.³¹

In the meantime, Commissioner Sithole had announced an internal investigation into the conduct of Mrs Kgosidintsi. The alleged transgressions related to the report sent to the Deputy President as well as several others. Dr Sithole also said in a media statement responding to an article in the *Mail & Guardian* that he was going to give Mrs Kgosidintsi two (2) days to persuade him that she ought not to be suspended. Despite his statements, she heard nothing from him in this regard.

She did, however, face a disciplinary inquiry in March 1999 and was given a written warning for two of the transgressions, inter alia, bringing the Department into disrepute by writing the report that was sent to the Deputy President. Mrs Kgosidintsi told the Commission that the recorded part of the inquiry was carried out professionally, but off the record the prosecutor reprimanded and abused her. She said that she was questioned why she asked whites to defend her and it was said to her that she was a loser and a failure.

³¹ In a report in *KwaZulu-Natal Briefing*, No. 15 June/July 1999, Mrs Kgosidintsi is quoted as saying that there was no clear demarcation between management and Popcru and that Popcru's national leadership had tried and failed to bring its provincial branch to order. "In March, after one of the incidents involving Kgosidintsi, the national leadership of Popcru suspended the entire provincial leadership and attempted to form an interim structure. But gun-wielding union members are reported to have disrupted a meeting demanding the reinstatement of their suspended officials."

Mrs Kgosidintsi was subsequently informed that the National Commissioner could no longer work with her because he did not trust her. She resigned and took a package upon leaving the Department.

6. INTIMIDATION

The Commission heard evidence from a number of people who claimed that intimidation played a major role in making the Pietermaritzburg Prison ungovernable. Attacks and incidents that were mentioned included:

- (a) Shots fired through the windows of Mr I.N. Zondi's house.
- (b) Mr N.S. Mkhize's house shot at and windows damaged.
- (c) Mr D.K. Mbanjwa, a senior member in the prison, shot by unknown persons in Pietermaritzburg.
- (d) Mr S.L. Jacobs shot dead within the prison premises. He was off duty and at home at the time.
- (e) Mr S. Mkhize killed next to his home in Edendale, Pietermaritzburg.
- (f) Mr L.W. Ngcobo killed mysteriously at the prison gate in an incident that some claimed was suicide.
- (g) Ms Thuthukile Bhengu assassinated by colleagues in the prison premises.³²
- (h) Mr T.R. Dlamini killed after leaving work.
- (i) Mr M.S. Lerumo, who was an initiator in many disciplinary hearings, received a threatening letter.
- (j) Mr Eugene Petrus Claasen assaulted by five members after he found them consuming liquor in the prison premises while they were on duty in December 1997. He was medically boarded in November 1999.

³² Two Pietermaritzburg Prison warders were sentenced in June 2002 to life imprisonment for the murder of Ms Bhengu. Mr Mlungisi Dlamini and Mr Lucky Mpungose were found guilty on the evidence of two accomplices, Mr Baba Majola and Mr Nkululeko Maphanga. The *Natal Witness* of 22 June 2002 states that Ms Bhengu's assassination was planned after she refused to consider the employment of Mr Mpungose's fiancée, allegedly as a result of a fraudulent job application.

- (k) Mr T. Dladla killed for going to work while other members were on strike.
- (l) Mr B.S. Mthethwa shot and crippled.
- (m) Mr M.G. Buthelezi attacked and assaulted in his office during working hours.
- (n) Mr P.M. Ntuli prevented from coming to work for about twelve (12) months and placed under special protection with his family.³³

It needs to be stated that the Area Manager, Mr Makhaye, was also intimidated and assaulted by Mr Ngubo.

Mr Claasen, mentioned in (j) above, told the Commission that he was hit with a long iron bar and broke his arm during the incident. He was transferred to Westville Prison after the incident and suffered from insomnia, nightmares and could no longer trust other members. No disciplinary inquiry was held and a decision was taken not to prosecute criminally because one of the members who assaulted Mr Claasen committed suicide and it was believed that all the blame would be put on that member. The members argued that they reacted to Mr Claasen in self-defence.

7. DISCIPLINE

The Commission heard a lot of evidence about disciplinary hearings and how they were carried out at the Pietermaritzburg Prison.

As a result of the incidents of intimidation as set out above, the Commission heard that managers are scared of hearing disciplinary cases and investigators are also threatened.³⁴

³³ See Pietermaritzburg Exhibit 'A' pages 10 –11.

³⁴ For more details see the Chapter dealing with Disciplinary Inquiries.

Absenteeism was a significant problem within the Pietermaritzburg Prison, and according to Mr Mchunu, members are regularly absent and disciplinary action is seldom taken against them.

8. RECRUITMENT

The Commission heard about a number of irregularities in recruitment procedures, in particular the significant number of employees of the Department of Correctional Services who were related to one another. An affidavit, which was part of a CCMA hearing, states that the deponent was at a meeting where an official from the Public Servants Association questioned the relevance of holding interviews for posts when the appointees had already been identified. The official offered to predict specific appointments due to be made and wrote down the names and placed them in a sealed envelope in the presence of an official from the Department of Correctional Services. When the envelope was opened after the interviews were conducted, it was found that four of the five posts had been filled, and the union official had predicted all four appointees correctly.

Nepotism is a major problem in the Management Area. One member testified that he had eight family members who were all fellow employees.³⁵

9. PROMOTIONS AND MERIT AWARDS

The issue of promotions and merit awards caused a lot of conflict in this Management Area. It exacerbated the tension between managers and affected the inter- personal relationship between managers in general.³⁶

³⁵ See evidence of Mr Pather, Pietermaritzburg Volume 33, at page 3 215. Also see Ms Kgosidintsi's evidence Pietermaritzburg Transcript Volume 13 at page 1 118.

³⁶ See also Pietermaritzburg Exhibit 'L4' and 'L5' and also the Chapter dealing with Recruitment for more details.

10. THE PRISON HOSPITAL

The Commission heard evidence about the operations of the Pietermaritzburg Prison Hospital, which had been substantially renovated at a cost of R4 million to R5 million and equipped at a cost of R1.5 million. The new facility, which contained one hundred and twenty (120) beds, had not been used since it opened several years before the Commission held its hearings in Pietermaritzburg. According to the evidence put before the Commission this was because of a shortage of nursing personnel.

Concerns were raised about the nurses who had been employed by the Department but were no longer performing their functions, if they even came to work at all. Mr Mchunu said that he thought several of the nurses were sick and four of them were not at work at all.

In the meantime a significant number of warders was being used to escort prisoners to external hospitals when they needed medical treatment. Two warders are required to escort a maximum prisoner and an average of between three and five maximum prisoners were taken to outside hospitals daily, according to the Head of External Custody at Pietermaritzburg Prison, Mr Morgan Naidoo. Should prisoners be admitted to hospital, maximum prisoners required two members per shift and a medium prisoner one per shift on guard for twenty four (24) hours a day. Mr Naidoo said that there are on average between eight (8) and ten (10) prisoners in hospital on a particular day.

In addition to the number of warders required, there are other financial implications. Mr Naidoo told the Commission that the Department pays about R100 per consultation for prisoners and R600 a day for an overnight stay. One prisoner stayed in hospital for eleven (11) months because he required a major operation on his knee at a cost to the Department of R168 908.

It is difficult to determine the cost to the State of continuing to take prisoners to external health facilities. However, perhaps one can consider the costs in the following manner.

If an average of eight prisoners are taken to the hospital on any particular day:

- Six (6) of these require a consultation at a cost of R100 each = R600.
- Two (2) require an overnight stay at a cost of R600 each = R1 200.
- Four (4) of the prisoners are maximum security prisoners and require the services of two warders as escorts. The warders are earning the minimum annual salary for a Correctional Officer of R49 227 (salary structure for 2005). The daily rate of these eight officers is about R190 each = R1 520.
- The remaining prisoners are not maximum security and require only one warder as an escort. The cost is based on the same rate of R190 per day = R760.
- The twelve (12) Correctional Officers would all receive a monthly allowance of R200 for working in a prison. This works out to a daily rate of about R9 each for twelve (12) officers = R108.
- The eight (8) Correctional Officers who are working with maximum category prisoners would get paid an additional allowance of R300 per month. This works out to a daily rate of about R14 each for the eight (8) officers = R112.
- The prisoners are all transported to the hospital by one driver who is also a Correctional Officer earning the minimum salary = R190.

On the basis of these figures, the daily cost to the State is R4 490. In fact, the cost is more than likely far higher when one considers that the highest earning Correctional Officer would be earning about R400 per day instead of the R190 used for the purposes of these calculations.

As a result of the evidence led, the Commission directed those responsible in the Department of Correctional Services in KwaZulu-Natal to come up with a

plan to open the hospital facility and put it to best use within a short space of time.

Mr King Khumalo, who was employed as the Provincial Co-ordinator of Nursing Services for the Department in KwaZulu-Natal, subsequently told the Commission that the first floor of the hospital had been opened and that the other two floors were to remain closed for only another five months. His testimony was that nine (9) nurses in the Pietermaritzburg area had been redeployed to the hospital.

11. PRISONERS' ASSAULTED BY WARDERS

The Commission heard testimony from three (3) prisoners who claimed to have been assaulted by warders on 11 April 2000. The prisoners were all members of the 26 Gang and the alleged incident occurred after a fight with other prisoners.

Although the Commission heard evidence from the prisoners and the warders it was difficult to draw conclusions about the incidents because neither the prisoners nor the warders seemed to provide the Commission with a truthful account. There is medical evidence to support the claim by the prisoners that they were assaulted. However, the circumstances around the assault made it difficult to determine culpability.

On the basis of his own version, the Commission found that Mr Elphas Mkhize, the Head of the Maximum Prison, had exceeded the reasonable force limit necessary to quell a riot.

Thus the Commission was of the view that it would recommend that the Department should institute disciplinary proceedings against him for the aforesaid transgression.³⁷

³⁷ See specific recommendations under Recommendations of Management Areas.

CHAPTER 37

DURBAN-WESTVILLE **MANAGEMENT AREA**

CHAPTER 37

DURBAN-WESTVILLE MANAGEMENT AREA

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CHAPTER 37

DURBAN-WESTVILLE MANAGEMENT AREA

1. INTRODUCTION

The Durban-Westville Management Area consists of five (5) prisons: Medium A, Medium B, Medium C, the Female Prison and the Juvenile Section. The Female Prison used to be reserved for white prisoners only during the apartheid years before it was converted. All the prisons have been overcrowded in the period February 2002 to June 2003.

2. POPULATION

As at June 2003, the population levels were:

Female Prison:	490 inmates	(200.82% full)
Juvenile Section:	1 145	(182.03%)
Medium A:	3 330	(144.20%)
Medium B:	4 057	(197.90%)
Medium C:	2 434	(362.70%)

All the prisons in the Durban-Westville Management Area are overcrowded, with Medium C being the worst at a level of 362.7% above its capacity. Medium C houses both awaiting-trial and sentenced prisoners, who are accommodated in different sections. According to evidence led before the Commission, Medium C is also the hub of corrupt activities within the prison.

3. STAFFING

The staff complement of the Management Area is 2 446 members, and is made up as follows:

Area Commissioner's office:	1 416	(62 vacant)
Juvenile Correctional Centre:	121	(10 vacant)
Female Correctional Centre:	99	(7 vacant)
Medium A:	299	(13 vacant)
Medium B:	339	(10 vacant)
Medium C:	172	(5 vacant)

While there is clearly a shortage of staff due to unfilled vacancies, there is an even distribution of staff in the various sectors compared to other prisons, which have been greatly affected by staff shortages.

4. CULTURE

The culture in Durban-Westville Management Area is one of members wanting to make a "fast buck" wherever they can, and the complaints before the Commission indicate that corruption is endemic.

Some of those implicated in corruption happened to be senior prison officials and the corruption filtered from the higher levels down to some of the junior officials. As a result of the involvement of senior officials in corruption, it became difficult for them to enforce rules and regulations among junior members. Even though an attempt was made to transfer some of the senior officials, the corrupt culture remained within the institution. This has persisted to date and, as a result, it will take some time before the Department can rid itself of these corrupt officials because they occupy some of the most senior positions in the province.

Absenteeism and truancy are particularly rife, and are yet another indication of maladministration at Durban-Westville.

The breakdown of law and order was apparent to the members of the Commission right at the entrance of the Management Area. The searching of visitors, as stipulated by the regulations, was not done, or else, if it was it was done on a selective basis. Members were not searched at all.

Evidence¹ was led before the Commission that searching was difficult because cameras and monitoring equipment were faulty as the Department had failed to repair them for a number of years in spite of numerous requests to do so. As a result the safety of members and the general public who visit the prisons is compromised because weapons can easily be smuggled into prison.

Be that as it may, it does not mean that members cannot physically search visitors and other members when they report for duty. Accordingly, it became apparent to the Commission that there is a disregard of basic rules for maintaining the safety and security of the prison.²

The breakdown in law and order at Durban-Westville and other prisons in KwaZulu-Natal has led to members of the Judiciary in the Natal Provincial Division not inspecting some of the prisons within the Province. The Judge President has indicated that Judges fear for their safety and as a result, they are not keen to visit some prisons.

The Judge President wrote in a letter dated 21 October 2002:

¹ See the evidence of Mr Terence Moses Sibiyi of Durban-Westville Transcript Volume 11, page 1 075.

² See Chapter dealing with Prison Security for more details on non-compliance of safety and security regulations.

“Further to our discussion about the above matter, I have made enquiries from a number of senior Judges as to the reason why gaol visits by the Judges of the NPD were stopped.

The general view is that it was for security reasons. Initially the procedure was that a Judge would phone the particular prison advising that he would be coming for an inspection and the prison authorities would duly see to it that the Judge was met and taken around to be shown the various facilities, but later Judges would phone and on arrival would find that no adequate arrangements had been made for them. There was also lack of security insofar as the inmates were concerned. The complaint was that inmates just moved around the prisons so the visiting Judge would not be secure and the perception was that there was a risk of Judges being held hostage by the inmates of prisons.”

This has also contributed to the general state of lawlessness because once members of the Judiciary no longer supervised the treatment of prisoners and the general conditions under which they are incarcerated, the officials had free reign.

5. LACK OF CONTROL : AREA MANAGER MR T. M. SIBIYA

It was apparent to the members of the Commission that the Area Manager of the Durban-Westville Management Area, Mr Sibiya, was not fully in control of the prison, and the Heads of Prisons and members did as they pleased. Information before the Commission indicated that as an outsider to KwaZulu-Natal, Mr Sibiya had not settled into the Durban-Westville Prison and was intimidated by junior members.

In evidence before the Commission Mr Sibiya failed to do his duty in the following respects:

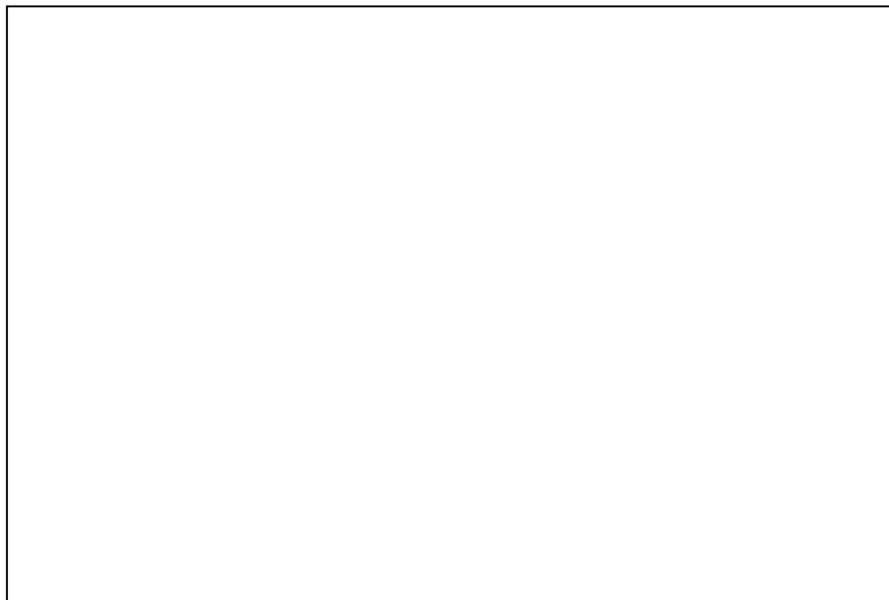
- a) He failed to investigate and follow up on receiving reports about the death of the prisoner Mr Elvis Cele.
- b) He failed to ensure that there are checks and balances for the disposal of dagga confiscated from prisoners in the boiler room.
- c) He failed to ensure that there are proper checks and balances to ensure that confiscated dagga does not find its way back into the prisons.
- d) He failed to oversee that there are proper controls for searching at the entrance gate and general security, which is his direct responsibility.
- e) He allowed two (2) entrance gates into the Management Area to be operational, with no searches being conducted at the Syringa Road gate, thus compromising security.
- f) He failed to ensure that disciplinary inquiries are properly chaired and that Chairpersons are properly qualified. The failure of the system is apparent from the evidence before the Commission and is acknowledged by Mr Sibiya, but he has not done anything to ensure better results or that incompetent members are not appointed to chair disciplinary inquiries.
- g) He has failed to ensure that there are proper controls in the health services, for example there were allegations that prisoners swapped the blood of HIV patients with theirs to be released on medical parole.
- h) He failed to ensure that staff members do not assault prisoners.³

³ See the memorandum, which was sent by Mr I.S. Zulu.

- i) He failed to deal decisively with Mr Nkomo, who had allowed a prisoner, Mr Chicago Mtshali, to leave the prison without authority. He merely transferred him to Medium B and laid no charges against him.

As a result of the general lack of control and security, corruption was rife in the prison,⁴ to the extent that one of the prisoners referred to Medium C as “a casino”. This witness found when he entered Medium C that gambling was widespread, and that it was done with the full knowledge and approval of members, some of whom even participated.⁵

Medium C, which houses both awaiting-trial and sentenced prisoners, was found to be the most problematic of all the prisons within the Durban-Westville Management Area, where the lack of proper management control and supervision was evident from the extent of smuggling, gambling and general lawlessness. In a glaring example of the lack of control one prisoner, Mr Greg Christensen, even had a fridge, TV, video recorder and other electronic equipment in his cell, as can be seen from the photograph below.



**Mr Gregory Anthony Christensen's single cell at
Durban-Westville, Medium C Prison(January 2002)**

⁴ In this regard see the First to the Third Interim Reports of the Commission.

⁵ See the First Interim Report of the Commission.

Mr Christiansen is a former policeman and it was clear that he was being favoured by members within the Department. This did not come as a surprise to the Commission because this trend has been observed in a number of Management Areas.⁶ It is impossible that any prison official could say that he was not aware that there was a fridge and other appliances in Mr Christiansen's cell. All departmental rules were breached with impunity in this case, and the main culprit must be the Head of the Prison who should have stamped his authority and enforced the rules.

6. BREAKDOWN IN LAW AND ORDER

The involvement by senior Durban-Westville officials in corrupt activities does not help the situation. It is clear that during the era of Mr I.S. Zulu, in particular, there was a breakdown of law and order in the Durban-Westville Management Area. It became a common trend in the Department of Correctional Services throughout KwaZulu-Natal that members who caused problems were promoted,⁷ which set the example for the conduct of all members. Corrupt members were not dealt with by the Department, which, instead of disciplining members, would instead promote them to Provincial or Head Office, as happened in the case of Mr I.S. Zulu.⁸

The breakdown in law and order during Mr Zulu's reign as Area Manager of the Durban-Westville Management Area is best illustrated by the evidence of a former prisoner, Mr Chicago Mtshali.

Mr Mtshali was incarcerated at Durban-Westville Management Area after being sentenced to thirteen (13) years for armed robbery. During this time he

⁶ See the chapter dealing with Mr Grootboom at St Albans and the manner in which Mr Eugene de Kok was dealt with in Pretoria.

⁷ The other person who comes to mind is Mr Ngubo in the Pietermaritzburg Management Area. This issue is dealt with in more detail under Pietermaritzburg.

⁸ Mr Zulu's alleged drug dealing was even known in the Provincial and National Head Office. Notwithstanding that he was promoted to be Provincial Control Officer in KwaZulu-Natal. (See Pietermaritzburg Transcript Volume 13 pages 1 166 and 1 159.)

befriended Mr Zulu and assisted him with the selling of dagga. Effectively, he acted as his “runner” in the prison. He was then made a monitor and later, on Mr Zulu’s instructions, transferred to work as a “male nurse” and “assistant” to one of the warders, Mr V. Ndimeni. In this capacity he was allowed to breach every rule imaginable in the Correctional Services Rules: he was allowed to sleep outside the prison at Mr Ndimeni’s quarters, attend soccer matches with Mr Ndimeni, frequent nightclubs in the Durban area with Mr Ndimeni, have visits by his girlfriend while staying at Mr Ndimeni’s premises, and attend picnics and braais with Mr Ndimeni and Mr Zulu, all with Mr Zulu’s full approval.⁹

The scene for corruption had been set during this era and there was no way in which the appointment of Mr Sibiya could have changed the culture, which had become endemic. Mr Sibiya’s appointment, while done with good intentions, could not have come at a worse time and it was clear that he would meet resistance from corrupt members.

This trend of corruption is further confirmed by the continuing escape of prisoners with the complicity and assistance of members of the Department.¹⁰ Despite the Department’s denials, this is commonplace and unless the Department deals with it, the situation will continue.¹¹

It was clear to the Commission that discipline remained a problem in the Durban-Westville management area, and will have to be addressed in order to restore confidence in the Department and the correctional system.

⁹ See the evidence of Mr Chicago Mtshali in the Durban-Westville Transcript Vol. 17 at pages 1 737-1 831 and Vol. 36 at pages 3 548-3 597.

¹⁰ See the recent escape by the prisoners Messrs Mlungisi Zulu, Lucky “Killer” Thwala and others who had been convicted and sentenced for killing Prince Mazwi Zulu and other escapes which have taken place from the Westville Prison.

¹¹ See Chapter on Prison Security.

7. PROCUREMENT AND LOGISTICS

There were a number of problems with regard to procurement and logistics, and these are dealt with in this report. The Commission found, amongst others, that the companies that tendered for the goods originally are known not to be manufacturers, but agents who phone around and tender for goods before adding a significant mark-up. This could not have been what was intended with the Preferential Procurement Regulations of 2001.¹²

¹² For more details on the problems uncovered relating to this procurement procedure see Chapter on Procurement and Logistics in this report.

CHAPTER 38

INCOME MANAGEMENT AREA

CHAPTER 38

INCOME MANAGEMENT AREA

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CHAPTER 38

NCOME MANAGEMENT AREA

1. INTRODUCTION

The Ncome Management Area consisted of three (3) prisons at the time the proclamation establishing the Commission was issued.¹ These were:

- Ncome Medium A
- Ncome Medium B
- Ingwavuma Prison

The boundaries of the Management Area were, however, subsequently amended to exclude Ingwavuma Prison and include the following prisons:²

- Vryheid Prison
- Nongoma Prison
- Melmoth Prison
- Nkandla Prison

However, as the Commission's powers are derived as at the time of the proclamation, the Commission confined its investigations at Ncome to those prisons that formed part of the Ncome Management Area at the time of the proclamation.

The institutional culture at the Ncome Management Area is similar to that at Pietermaritzburg. It is, however, complicated by the geographical location of the Ncome Management Area, which is in far northern KwaZulu-Natal. This

¹ 27 September 2001.

² According to the information supplied by the Area Commissioner of Ncome, the amendments to the boundaries of the Ncome Management Area came into effect on 1 August 2003.

Management Area fell under the authority of the old KwaZulu-Natal Government before 27 April 1994. As a result, there is a perception, rightly or wrongly, that those who were previously employed at Ncome were members of the Inkatha Freedom Party or alternatively, they were partisan to the IFP. This has complicated matters and exacerbated tensions within the Management Area. Furthermore, there is strong trade union rivalry between Popcru and the PSA, which is affecting the functioning of the Management Area.

2. POPULATION

Ncome suffers from overcrowding in the same way as other prisons, and as at June 2002 its numbers were:

- Medium A: 1 014 (211.25% full)
- Medium B: 1 136 (150.86% full)³

As a result of serious drought and water restrictions, the prison population at Ncome was reduced during the Commission investigations. In an attempt to relieve the demand for water at the prison, the authorities had commenced with the transfer of prisoners from Ncome to other prisons. The Area Commissioner of Ncome advised the Commission that at 2 March 2004, a total of 725 prisoners had been transferred from Ncome to the following prisons situated in KwaZulu-Natal:

- Empangeni: 136
- Kokstad: 230

³ In November 2005, one of the Commission secretary's telephoned Ncome Management Area to verify the capacity of the prison at Ncome. In doing so, Ncome also furnished the Commission with figures of prisoners that were incarcerated there during 2002. The figures which were given to the Commission for June 2002 were different to the figures which were previously furnished. In November 2005, the information provided was that in June 2002, Medium A had 1197 prisoners and Medium B had 1015 prisoners, which totals 2212 prisoners. (See Ncome Exhibit "AAA").

- Waterval: 323
- Pietermaritzburg: 36

Another 1 000 prisoners were earmarked for transfer. On completion of the transfer exercise, the prison was likely to have a population of only three hundred (300) prisoners.

3. STAFFING

The total number of staff at the Ncome Management Area is 1 416. The staffing levels in the different sections are as follows:

- Ncome Area Commissioner: 606 (86 vacant)
- Medium A (reception centre): 146 (25 vacant)
- Medium B: 231 (30 vacant)

4. OBSTACLES

On 2 February 2004, the Commission dispatched a team of investigators to commence with the investigations at Ncome. However, their ability to investigate the prison was severely hampered by the following circumstances:

- a) The prison was in the grip of a severe drought that started in May 2003.
- b) Severe water restrictions had been imposed with no water being available during the day and only for a limited period during the night.
- c) Lack of hygiene, with prisoners being kept in confined spaces and toilet facilities being inoperative for most of the day.

The initial transfer of seven hundred and twenty five (725) prisoners negatively impacted on the Commission's investigations and the pace of the investigation slowed drastically as investigators were compelled to make

contact with all the transferred prisoners, which entailed travelling great distances.

With those difficulties already confronting the Commission, it was clear that any further transfer of inmates as planned by management would have resulted in the Commission being unable properly to execute its mandate. The Commission seriously considered abandoning the Ncome investigation and in this regard requested an urgent meeting with the then Minister of Correctional Services Mr Ben Skosana. A meeting was held at the Minister's Cape Town offices on 24 February 2004 where, among other things, the drought and the option of abandoning the Ncome investigation were discussed.

It was agreed that no matter what the prevailing obstacles and challenges were, the investigation into Ncome should proceed as planned.

Department staff at the meeting suggested that all transferred inmates should be returned to Ncome and that the Department of Public Works should transport water to the prison to make it fully operational. The costs would have been as follows:

- Return of inmates to Ncome Prison: R 4 185 000,00
- Water requirements per month: R40 510 000,00

The Commission was of the opinion that neither the Department nor the Commission could justify or adequately explain the increased costs to the South African taxpayer.

Other strategies discussed at the meeting were the possible relocation of the prisoners to Kokstad Prison, where there was spare capacity, and Waterval Prison, which is in fairly close proximity. None of these alternatives was found to be suitable.

The meeting agreed that the return of prisoners to Ncome should be put on hold until further cost-effective alternatives and options had been fully explored.

Pending the decision, the Commission continued with its investigations at Ncome. The spread of inmates, however, required more staff and the Commission employed two (2) more investigators.

It was also agreed that the Commission could employ a new Commissioner to replace Advocate E. Steyn who had presided in all the hearings before Ncome but who was obliged to return to her duties at the University of Cape Town. The services of Advocate S. Poswa-Lerotholi of the Durban Bar were then secured.

4.1 Commission Hearings

The Commission experienced great difficulty finding a suitable venue for its hearings in the north-western part of KwaZulu-Natal. The Commission believes that such difficulties are a constant source of frustration for the High Court, which also appears to have difficulty finding a venue for trials in the area. One would have expected courts in large towns like Newcastle and Ladysmith to have the spare capacity to accommodate circuit courts, Commissions and other tribunals. The Commission was finally referred to a converted school, but was concerned that its security would be compromised.

The Commission's hearings eventually had to start in Pietermaritzburg, until the issue of a venue was finally resolved by arranging for the Commission to sit in the Dundee Magistrate's Court.

5. MISCONDUCT AND MALADMINISTRATION

Several incidents of misconduct and maladministration were discovered at Ncome Prison, including poor controls at the Ncome Arsenal, unlawful pecuniary dealings with prisoners, the illegal taking out of prisoners from prison and the absence of any control over prisoners' private cash at Medium B.

5.1 Poor Control of Arsenal Records

The Commission found that the various registers, the weekly and monthly certificates that should be in place in an armoury in the Department, were in a state of disarray at Ncome. Furthermore, the rules and regulations governing the control and maintenance of the arsenal were not being followed by the officials. This was evidenced by the fact that when a Head Office official, Mr Somaru, attempted to inspect the armoury, he was unsuccessful due to the armoury documentation not being available.

As a result of the poor controls, one (1) firearm could not be accounted for. The firearms register clearly reflects that the last person to book out the firearm on 16 April 2004 returned it on 17 April 2004. There was no evidence of this firearm having been booked out at any stage after that, yet the firearm could not be located by the Commission investigators or by the official in charge of the armoury.

The poor state of the armoury records at Ncome Management Area, reinforces the Commission's view that records and information at many levels of the Department are not being maintained at the required standard.

5.2 Incompetence and Lack of Training

It was also patently obvious to the Commission during its investigations at Ncome that many officials occupy positions of responsibility without having

had the necessary training to equip them to properly manage the responsibilities of their positions. When an Acting Head of a Prison, in this case Mr Khumalo, pleads to be released from the responsibility of the armoury because he is overwhelmed and ill equipped, alarm bells should begin to ring for those running the Department. Endless problems will be experienced throughout our prisons if persons are placed in positions of responsibility who are totally unfit to carry out those duties.⁴

5.3 Pecuniary Dealings with Prisoners

The evidence at the Ncome Management Area showed that, contrary to the provisions of the Correctional Services Act, some members continue to have direct or indirect pecuniary dealings with prisoners.⁵

The evidence of improper pecuniary dealings at Ncome included:

- A member receiving money from an inmate to purchase a television set for the inmate. The member subsequently failed to deliver the television set and also failed to refund the prisoner's money;
- Another member borrowed money from a prisoner and also used money entrusted to him by family members of a prisoner for his own personal benefit;
- Another member was found to have borrowed various amounts of money from a prisoner over a period of time.

The Commission hearings also dealt with the cashless system introduced by the Department on 31 December 2002.

⁴ The role played by the unions through specific "operations" in positions irrespective of qualifications or the suitability or the potential to do the job and the long-term effect of these operations are dealt with by the Commission in the Chapter on Historical Background.

⁵ Section 118(2)(b) of the Correctional Services Act 111 of 1998 specifically provides that no Correctional/Custody Official may directly or indirectly have any pecuniary dealings with a prisoner.

5.4 Inmate “Gonondo”

The Commission has in several of its reports expressed the concern that members of the Department must always be vigilant against allowing the distinction between members and inmates to become blurred. Many prisoners are cunning by nature and if this line is crossed by members they will soon find themselves pawns in the hands of manipulative inmates. Crossing this line is but a short step towards a system of chaos where inmates are in control rather than warders.

The evidence relating to the inmate, “Gonondo”, a prisoner currently serving a life sentence for murder at Barberton Prison, is a prime example of how members can surrender the positions of authority to an inmate. Gonondo, who is also an inyanga⁶, seems to have been given free access to and from the Ncome prison by the implicated members, who appeared to be in fear of the powers of the prisoner.

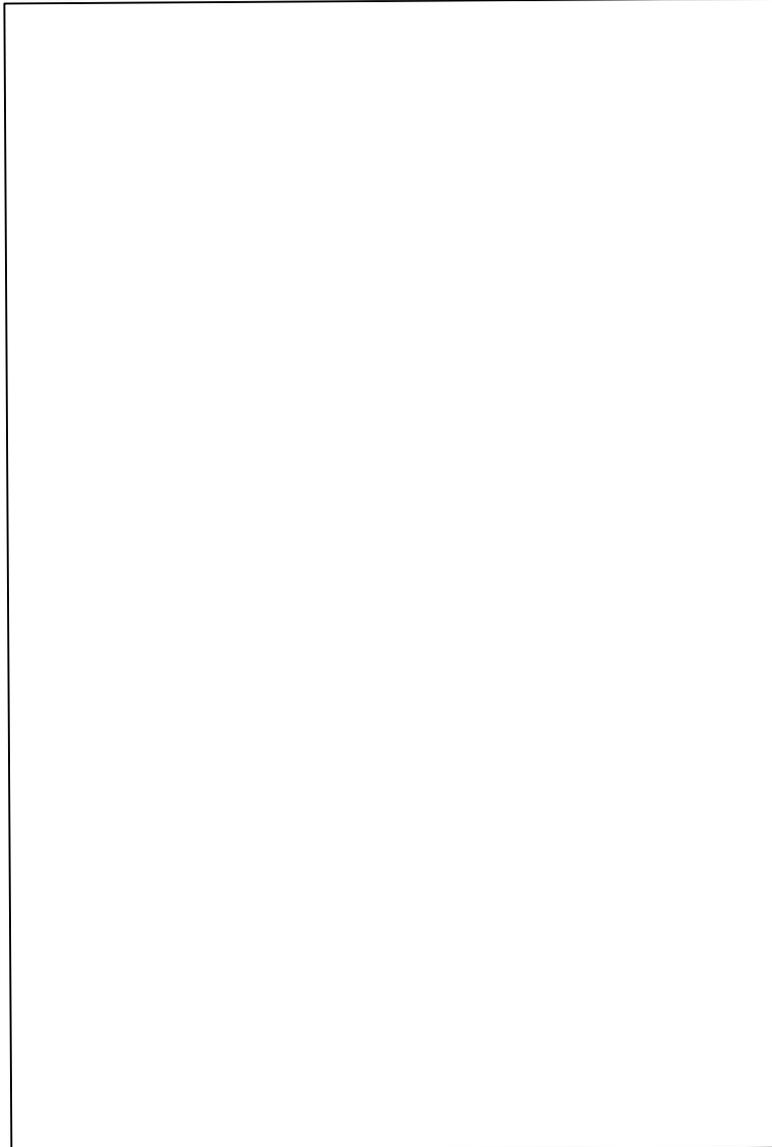
The Commission found that Gonondo continued to practice as an inyanga even though he was imprisoned. He did not feel that he was incarcerated and it is obvious that the officials either through fear or neglect did nothing to prevent his conduct. It is blatantly clear that in some of the prisons mentioned Gonondo was permitted to do as he pleased. He was even allowed to keep a suitcase of medicine in the storeroom and he was given the key to the storeroom both at Pietermaritzburg and at Ncome Prisons. He also allegedly had a cell phone which had been supplied to him by a warder. The photographs shown below which are also attached⁷ show Gonondo with his trunk, which is full of medicines and his healing regalia on top of his prison uniform.

Further photographs⁸ of him support the contention that for all intents and purposes he was not a prisoner.

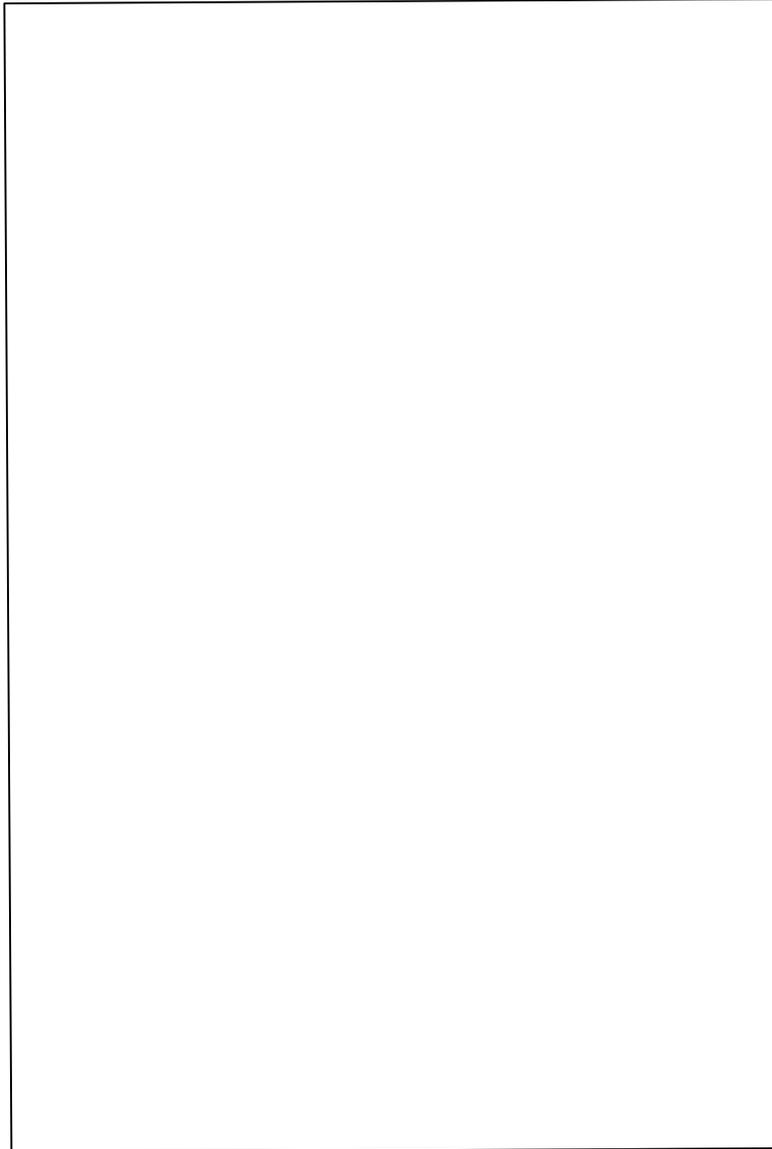
⁶ A traditional healer.

⁷ See Appendix ‘I’.

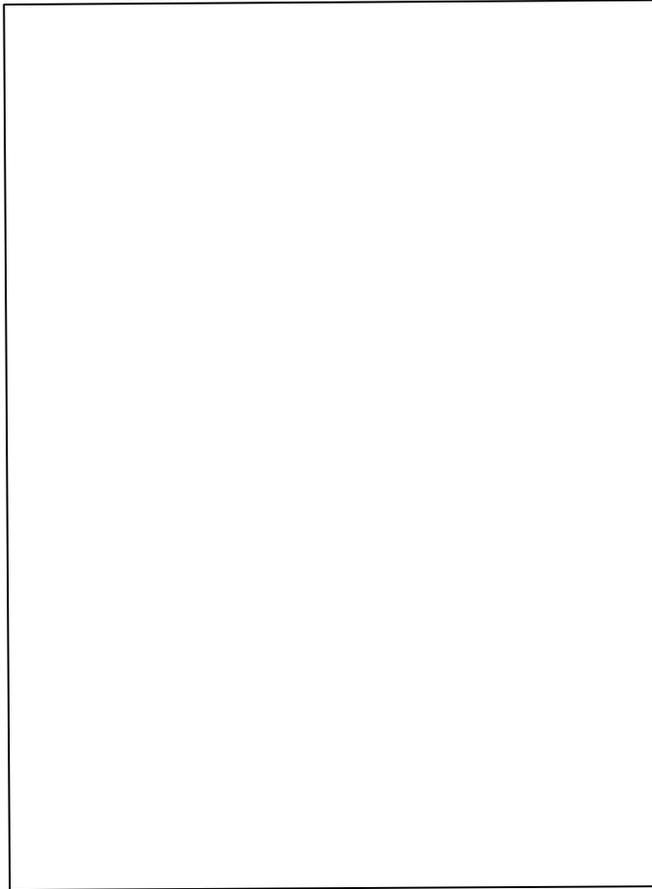
⁸ See Appendix ‘I’.



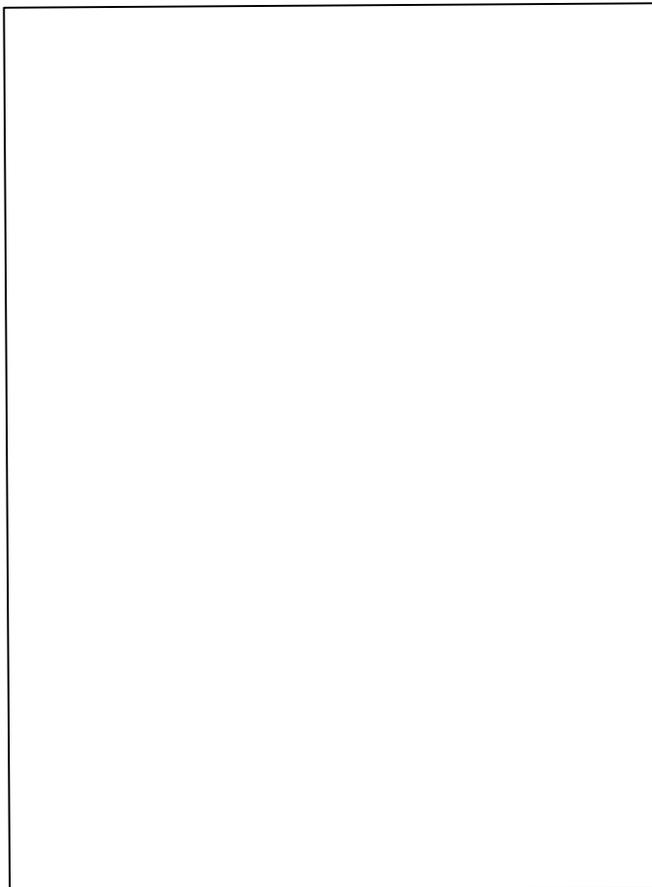
**Inmate “Gonondo” shown in the photograph
above with his trunk of medicines and him adorned with his
full healing regalia on top of his prison uniform**



**Inmate “Gonondo” shown in the photograph
with a cellphone given to him by member Mr Luthuli
as part payment for treatment.**



**Gonondo at member
Mr Qiniso Zulu's
quarters where
Gonondo sold herbs
and treated his patients**



**Another photo of
Gonondo at Mr Zulu's
quarters where he sold
herbs and treated
patients**

5.5 Assaults

On 4 January 2004 widespread assaults were carried out on prisoners by warders, allegedly at the instigation of the Acting Head of Medium A, Mr F.B. Buthelezi. The assaults were given wide media coverage and the Human Rights Commission as well as SAPOHR and some members of the Executive Council visited the prison. Up to one hundred and fifty (150) prisoners were wounded and many were hospitalised.

At the insistence of both the HRC and SAPOHR, it was agreed that an investigation be conducted by the Provincial Office instead of the local Area Commissioner, as is the practice, in order to lend credibility to the investigation itself.

There were problems with this investigation, as many members were reluctant to come forward to implicate other members. The fear and intimidation prevalent at Pietermaritzburg, was also found to exist amongst the members at Ncome.

In the case of the assaults, the Area Manager allowed the investigation report to lie on her desk for eight (8) weeks without taking any action. The initiators of the disciplinary proceedings also did not give the matter the attention it warranted. These incidents show how easily the present system of the disciplinary process can be manipulated.⁹

Other government departments have created highly skilled and specialised industrial relations departments staffed by full-time investigators, prosecutors and presiding officers. The Department would be well advised to follow this route.

⁹ See Chapter on Disciplinary Inquiries.

5.6 Prisoners' Private Cash

During the course of the evidence presented to the Commission at the Dundee Magistrate's Court an allegation was made that the prisoners' private cash at Medium B of Ncome Prison did not balance. As a result, the Commission dispatched a group of investigators to conduct an investigation into the prisoners' private cash records of all prisons forming part of the Ncome Management Area to determine whether a shortfall in fact existed.¹⁰

The Commission's investigators established not only that there was a shortfall, but that the situation had been in existence for a period of three years. Furthermore, senior officials of the Department at the Management Area and the Provincial Office were all aware of the situation but did little to rectify the problem. The lack of action by senior officials in the face of transgressions by members brought to the fore a number of concerns for the Commission regarding the situation at Ncome Prison.

¹⁰ See Chapter dealing with Prisoners' Cash Shortfall.

CHAPTER 39

JOHANNESBURG **MANAGEMENT AREA**

CHAPTER 39
JOHANNESBURG MANAGEMENT AREA
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CHAPTER 39

JOHANNESBURG MANAGEMENT AREA

1. INTRODUCTION

The Johannesburg Management Area is one of the biggest Management Areas in terms of size, employees, number of prisoners and financial resources. Medium A Prison in Johannesburg Prison is intended to house awaiting-trial prisoners, while Medium C has a juvenile section. If taken together with the rest of the Gauteng prisons, it accounts for approximately one third of the budget of the Department of Correctional Services. Because of its size, there is also a major problem of overcrowding, as in the rest of the prisons.

The investigations of the Commission in Johannesburg were hampered by the fact that the Special Investigation Unit had been in the Johannesburg Prison for six months before the Commission commenced investigations. The Commission decided not to investigate matters that had already been investigated by the Special Investigation Unit. However, many documents that the Commission required had already been seized by the Special Investigation Unit.

2. POPULATION

Mr Moleko Zacharia Isack Modise, the Provincial Commissioner of Correctional Services in Gauteng, told the Commission that the cells at Johannesburg are built to accommodate thirty eight (38) inmates, but one hundred (100) inmates are held in the communal cell at times. "Because of the effect of Saturday courts and as well as extended hours of magistrates'

courts you'll find that now we have more convicted and sentenced inmates and that is why Johannesburg Medium B is now at this level."¹

The Head of Medium A Prison, Mr Tozamile Templeton Tana, said that at the time of the Commission's hearings Medium A held 7 523 prisoners although it was designed to hold 2 630.

3. STAFFING

Mr Tana stated that the approved post establishment makes provision for five hundred and forty four (544) officials, but the financed establishment provides for only three hundred and fifty six (356). As a result he said there was a great shortage of members in daily contact with inmates. "The statistics indicate that certain sections have more than a hundred (100) inmates per official. This is a great security risk to both officials and inmates, as it impedes supervision and proper searching."²

4. GENERAL CONDITIONS

Mr Tana said that contractors are busy on a daily basis. "Virtually all the sections have maintenance problems, for example water leaking through the walls, lights that are out of order, low water pressure and broken window panes."³

In addition, he said that, as of 18 June 2003, E Section had been handed over to the contractors and inmates who should be housed there were being accommodated in other sections. This contributed to the problems related to overcrowding. "There are approximately seventy (70) inmates in each cell, using one toilet, two showers, and one urinal. Most of the outlets are out of

¹ See Leeuwkop transcript Volume One, page 23.

² See Johannesburg Exhibit 'A'.

³ See Johannesburg Exhibit 'A', at 1.3.

order, due to over-flushing by inmates, thus inmates resort to flushing toilets by utilising buckets of water."⁴

5. THE FEMALE PRISON

The Acting Head of the Female Prison, Mrs Gladys Pheladi Mokautu, said that at the time of the hearings, August 2003, there were five hundred and ninety (590) sentenced female prisoners and three hundred and nineteen (319) awaiting trialists. Of these, forty six (46) awaiting-trial prisoners were juveniles, and thirty eight (38) sentenced juveniles were being held at the prison. The Female Prison consists of nine sections housing prisoners sentenced to different terms of imprisonment. Awaiting trial juveniles are kept in single cells, while adult accused are kept in communal cells in one section. However, juveniles who have been sentenced are in a separate section.

Mrs Mokautu said that smuggling of dagga was the biggest problem that she faced. In addition, prisoners would run businesses by, for example, selling cigarettes. She said that she is not able to search male prisoners who come to work in the Female Prison because she only has one (1) male member who is able to search the male prisoners. Mrs Mokautu said that male members are too scared to work in the Female Prison.

6. CORRUPTION

Mr Tana testified that smuggling and corruption were key problems that faced his prison. He said that people are being brought in with fake warrants, and police officers are bringing documents giving them permission to take prisoners for interrogation, but not returning the prisoners after the alleged interrogation.

⁴ See Johannesburg Exhibit 'A'.

Mrs Lutchmee Naidoo testified that she had been assisted by a warder, Mr Mondli Blessing Madondo, to see her husband, inmate Mr Balakisten Anand Naidoo, on a regular basis in the boiler room at the prison where Mr Naidoo worked, at the dental surgery where he went for treatment and to their house. In addition, they had sex during the home visit and Mrs Naidoo fell pregnant. On one occasion Mrs Naidoo paid Mr Madondo R5 000, which he said he would repay but never did.

Mr Naidoo told the Commission that he bought Mr Madondo meals and hot drinks, and would lend him money.

“Once the members actually get to know you, they know your background and what you really need to do. So, they always come to you and say, “You know what, I need R10.00 today or I need R20.00”. It’s a habit they actually get used to and us being inmates or prisoners at the time we actually feel it’s bad for us to refuse...Because if we refuse them whenever we request a favour thereafter they actually turn a blind eye to our favours...So whatever we need inside the prison we get it through them, so for us refusing them to get whatever R20.00 or what then we’re actually closing our own road in the prison itself.”⁵

Mr Naidoo said that the prisoners would also pay warders to bring alcohol and crisps into the prison for the inmates to have a party at Christmas:

“Johannesburg prison, you can actually get whatever you want to get in that prison.”⁶

In addition, Mr Naidoo would ask to be taken to the Female Prison to use the telephones because the ones at Medium B were regularly out of order. When the prisoners requested items the warders sometimes hid them in places such as under a tree or in a coal yard for the prisoner to collect. Drugs were also smuggled in and this often happened at the boilers where Mr Naidoo worked.

⁵ See Johannesburg transcript Volume 54 page 4 538.

⁶ See Johannesburg transcript Volume 54 page 4 542.

Mr Naidoo told the Commission that there is a significant amount of corruption at Johannesburg Prison.

“Johannesburg Prison is a heaven for corruption. So basically as a prisoner I could say I live like a king at Johannesburg Prison. I mean I’ve had everything that I wanted at Johannesburg Prison, anything that I wanted I had it at Johannesburg Prison...I had my own microwave. I had a four piece sound system with major size speakers in my single cell. I had frying pans, toasters, you name it, groceries. Whatever I needed I had it in that cell and this all comes through the member...If you have money you’ve got the members in your hands. You can arrange with any member there to do what you want to do. You just have to show them the colour of your money and the person will do you the favours that you want. So it’s money that talks at Johannesburg Prison.”⁷ (Own emphasis).

Another aspect of general corruption is the number of escapes, which are internally generated. This is one Management Area where prisoners just disappear in the prison system.⁸ Drug smuggling is also a major problem, as is poor discipline, which exacerbates the problem of corruption because it is clear to the members that no matter what you do, you never get disciplined.⁹

Alcohol is also freely available. The Commission investigators observed that there are a lot of empty liquor bottle in the courtyard, in the female prisons within the Management Area.¹⁰ The prisoners confirmed that these are from the liquor they consume in prison.

Furthermore, it was also apparent to the members of the Commission that there is a major problem with the general compliance with rules and

⁷ Johannesburg transcript Volume 54 pages 4 554 – 4 555.

⁸ See the Chapter dealing with Prison Security.

⁹ For more details in this regard, see the Chapter dealing with Disciplinary Inquiries in this report.

¹⁰ See Johannesburg Exhibit “KKK”.

regulations by the employees at the Johannesburg Management Area, which contributes to the overall level of corruption.

7. POLICE INVESTIGATIONS

Mr Tana told the Commission that there was a communication problem between the prison officials and South African Police Service regarding investigations that had been reported to South African Police Service. In addition, it seemed to him that the police did not take reported matters further.

“If ever I can speak about the smuggling of dagga, almost each and every week, if not month, we arrest the members from the public who are smuggling in the dagga and those people are being sent to Mondeor Police Station and what is painful about that, nothing is being done about that.”¹¹

8. MANAGEMENT

It was apparent to the members of the Commission that there is a major problem with the general compliance with rules and regulations by the employees and that the situation persists because there is a lack of management capacity. Management is weak.

The example of poor management is set at the highest level by the Area Manager, Mr Davis, who was formerly at Leeuwkop Prison. The Commission’s investigations at Leeuwkop, a smaller prison, indicated that he was not even an effective manager there. The Commission fails to understand how he could be “promoted” to run the Johannesburg Management Area. Problems encountered in the rest of the Department with regard to lack of capacity and

¹¹ Johannesburg transcript Volume 43 page 3 536. Also see Chapter on Sexual Violence for more shortcomings in investigating crime in prisons.

the failure to use people in jobs for which they are qualified was apparent in the Johannesburg area in general.

During his era at Leeuwkop, he was involved in a number of incidents, which were the subject of an investigation by the Commission.¹²

Mr Davis may be an experienced member of the Department of Correctional Services, however, he is not management material. As an example, he was unable to provide a basic submission to the Commission and when after two years he eventually delivered it, it was inadequate.

The Commission had first requested the submission in 2002, but it was finally delivered in February 2005. This was a clear indication to the Commission that Mr Davis is not capable of managing the Johannesburg area and he could not give an account of basic matters that were happening within his Management Area. Furthermore, the document, which he produced was such an embarrassment that if compared with presentations from other Management Areas it could not be regarded as a presentation from an Area Manager. The presentation failed to address the basic issues which he was expected to address. This could be another indication of a manager who is out of his depth.

There also appears to be a general culture of violating prisoners' constitutional rights in the manner in which they are treated by members. Prisoners are assaulted and often deprived of their full visitation rights.¹³ In addition, there was also evidence that the two (2) meal serving system referred to was often being implemented at this Management Area because members want to go

¹² See, amongst others, the Tenth Interim Report dealing with the transfer of Mr Mohapi.

¹³ See also Chapter dealing with Treatment of Prisoners.

off duty early to, *inter alia*, watch sport events.¹⁴

Further evidence of poor management was given to the Commission through the Office of the President of the Republic of South Africa, by Mr Gesond Mazingi.

During one of the Presidential “imbizos” at Gamalakhe in KwaZulu-Natal, the President was advised by Mr Mazingi of incidents of maladministration and corruption, which occurred whilst Mr Mazingi was incarcerated at the Johannesburg Prison. The incidents he referred to were, amongst others, murders, theft and general smuggling. The President brought this matter to the attention of the Chairman of the Commission, who instructed the Commission investigators to pursue the matter and get hold of Mr Mazingi.¹⁵

The investigators interviewed Mr Mazingi and a detailed statement was obtained from him.¹⁶ It became apparent from the statement that a number of people were mentioned who had to be interviewed to verify Mr Mazingi’s statements. Mr Mazingi’s statement corroborated earlier allegations made before the Commission such as sexual abuse and drug smuggling. His evidence also led the Commission to other witnesses who were also helpful to the Commission.

¹⁴ See the Chapter dealing with Treatment of Prisoners and the section on Johannesburg Management Area where officials are alleged to leave their posts when big soccer matches are being played and the evidence of Mr Golden Miles Bhudu, a Director of SAPHOR who alleged that this also occurred in the old days whenever there was a Springbok rugby match. See Leeuwkop transcript Volume 40, page 3 327.

¹⁵ The staff immediately and thereafter on numerous occasions, telephoned the cell number, which had been provided by Mr Mazingi as his contact telephone number, without any success. The said number was that of Mr Mazingi’s relative. Inadvertently, the number, which had been given to the President by Mr Mazingi, was incorrect and thus Mr Mazingi could not be reached telephonically. Eventually, members of the investigating team of the Commission were instructed to proceed to Port Shepstone to look for Mr Mazingi in the Gamalakhe area in a house-to-house search. They eventually got hold of Mr Mazingi at a rural area, which is outside the Gamalakhe Township known as Madakane.

¹⁶ A copy of the statements were handed in and marked Johannesburg Exhibit ‘JJJ’ and ‘JJJ1’.

The investigations revealed that drug smuggling and sexual abuse of juveniles is rife at the Johannesburg Prison.¹⁷ Investigations conducted by the Commission have confirmed that there are a number of prisoners who were subjected to abuse by members of the Johannesburg Prison and by other prisoners.

The Commission was also provided with information about disciplinary matters relating to drugs which were found inside the prison.

CASES OF DAGGA OR POSSESSION OF UNAUTHORISED DRUGS

Persal No:	Surname	Offence	Date of Offence	Outcome
12816205	Jantjie F.V	Possession of prohibited drugs Mandrax	07/02/2003	Dismissed- 22/09/2003
18431534	Vilakazi P.G	Possession and dealing with dagga	20/01/2001	Dismissed- 19/11/2003
18408494	Mnculwane V.W	Possession and dealing with dagga	12/11/2002	Pending /Medium B Responsibility
18935231	Radebe M.A	Possession and dealing with dagga	06/10/2002	Dismissed- 11/02/2004
18431534	Manganye F	Possession of prohibited drugs (Mandrax)	30/12/2003	Dismissed- 18/03/2004

¹⁷ See Annexure "A" to this Chapter.

The problems, which are encountered in the rest of the Department with regard to lack of capacity and the failure generally to use people in jobs for which they are qualified, are also apparent in the Johannesburg area.

If one looks at the statistics of the Johannesburg Prison, it is clear that there is a big shortage of staff in the Johannesburg Management Area. However, this is a phenomenon that is not limited to Johannesburg but is common throughout the Department.

9. MANAGEMENT OF INFORMATION

The Commission has already alluded to the issue of the importance of management of information in Chapter one and also in the Chapters dealing with management areas, it is necessary to highlight the potential implications for the Department that can arise due to the failure of maintaining up to date and accurate information.¹⁸

It is the duty of management to ensure that all the relevant information is in the personnel files(SP Files). The failure of the Department to maintain proper records, can impact on the Department in the following areas:

9.1 Corruption

If the movement of a particular member of the Department is not recorded, this may lead to corruption being easily disguised, hidden and even overlooked when the paper trail is incomplete. This shortcoming may also

¹⁸ For example, when the Commission investigated the possession of fraudulent matric certificates by members, it became evident that the personnel files of the Department are not always updated as they should be and that important information was missing, such as, members' bank account details, school certificates, qualifications, identification documents, their original application forms for the positions they applied for and also the necessary forms indicating any transfer authorised by Head Office were not on file.

create opportunities for corruption in the area of procurement and logistics in the Department. Poor record keeping in procurement transactions make it very difficult to investigate and detect corruption and to follow the paper trail.

9.2 Recruitment

Without proper records the Department would not be in a position to question the appointment of a member to a specific position. In this regard it is very important that when dealing with recruitment that the Department verifies¹⁹ the applicants qualifications at an early stage.²⁰

9.3 Nepotism

If the documentation on file is incomplete or inaccurate it becomes difficult to detect nepotism in increments or appointments or merit wards etc.

9.4 “Ghost” Employees

Poor records create opportunities for corrupt members to employ “ghost” employees.

9.5 Responsibility and Accountability

Incomplete records furthermore make it extremely difficult to establish responsibility for various functions at a management area. Accordingly, it is often not even clear as to who should take the blame for the procedures and policies that are not implemented and followed at a particular time.²¹

¹⁹ See the Fourth Interim Report dealing with the fraudulent matric certificates where the Commission heard the evidence that in some cases the Police when they certify a document, as a copy of the original, that there is no original to support the certification but just a copy of a copy and in that case it is always important to request either the original or to follow up from the particular tertiary institution or the school where it is alleged that the person has matriculated, whether the person was indeed enrolled at the school and definitely matriculated at that particular time.

²⁰ See also the Chapter on Recruitment regarding the problems at Pollsmoor.

The lack of control and maintenance of information, creates a situation where the employees of the Department escape responsibility and accountability. This can also result in financial losses for the Department as demonstrated above.

In concluding, the Commission would like to re-iterate that whilst this issue of management of information is discussed under the Johannesburg Management Area, it is a problem in most Management Areas.²²

²¹ See the Chapter on Pietermaritzburg Management Area and the problems around the detection of Mr R Ngubo's appointment as Prison Head.

²² See St Albans, Ncome, and Pietermaritzburg Management Areas.

ANNEXURE 'A'**JOHANNESBURG MANAGEMENT AREA
DRUGS STATISTICS 2000-2004
(JUVENILE CORRECTIONAL CENTRE)**

<u>Date</u>	<u>Description</u>	<u>Where Found</u>	<u>By Whom</u>	<u>Manner of Disposal</u>	<u>Date Destroyed</u>
00-02-03	Blade Dagga	A Section Cell 68. Prisoner HB Bezedenhout and Jaars.	Mr. Mononyane M.P.	Mr. Miya at Boiler	00-02-16
00-06-28	Five Blades. One blade dagga	C. Section Cell 39 and 40 respectively	Mr. Nkotho and Mr. Combrinck	Mr. Motlohi at Boiler Section	00-08-30
00-07-17	One blade of dagga	A- Section in a cell	Mr. Motlohi	Mr. Motlohi at Boiler Section	00-08-30
00-07-27	One packet of dagga	B- Section in a cell	Mr. Lategan	Mr. Motlohi at Boiler Section	00-08-30
00-08-18	235 grams of dagga	Member's possession while reporting for duty. Mr. Deleki	Mr. Moto	Taken to Mondeor SAPS	
00-08-31	Seven blades of dagga	Possession of prisoner. Thabo Pilane.	Member	Mr. Motlohi at Boiler Section	00-10-25
00-09-29	Blade dagga	B- Section pipe shaft	Mr. van der Bergh H.J.	Boiler Section	00-10-25
00-10-21	64 Blazes of dagga	Plumbing duct D-Section	Mr. Mkhosi	Mr. Molefe at Boiler	01-05-17
01-05-04	27 dagga blades	Prisoner Thokozani Buthelezi.	Mr. Papenfuss	Mr. Molefe at Boiler	01-05-17
01-07-13	15 Blades of dagga	Prisoner Kenneth Khumalo	Mr. Dike	Mr. Motlohi at Boiler	01-05-17
01-07-22	4 Blades of dagga	A Section Cell 18	V/D Bergh H.J	Mr. Molefe at Boiler	01-08-27
01-08-22	5 Packets of dagga	Prisoner Richard Mohau	Mr. Ndlovu	Mr. Molefe	01-08-27
01-11-12	1 Blade dagga	B Section Cell 5	V/D Bergh H.J	Mr. Molefe at Boiler Section	01-08-27
01-11-14	1 Blade dagga	B Section Cell 15	V/D Bergh H.J	Mr. Molefe at Boiler Section	01-12-18

<u>Date</u>	<u>Description</u>	<u>Where Found</u>	<u>By Whom</u>	<u>Manner of Disposal</u>	<u>Date Destroyed</u>
01-12-07	3 Plastics dagga	F Section Cell 12	Mr. V/D Walt	Mr. Molefe at Boiler Section	01-12-18
02-05-02	Plastic dagga	Prisoner Mduduzi Ngwenya	Mr. Barnard & Mr. Dreyer	Disposed at Boiler Section	02-05-21
02-08-15	Plastic dagga	A Section in Cell 24	Mr. Hlongwane N.B	Disposed at Boiler Section	02-05-21
02-08-21	2 plastics dagga	B Section Cell 1	Mr. V/D Bergh H.J	Mr. Miya at Boiler Section	02-09-25
02-09-16	Plastic dagga	B Section Cell 35	Mr. V/D Bergh H.J	Mr. Lepele at Boiler Section	02-09-25
03-01-18	Plastic dagga	Prisoner S. Zondi	Mr. Griecke	Disposed at Boiler Section	03-02-26
03-02-17	Plastic dagga	F. Section	Dog Unit Officials	Disposed at Boiler Section	03-02-26
03-04-27	11 Blades dagga	B Section passage	Mr. Magakwe	Mr. V/D Walt at Boiler Section	03-04-30
03-04-28	Blade dagga	F Section	Mr. Naught	Mr. V/D Walt at Boiler Section	03-04-30
03-04-28	Plastic dagga	F Section store room	Mr. Ronald	Mr. V/D Walt at Boiler Section	03-04-30
03-04-29	3 envelopes dagga	F Section store room	Mr. Viljoen	Mr. Myburgh at Boiler Section	03-04-30
03-05-20	3 Blades dagga	A 3 Section in a cell	Mr. Mbatha	Disposed at Boiler Section	03-08-25
03-06-25	Blade dagga	B Section in a cell	V/D Bergh H.J	Disposed at Boiler Section	03-08-25
03-07-01	Blade And Plastic dagga	Prisoner in B Section	V/D Bergh H.J	Disposed at Boiler Section	03-08-25
03-08-01	Blade dagga	Prisoner possession	V/D Bergh H.J	Disposed at Boiler Section	03-08-25
03-08-14	Plastic dagga	Prisoner Z. Zwane	V/D Bergh H.J	Disposed at Boiler Section	03-08-25
03-09-09	2 Plastic dagga	Prisoner G. Mashigo	V/D Merwe	Disposed at Boiler Section	03-09-15
03-09-10	18 Mandrax tablets	Kiosk (Shop)	Mr. van Zyl , Mr. V/d Merwe, Mrs Molahloe.	Hand over to Mondeor SAPS	03-09-15

CHAPTER 40

POLLSMOOR MANAGEMENT **AREA**

CHAPTER 40

POLLSMOOR MANAGEMENT AREA

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CHAPTER 40

POLLSMOOR MANAGEMENT AREA

1. INTRODUCTION

Pollsmoor Prison is the largest in the Western Cape and consists of four (4) male prisons - Medium A, Medium B, Medium C and Maximum Security (which is now known as the Admission Centre) - and one Female Correctional Centre within the Pollsmoor precinct. Children under 18 years are accommodated in Section B4 (sentenced children) and Section B5 (unsentenced children) of Medium A.

2. POPULATION

The number of inmates in the various prisons as at June 2003 is as follows:

Medium A:	2 272 (204.50% full)
Medium B:	896 (167.79% full)
Medium C:	697 (121.43% full)
Maximum Security:	3 447 (184.13% full)
Female:	294 (120% full)

The Head of Prison at the Admission Centre at Pollsmoor, Mr John Joseph Jansen, said in his evidence that:

“Conditions in this prison do not support the promotion and protection of human rights. This institution has one of the highest prison population in the country with a big shortage of staff. There is massive overcrowding, cell and ablution conditions are very poor,

*meals are often insufficient with excessively long periods between the last meal of the day and the next day's breakfast."*¹

Mr Jansen also said in his testimony that overcrowding resulted among other things in difficulties in ensuring that the prisoners were able to have exercise: The 3 300 prisoners in the Admission Centre only had four courtyards for exercise.

3 STAFFING

The staffing complement of the Management Area is 2 104 members who are stationed as follows:

Area Commissioner's Office:	1 243 (46 vacant)
Medium A:	259 (8 vacant)
Medium B:	132 (7 vacant)
Medium C:	104 (7 vacant)
Maximum Security:	366 (8 vacant)
Female:	79 (5 vacant)

However, in his submission to the Commission in November 2002, Pollsmoor Area Manager Ntobeko Mketshane provided the following breakdown of personnel, totalling nine hundred and two (902), which excluded the administration staff and personnel in the prison industries and agriculture.²

Medium A:	226
Medium B:	122
Medium C:	110
Maximum Security:	353
Female:	91

¹ See the Cape Town hearings Exhibit 'D'.

² Pollsmoor Hearings, Exhibit 'C'.

Significant vacancies in the Area Commissioner's Office included nursing, medical, legal and educational staff. The highest number of vacancies in Medium A was among medical staff. Medium B and Medium C both had significant vacancies among nursing staff, while the Female Section was not affected to the same degree as the others. The Admission Centre had significant vacancies among medical staff. All had some vacancies among custodial staff.

The Area Manager of Pollsmoor, Mr Mketshane, told the Commission that attempts were being made to reduce the number of prisoners by discussing with judicial officers the possibility of reducing the amount of bail or releasing awaiting-trial prisoners on their own recognisance in the case of prisoners who are detained because they are unable to pay the relatively small amounts that are set as bail.

Mr Jansen told the Commission that the impression has been created that corruption in the Department of Correctional Services only started after April 1994, when in fact Popcru had uncovered corruption as far back as 1989, but was at that stage not recognised by the Department. Mr Jansen said that the union did expose the Department in newspapers and in protest actions and that many of the people accused had since taken severance packages.

According to a report of the Portfolio Committee on Correctional Services on a visit to Pollsmoor Juvenile Detention Centres on 15 October 2004:

- More than half of the juveniles at Medium A (aged between 18 and 21 years) indicated to the Committee that they had been awaiting trial for over a year.
- About ten (10) had been awaiting trial for over three years.
- A few indicated that they had been awaiting trial for more than four (4) years.³

³ See www.pmg.org.za/docs/2004/appendices/041115pollsmoor.htm accessed on 26 January 2005.

Mr Jansen provided the Commission with statistics of natural and unnatural deaths in the Admission Centre. The Commission requested statistics for the whole of Pollsmoor, but never received any.

Mr Jansen said that a major problem experienced by the Department relates to sick leave. He told the Commission that the average absenteeism per month is between 2.7% and 3.2%, although it is a significant drop from previous figures of between 5% and 7%. Mr Jansen attributed this to members having received more skills through the involvement of non-governmental organisations. In addition, he said, “the situation is more relaxed inside the institution”, and this contributed to the drop in sick leave.⁴

4. GANGSTERISM AND DRUGS

Gangsterism is a significant problem in Pollsmoor Prison, but from the evidence of warders it was unclear if or how the issue was being dealt with. The Commission heard evidence from “Mr X”,⁵ who was an active member of the 26 Gang, and who has since become inactive but has retained his status in the gang.⁶

Mr X described the important role played by warders in gang activities and said that they are also members of the various gangs. He said that money is obtained from non-gangsters and from prison warders; in addition drugs, dagga, guns and knives are smuggled in by prison warders.

The Area Manager of Pollsmoor, Mr Mketshane, said that drugs are sometimes confiscated daily. He said Pollsmoor is geographically vulnerable because it is accessible to Cape Town International Airport and is surrounded

⁴ See Cape Town transcript Volume 4 at page 377.

⁵ The full name of this witness is known to the Commission and he testified on the basis that his identity would not be disclosed.

⁶ This evidence is dealt with in detail in a separate Chapter on Gangsterism.

by a number of townships. The drug problem was further exacerbated by the close relationship between gangsters outside and gang members inside.

The warders who testified before the Commission were at pains to claim that gangs were being dealt with and were no longer a significant problem. The Head of Prison at the Admission Centre, Mr Jansen, claimed there had been a decrease in the activities of gangsters. Previously, he said, gang murders took place on a regular basis, active violence was the order of the day and some members were even afraid to go into the prison. Statistics of injuries that occurred inside the prison and were reported in hospital as having occurred at the Admission Centre from 1996 revealed the following:

Year	Injuries Inside Admission Centre
1996	244 cases
1997	318 cases
1998	92 cases
1999	76 cases
2000	94 cases
2001	62 cases

There has clearly been a decline in the injuries during the aforesaid period.

Mr Jansen also stated that the last violent death of a member or a prisoner that was recorded at the Admission Centre was in November 1997 when one (1) prisoner stabbed another.

There was uncertainty and confusion among those giving evidence before the Commission about how best gangs should be dealt with. Provincial Commissioner Bongani Gxilishe stated that gang activity must be discouraged by separating prisoners who belong to different gangs. However, he also said

the Correctional Services system should not recognise people who belong to gangs, but at the same time it should accept that gangs are a reality.

5. RECRUITMENT

The Commission heard extensive evidence detailing irregularities that had occurred during two recruitment drives. In one drive, the list of persons to be appointed was changed several times and, in another, persons were appointed without filling in a Z83 form, which is a prerequisite for appointment to any State department.⁷

6. FEMALE PRISON AND SEXUAL ASSAULT

The Head of the Female Prison at Pollsmoor, Ms Lulama Nogqada, told the Commission that ninety one (91) members work at the Female Prison, including the members who work at B4, which accommodates male juvenile inmates.⁸

At the time of the hearings there were three hundred and five (305) inmates in the Female Prison and fourteen (14) babies who are the children of inmates. Ms Nogqada said some children were born in prison, others were born outside and some inmates had come in with their children. There is a crèche in the female section for the children of the prisoners to use over the weekend, while during the week inmates' children and members' children go to another facility during the day.

Ms Nogqada testified about three cases of inmates who complained that they were raped in the cells. One case, which involved another female prisoner, involved oral sex. The offender was sentenced to three (3) months'

⁷ The evidence dealing with these drives is discussed in the Chapter dealing with Recruitment.

⁸ See Exhibit 'J' of the Pollsmoor hearings.

imprisonment. In the other two cases, the women did not want to lay criminal charges, but Departmental charges were laid.

Commission Investigator, Advocate Nicolette Joubert, subsequently carried out an investigation for the Commission as a result of the allegations made by Ms Nogqada and later testified in this regard.⁹

7. MOTIVATION AND REHABILITATION

The Western Cape Provincial Commissioner at the time of the Commission hearings, Mr Bongani Gxilishe, emphasised in his evidence that he had been conducting roadshows to ensure that members focus on placing rehabilitation at the centre of their activities and to mobilise members away from corruption and malpractices in the Department. Mr Gxilishe was appointed as Provincial Commissioner about eight months prior to him testifying before the Commission.

He said that on visiting Management Areas, he found members were demotivated and disillusioned and that some members had problems that were never addressed or concerns that they never had the opportunity to raise. Members also mentioned problems relating to the relationship between immediate supervisors and members, and they complained of squabbles both within management, and between management and unions. The nature of the tensions varied from area to area.

In his submission to the Commission,¹⁰ he stated that:

“I was particularly struck by the following observations, amongst others:

- *The extent of demotivation and disillusionment amongst members.*

⁹ See Pollsmoor Exhibit ‘BBB’.

¹⁰ See Pollsmoor hearings Exhibit ‘A’.

- *The lack of communication with members and the extent to which members are ill-informed of policies, strategic direction and current information of the Department.*
- *The disjuncture between the strategy, the core business of the Department (Mvelapanda) and the day-to-day operations.*
- *The absence of a culture of openness, transparency and debate.*
- *The ineffectiveness and incompetence of some managers.*
- *The lack of effective communication with offenders which is based on mutual respect, dignity, care and love.*
- *The extent of infighting and tensions within the management, between management and unions, members and offenders.*
- *The entrenched fear of victimisation and harassment.*
- *The complete disregard of the constitutional imperative with regard to a human rights culture approach to prison management.*
- *The isolation of the Department from the wider society, including immediate communities from which prisoners come and to which they will return.”*

Members also raised concerns regarding the manner in which merit awards were made. Communication was a problem with members complaining of being poorly informed about the policies and strategies of the Department of Correctional Services.

Mr Gxilishe said that he had made a plea to members during the roadshows that if they have information on corruption they should contact him or write to

him anonymously if necessary. The response to this plea had been positive, he said.

8. MEDICAL FACILITIES

A medical doctor who provides services at Pollsmoor Prison, Dr Paul Theron,¹¹ gave evidence before the Commission about observations that he and other nursing staff had made at the Prison. A report detailing this information had been given to the chairperson of the Select Committee on Security and Constitutional Affairs some time prior to his testifying before the Commission.

Dr Theron said that when Medium A was changed from an adult sentenced prison to a juvenile reception prison or admission prison in August 1998, it was done without any consultation or planning. He said that the prison was intended for about 1 000 adult sentenced prisoners, but had been holding about 1 500. This was not too much of a problem because adult sentenced prisoners were there long-term and maintained fairly good control of their health, didn't damage facilities and tended to be fairly organised.

Once the change occurred the prison accommodated about 2 000 prisoners of which about 1 500 were unsentenced. Dr Theron said the younger prisoners are much more vulnerable than the older prisoners and the disease pattern is completely different.

Dr Theron said there should have been some consideration of how many prisoners one could accommodate in such facilities, what changes would need to be made, how staff would need to be trained, what medical staff would be required, what procedures and protocol should be followed when people come in at admission and how prisoners would be handled if they had illnesses.

¹¹ See Pollsmoor hearings, Exhibit 'K'.

Dr Theron said there was no health plan for Pollsmoor. In June 2000 the Minister responded to a media report about children being held in prison by asking for a task team to be established, but nothing was achieved. Plans, decisions and notices of meetings were sent to Correctional Services Head Office but no response was received.

Dr Theron described the need for prisoners to be examined upon admission in order to prevent serious diseases being spread throughout the prison. He said that it would be necessary for prisoners to have uniforms made so that their own clothes could be properly fumigated. In addition, he said inmates are often traumatised when they are admitted to prison, or injured or carrying diseases and the only sensible way to ensure some control was to deal with inmates immediately.

Dr Theron said that the current staff shortages result in staff only dealing with problems or emergencies rather than any preventative care. This he said was costing the State about ten (10) times more per patient that it should because curative care was expensive.

9. INTERVENTIONS BY OUTSIDE AGENCIES

There is significant intervention from non-governmental organisations in Pollsmoor Prison, with various agencies involved in programmes for conflict resolution and life skills training. Several of these organisations gave evidence and provided submissions to the Commission about these programmes, which are offered to prisoners who choose to participate.

A former Area Manager of Pollsmoor Prison, Mr Fred Engelbrecht, told the Commission that such programmes started after a massive assault in the Admission Centre in 1997. This incident received international media coverage and management as a result decided to approach non-governmental organisations to assist.

The Head of Prison at the Admission Centre, Mr Jansen, said that about twenty five (25) non-governmental organisations have some relationship with the prison. He said the agencies had without a doubt contributed to capacity building for staff, management and prisons.

The Friends Against Abuse programme, which was started by inmates and some staff members in 2001, saw inmates being trained as lay counsellors to care for prisoners who had been sexually abused inside the prison. Mr Jansen said that although people were not coming forward in large numbers, increasing numbers had been coming to the counsellors over the previous six months.

A project run by the Centre for Conflict Resolution¹² was the subject of a commissioned British Broadcasting Corporation¹³ documentary, *Cage of Dreams*. The project focused on the numbers gangs in the Pollsmoor Admission Centre and showed how the Centre for Conflict Resolution (CCR) and Mr Jansen worked to improve social relationships within the prison, especially on the floor where the gang members were housed.

Mr Christopher John Giffard from the CCR's Prison Project said the project shown in the documentary consisted of a series of workshops that were run with gang leaders within the Admission Centre. The documentary followed the lives of particular individuals within those gangs and showed how the skills that they were learning from the workshops were assisting them in the process of change.

Mr Giffard said that the core of the Prison Project is conflict resolution training of which a key aspect is communication and listening skills. The project is donor funded and is not funded by the Department of Correctional Services. Initially the training focused on both inmates and members, but since the middle of 2001 the focus has shifted to working particularly with staff.

¹² Hereinafter referred to the "CCR".

¹³ Hereinafter referred to the "BBC".

Although the CCR has tried to ensure that management also receives training, it has experienced difficulties where unit managers send more junior staff and do not attend workshops themselves. In addition, staff sometimes “abscond” between the prison and the training centre and do not attend the workshops. Mr Gifford said that it is also difficult to keep up with the turnover of staff and make sure that staff members are trained thoroughly.

Mr Gifford also highlighted the difficulties of communicating within an organisation as large as the prison. He said there is no base where people go when they arrive at work and no general staff room, and each unit tends to have only a very small office for unit staff, which would not be suitable for holding a meeting.

Mr Gifford told the Commission that the number of reported assaults by staff on prisoners had decreased quite dramatically from 1995 to 2000. The Centre did, however, take into account that the actual incidence of assault is likely to be much higher as some incidents would not be reported. The Centre also recognised that it could not claim that CCR has sole responsibility for the reductions adding that the Admission Centre Head Mr Jansen had made changes to the management style of the prison and the management itself had made a significant contribution to the atmosphere of calm within the prison.

10. WORKSHOPS AND LOGISTICS

The Commission also heard evidence of corruption and maladministration with regard to workshops and the logistics department at Pollsmoor. Subsequent to that the Forensic Auditors were asked to investigate these areas further. A detailed account of the evidence heard and the Forensic Auditor’s findings, are fully dealt with in the chapters dealing with Procurement and Logistics and Workshops and Stock Take Systems in this report.

CHAPTER 41

PRETORIA MANAGEMENT AREA

CHAPTER 41

PRETORIA MANAGEMENT AREA

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CHAPTER 41

PRETORIA MANAGEMENT AREA

1. INTRODUCTION

The Pretoria Management Area is made up of six (6) correctional centres and one community corrections centre.

As of November 2003, the Pretoria Local Prison (also known as New Local Prison or Newloc), which was the admission centre and was designed to accommodate 2 171, had a population of 4 162 prisoners. The majority were awaiting trial.

The staff complement was four hundred and ninety three (493). At the time of the hearings nineteen (19) out of forty seven (47) posts for nursing staff had been filled. There was no doctor allocated for the 24-hour regional hospital in the facility, which was served instead by sessional doctors.

The Pretoria Central Correctional Centre, which is for medium security classification, was built for 1 563 prisoners, but at the time of the hearings was housing 2 662. Mr Polataka Frank Hlalethoa, the Head of Pretoria Central Prison, told the Commission there were two hundred and sixteen (216) staff members in Central, including three (3) psychologists, about eight (8) social workers, eight (8) teachers and about one hundred and seventy (170) custodial workers. Pretoria Central consists of three sections: Medium A, Medium B and Medium C, and Administration.

The Head of Pretoria Female Correctional Centre, Mrs Nonhlanhla Doreen Leola, told the Commission that one hundred and fifteen (115) sentenced adults, who were sentenced for up to ten (10) years, were housed in the

Female Prison, which was designed to accommodate about seventy five (75) prisoners. At the time of the hearings the staff complement was fifty eight (58).

The Atteridgeville Correctional Centre, which accommodates sentenced prisoners, was built to accommodate six hundred and nine (609) prisoners. At the time of the hearings it had over 1 000, and a staff complement of one hundred and twenty eight (128). The prison is made of corrugated iron and only prisoners with terms of up to seven (7) years could be accommodated there. The centre is on a farm in Thaba Tshwane where vegetables are produced for prisoners.

Pretoria C-Max Correctional Centre houses sentenced prisoners in the maximum security classification who are mainly problematic or dangerous cases and awaiting-trial prisoners with a high escape risk.

Although there is capacity for two hundred and eighty one (281) prisoners, at the time of the hearings just more than two hundred (200) were being housed there due to stringent criteria for placing prisoners in the facility. C-Max had a staff complement of one hundred and forty eight (148).

The Odi Correctional Centre accommodates all categories of prisoners and was designed to accommodate eight hundred and ninety one (891) prisoners. As at November 2003, it accommodated about 1 800 prisoners. This facility is on a farm and vegetables are also produced there for prisoners. The staff complement at the time of the hearings was one hundred and ninety two (192) officials. The centre became part of the Pretoria Management Area from 1 August 2003.

The Pretoria Community Corrections Office consists of the main office in Pretoria and three satellite offices. At the time of the hearings there were 1 200 offenders under supervision and the staff complement was one hundred and eleven (111).

2. POPULATION

The offender population per correctional centre as at the end of August 2003 was:

Correctional Centre	Approved accommodation at 100%	Offender population: Sentenced	Offender population: Unsented	Total	%
Local	2 171	779	3 383	4 162	191.70%
Central	1 563	2 681	0	2 681	171.52%
Maximum	281	154	30	184	65.48%
Atteridgeville	609	1 047	0	1 047	171.92%
Female	166	140	110	250	150.60%
Odi	891	1 026	863	1 889	212.00%
Total	5 681	5 827	4 383	10 213	179.77%

3. GENERAL CONDITIONS

Mr Winson Naidoo, who was appointed as Head of Medium A in December 2002, told the Commission he found numerous problems when he was appointed.

“Prisoners were complaining of being ill treated and that they were not being given the full amount of their prescribed diets, and that dagga was being smuggled in large amounts into this section...Prisoners were

not even getting food in certain instances and I intervened and bread and milk powder was given to inmates who did not receive any food. Inmates have also been complaining that they do not receive their full rations, and I have personally seen that when meat is served for instance beef, there is virtually no meat, but only bones. I have tried to address this issue, but to no avail...The only explanation I can submit for the shortages of food is due to the large scale of theft of prisoners' rations, which is primarily the meat.¹

According to a presentation by the former head of the Local Prison, Mr Nicholas Baloyi, the admission centre houses awaiting trial adults, juveniles and children. In addition, some sentenced adult prisoners and sentenced juveniles were incarcerated. He said that weak points at the prison included:

"The mixing of sentenced and unsentenced juveniles and adult prisoners due to overcrowding and limited facilities.

No proper programmes for children under 18 years.

Local CC is dilapidated in such a way that it creates unhygienic conditions for inmates as well as officials, toilets are forever blocked, water is sometimes scarce, pipes are broken and there is no hot water, wires are hanging loose etc... (Own emphasis)

Large numbers of officials on trauma and stress leave caused by the situation in the workplace and medical fund no longer catering for these members."²

The Commission heard that as a result of overcrowding at Atteridgeville Correctional Centre not all prisoners could be allocated to work teams. However, the biggest challenge faced by the prison was HIV/Aids.

¹ Pretoria Exhibit 'D.'

² Pretoria Exhibit 'NNN'.

“Currently we are testing between 4-7 inmates for HIV/Aids per week and in most cases 3 would be positive. Our challenge includes encouraging prisoners to comply with supplementary medicine (vitamins etc) in the absence of anti-retrovirals. The facility needs more manpower to effectively discharge its duties without any strain to the present staff.”³

4. OVERCROWDING

Mr Ephraim Bheki Ndebele, was the Area Commissioner for the Pretoria Management Area from November 2002 until the end of July 2003 and the Acting Area Commissioner for two months subsequent to him testifying before the Commission.

Mr Ndebele said that as a result of the overcrowding prisoners are not rehabilitated and officials battle to keep the prisoners secure. He added that it also resulted in prisoners being held under inhumane conditions.

Mr Ndebele said there were twenty (20) social workers catering for 10 000 prisoners. The social workers were expected to run life skills programmes for prisoners as well as provide services to individual prisoners. As a result of the size of this task, Mr Ndebele said that outsiders were asked to render programmes to prisoners and prisoners are trained by social workers to act as peer group educators. Awaiting-trial prisoners had no access to psychologists or social workers unless there was a crisis.⁴

Mr Ndebele said the department had no specific policy to address overcrowding, but that it formed part of the strategic plan as an issue that needed to be addressed.

³ Pretoria Exhibit ‘FFF’.

⁴ See Chapter on Sexual Violence for a discussion of this policy.

Mr Ndebele said that the most problematic prison for him during his tenure was Local Prison. This was because of the need to accommodate unsentenced prisoners and juveniles. He said that it would be desirable to have a separate prison to deal only with awaiting-trial prisoners.

Mr Jacobus Johannes Maartens, who was detained at Pretoria Local in 2000, told the Commission that on admission he was put in a cell with about one hundred and twenty (120) other prisoners. There were a limited number of beds and those who had money paid the cell cleaner for a bed. Prisoners who did not have any money did not get a bed.

Mr Hlalethoa described the situation in an area of single cells called Special Care better known as the “Bomb”, to which prisoners are sent for security reasons, while disciplinary inquiries are underway, or on their own request.

He said that when he first arrived inmates were being held unjustly in the Bomb. Prisoners who are there as part of a disciplinary measure are kept in a cell for twenty one (21) or twenty two (22) hours a day.⁵

The Head of Pretoria Female Correctional Centre, Mrs Leola, said this prison was largely built to accommodate security male prisoners housed in single cells. These single cells are used by three (3) inmates instead of one (1) as a result of overcrowding. The cells are not locked and only the main entrance is locked at night to allow movement and ventilation in the small passage.

Sick prisoners are housed with other prisoners because there was no facility for them. There is no dining hall and the prisoners use a passageway instead. A number of juveniles are held in the prison, as well as babies of incarcerated women. The total number of inmates as at 4 September 2003 was two hundred twenty six (226) with eight (8) babies made up as follows:

⁵ See Chapter on Treatment of Prisoners for a detailed discussion on detentions at the “Bomb.”

Inmates	Number
Sentenced adults	115
Unsentenced adults	81
Sentenced juveniles	7
Unsentenced juveniles	21
Sentenced mothers with babies	4
Unsentenced mothers with babies	0
Sentenced juveniles with babies	2
Unsentenced juveniles with babies	2
Total number of babies behind bars	8
Youngest baby incarcerated	15 days
Oldest baby incarcerated	2 years 2 months
Sentenced pregnant adults	1
Unsentenced pregnant adults	1
Pregnant unsentenced juveniles	1
Pregnant sentenced juveniles	2

5. CORRUPTION

The Commission heard evidence that there was a significant level of mayhem and corruption at Pretoria Local Prison. In addition, the former Head of Prison, Mr Baloyi, was found to be incompetent.⁶

The evidence showed that when crimes are committed inside the prison, prisoners have to first report to the warders to be able to report cases to the police. As a result the effective investigation of criminal matters is being hampered.⁷

⁶ Recommendations regarding Mr Baloyi are in the Chapter on Sexual Violence in Prisons.

⁷ See Chapter on Sexual Violence for a discussion of this issue.

Former inmate Mr Maartens told the Commission that a prisoner who wanted to use the phone was required to pay a warder R2.00, warders were paid to buy food for prisoners, warders regularly smuggled drugs into the prison for inmates, and a firearm was found during a search of a cell near to the one in which he was kept.

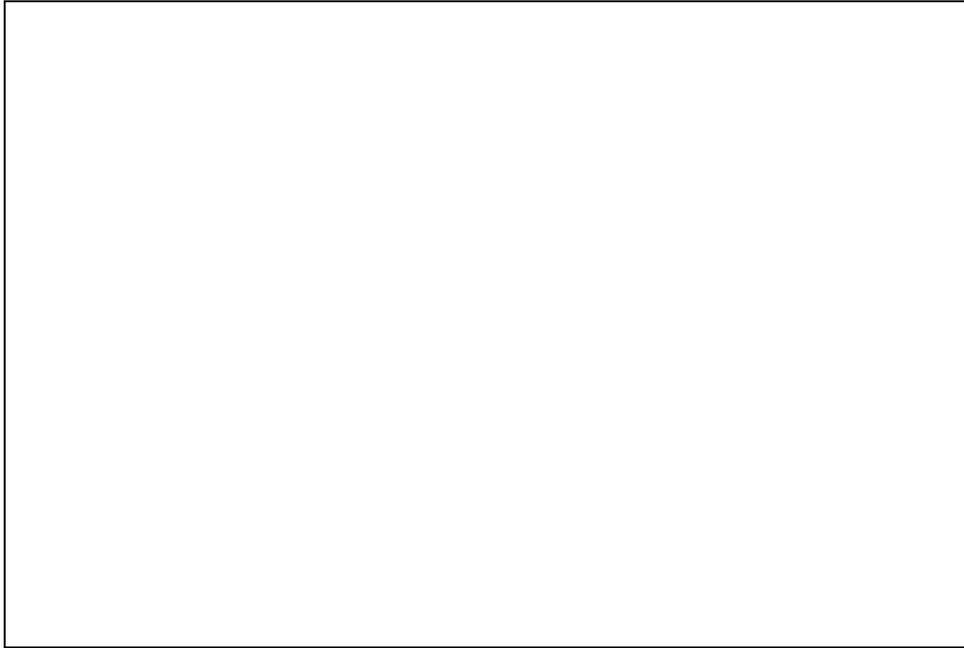
Mr Hlalethoa told the Commission that the smuggling of drugs and liquor into the cells is a major problem at Central. He said procedures were in place for officials to be searched, but that he could not always rely on the integrity of the staff.

It again appeared that ex-members of the police service who were in detention were given preferential treatment while in prison, for example, Mr Eugene De Kock, the ex-captain of Vlakplaas hit-squads, was allowed extended privileges to which he was not entitled and was being held at Pretoria Local Prison when he should have been held at Pretoria Maximum.

The Commission investigated allegations of collusion between members and prisoners in smuggling drugs in and out of prison and heard evidence from warders who admitted to doing so. It was evident that there were severe limitations in the security arrangements at Pretoria Central Prison, the facilities were inadequate and members manning the gates were in many cases neither reliable nor competent.

Mr Lulama David Halam, an investigator for the Commission, stated in an affidavit that various methods were used to smuggle goods into prison after due consultation with various prisoners. Drugs and firearms were commonly smuggled in dustbins that were transported back to the prison after being emptied. Drugs such as mandrax, cocaine and small quantities of dagga, as well as money, were often smuggled through the visiting area. Small quantities of unauthorised articles were smuggled through small openings like ventilators at the back of Pretoria Central Prison. Smuggling also took place through a pre-cast and rusty fence, which is not electrified, on the far side of

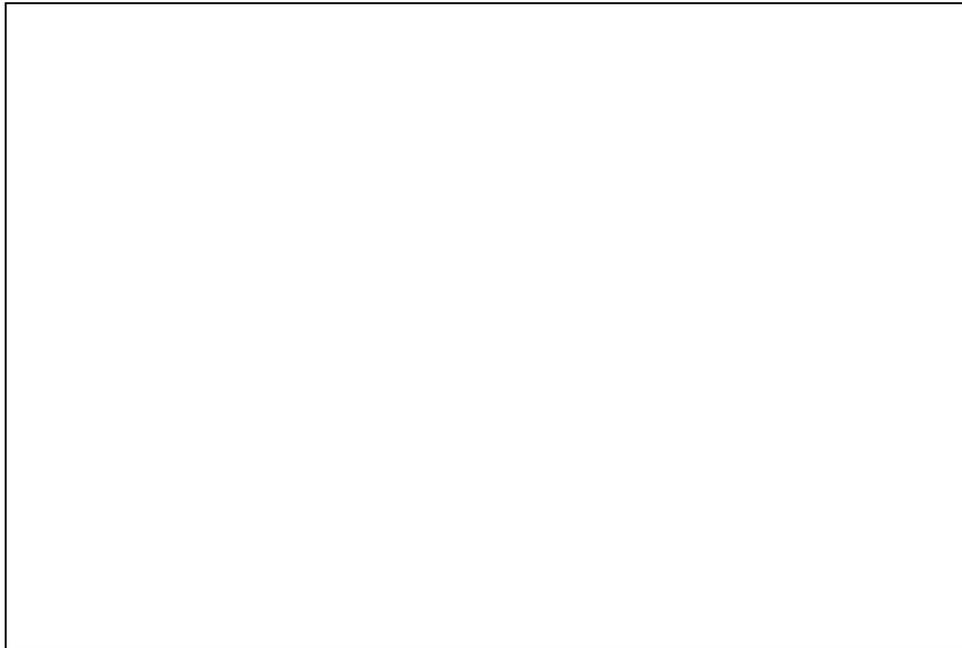
the prison yard. The problems with the fence are best depicted in the photographs, which follow hereinafter:



Trees where dagga would be left unattended to be later thrown over the the fence by warders who use prisoners to sell the dagga



Picture shows how close concrete wall and rusty fence is to the trees. It is here that prisoners and warders pick up the dagga left by warders to be later thrown into the prison.



Confiscated dagga divided in smaller parcels to be distributed to prisoners to sell. The brown bag is used to carry the dagga to be left at the fence.

It is clear from the above photographs that it would be easy to smuggle bags of dagga into the prison precinct.

Mr Halam's evidence also confirmed that members colluded with prisoners by supplying their bank details to the prisoners, who would ask relatives to deposit money into the bank accounts. Members would get a commission for withdrawing the money and giving it to the prisoner. Females were often asked to smuggle goods into the prison because there are not always female warders at the gate to search females. Members bringing in lunch parcels at lunchtime would not be searched, providing an opportunity for members to smuggle in liquor and drugs.

6. DISCIPLINARY INQUIRIES

Several officials raised concerns about the way in which disciplinary inquiries are dealt with in Pretoria Prison. Mr Hlalethoa told the Commission that the quality of investigations was inadequate and there are lengthy delays in

instituting proceedings. He also agreed that the Head of Discipline at the time was deliberately manipulating the system, which allowed many people to escape disciplinary sanctions.

Mr Ndebele told the Commission that disciplinary cases take a long time to be finalised because officials are not well trained to deal with the cases. As a result of delays, cases are struck off the roll.

Mr Hlalethoa said many cases are withdrawn because inmates sometimes falsely lay charges of assault against warders with whom they have had a disagreement.

“If there was a transaction between (sic) money, either the prisoner is sent an official and the official has promised to bring such thing, articles, and he does not bring and he tends to make an allegation that he has been assaulted, and then later they solve up the matter and after it has been reported and then the prisoner do not want to further give – testify to that. He says, no let’s – I don’t want to testify and we have no proof and in some cases where the prisoner had made an allegation that the official had assaulted him, one cannot prove. There are no marks.”⁸

The following statistics of assaults were provided to the Commission:

Type of assault	1998	1999	2000	2001	2002	2003
Member on Prisoner	46	46	34	95	41	25
Prisoner on Prisoner	106	100	91	75	62	27
Prisoner on Member	9	4	1	3	4	1

⁸ Pretoria transcript Volume 41 page 3 493.

Former Area Commissioner of the Pretoria Management Area, Mr Ndebele, provided the following statistics of disciplinary cases for 1 July 2002 to 31 July 2003:

Cases	No
Cases successfully instituted, including acquittals	88
Sanctions imposed	62
Number of cases withdrawn	33
Number of cases pending	26
Number of acquittals	26
Total number of disciplinary hearings (including cases withdrawn, pending)	147

The breakdown of the sanctions imposed referred to in the table above was as follows:

	Sanctions imposed	No
(a)	Verbal warning	22
(b)	Written warning	14
(c)	Serious written warning	10
(d)	Final written warning	10
(e)	Dismissal	6
	Total	62

7. SEXUAL ASSAULTS

A number of inmates and former inmates who had been subjected to sexual abuse by inmates and some of them by warders, testified before the Commission. The main thrust of the evidence related to the manner in which they were abused with the full knowledge of the warders, who either ignored them or participated in abusing them either verbally or sexually. One warder even sold one of the prisoners to other prisoners so that they could sexually abuse him.

A number of witnesses testified before the Commission in support of the allegations.⁹ Some of the witnesses said they would be haunted throughout their lives by their traumatic experiences.¹⁰

8. C-MAX PRISON

Pretoria C-Max Prison in particular and Maximum Security Prisons in general are discussed under the Chapter on Treatment of Prisoners. The Commission heard evidence of the psychological impact of solitary confinement in C-Max, the lack of proper procedure, and the tendency to use solitary confinement as a punitive measure. These factors are of great concern and have prompted the Commission to make wide-ranging recommendations.

9. USE OF EXAMINATION CENTRES

The Commission heard evidence that the examination centre, permitted by the Department of Education to be used by inmates at Pretoria Central Prison, was also being used by members and civilians in contravention of Departmental policy. One (1) civilian (a relative of a member) wrote an examination at the prison in October 2003. He did not pay fees to register and

⁹ For more details on these assaults see the Chapter on Sexual Violence in Prisons.

¹⁰ For more details on these “rapes”, see the Chapter on Sexual Violence in Prisons.

did not attend classes at the prison school. When he arrived at the gate to write his examination, he was escorted to the centre where everyone was writing.

CHAPTER 42

ST ALBANS MANAGEMENT **AREA**

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ST ALBANS MANAGEMENT AREA
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CHAPTER 42

ST ALBANS MANAGEMENT AREA

1. INTRODUCTION

The St Albans Management Area consists of three (3) prisons, namely, Maximum Security Prison, Medium A Prison and Medium C Prison. During the period February 2002 to June 2003 all of the prisons were overcrowded, with Medium A being the most affected.

2. POPULATION

The population of the three prisons as at June 2003 was:

Maximum Security:	1 517 (211.58% full)
Medium A:	2 536 (175.38% full)
Medium B:	1 640 (177.68% full)

The Commission inspected St Albans Prison, together with the Provincial Commissioner, on 5 September 2002 and found that the communal cells in Medium B were hopelessly overcrowded. Some cells should hold twenty nine (29) prisoners, but, in fact, hold thirty five (35) or more, and the larger cells which should hold forty two (42), hold as many as sixty (60).

As a result of the overcrowding in Medium A, there are no beds in the communal cells, only mattresses strewn on the floor. The wing should hold about two hundred (200) prisoners, but housed about double that number. The Commission was also told that as a result of the overcrowding and limited human resources the provision of three (3) meals to prisoners with four (4)

hours between meals is not possible in two (2) big units. In addition, the providing of exercise time to all inmates on a daily basis is not possible.¹

An affidavit provided by the Head of St Albans Maximum Prison stated:

*"This severe overpopulation of the facility not only makes it extremely difficult to administer the daily incarceration programme properly and successfully but also places a huge burden on the coping abilities of the significantly limited available manpower at the said prison. In addition, the high degree of prison-gang affiliation amongst the inmate population and regular inter-gang conflicts further taxes the smooth running of the prison."*²

The Head of Medium A, Mr Francois Rosseau de Villiers, told the Commission that he estimated about seventy per cent (70%) of the awaiting-trial prisoners are ex-maximum prisoners and/or ex-long-term prisoners who were coming back into the system.³

3. STAFFING

There are 1 691 warders based at St Albans, but of these posts 83 are vacant. Staff were stationed in various places as follows:

Area Commissioner's Office	1 079 (51 vacant)
Medium A	196 (14 vacant)
Medium B	239 (16 vacant)
Maximum	177 (2 vacant)

Amongst the staff vacancies at St Albans, it is notable that of the nursing categories in the Area Commissioner's Office forty two per cent (42%) of the

¹ See Exhibit 'E'.

² See Exhibit 'F'.

³ See St Albans Transcript Volume 4, page 319.

posts are vacant, while 24% are vacant in the education categories. The total vacancies in this office stand at 5%.

Similarly, in Medium A there are significant vacancies: 50% in the nursing positions, 66% in social services and 33% in education positions. The total number of vacancies is 7%.

The Head of Medium A, Mr de Villiers, told the Commission in 2002 that the post establishment for the Centre was approved at two hundred and thirty three (233) staff members by head office, but is only financed at one hundred and seventy eight (178). At that time there were about one hundred and seventy three (173) actual staff members at Medium A, of which about fourteen (14) were appointed to work in other areas such as on the Broiler Project and in the Area Manager's office. This shortage, he said, affects performance.

As an example, he said that there should be five members at the entrance gate, but he can only afford to put two officials there and they are not able to search all cars going in and out. Mr de Villiers told the Commission:

*"The policy says searching must be done. They do not say each and every member, each and every person entering the premises or leaving the premises must be searched. The policy says searching must be done, and with the shortage of staff it's impossible to search all the people leaving the main entrance gate. I do that also on an ad hoc basis. In any case, the fence around the prison are being cut open daily whereby private people are entering on the side."*⁴

In Medium B 43% of the nursing posts are vacant, 25% of the social services, and 20% of the education posts. In total 7% of the posts are vacant.

⁴ See St Albans transcript Volume 4 at page 332.

Statistics for the Maximum Security Centre show that 20% of the social services posts are vacant, and 1% of the total posts.

It is clear that there is an even distribution of staff within this Management Area. However, as with most of the management areas investigated by the Commission, the area that is most affected by the staff shortage is the medical facilities.

During an inspection of St Albans Prison on 5 September 2002, the Commission found the prison hospital quite impressive. There are eight (8) large wards and about ten (10) single wards and a well-stocked pharmacy. There are sixteen (16) professional nurses attached to the hospital, with five (5) usually allocated to the maximum security wing. On occasion they are reduced to only three (3) nurses in the wards due to annual leave, sick leave and study leave, as well as other nurses being seconded to the clinics. Hospital staff assured the Commission that they did manage even when short-staffed.

The hospital has an operating theatre with first class modern equipment, but it is no longer operative because the prison does not have a surgeon. There was a visiting surgeon, but he retired and prison authorities were, at the time of the inspection, considering the employment of a full-time doctor. At that time, a visiting doctor came to the prison and performed minor surgery under local anaesthetic and extractions were done in a dentist's room, which has modern equipment. Prisoners wanting fillings, dentures etc have to pay for the service.

St Albans Area Manager Richard Elliot Marcus, told the Commission that overcrowding is aggravated by a shortage of staff due to members not being motivated to work. At the time of his testimony he had twenty (20) members, including four senior officials, who were off work due to stress, but still receiving a full salary. These included the chairperson of the parole board who

had been off sick for more than eighteen (18) months. Mr Marcus had a further ten (10) members who were involved in sport matters.

The Head of Maximum Prison, Siposandile Clifton Mshungane, told the Commission in 2002 that he had seven (7) members who had been off work due to stress for more than a year. He said that it is difficult to work with maximum security prisoners:

“When we search we get these knives when we search every day. That is why now most of the members are stressing and some of them have been stabbed by prisoners several times.”⁵

The Provincial Commissioner in the Eastern Cape at the time of the Commission’s hearings was Mr Raphepheng Ephraim Mataka. He joined the Department of Correctional Services in 1986. He was a founder member and former national secretary of Popcru. He was appointed to the Eastern Cape on 4 August 2000.

Mr Mataka said that at the time the evidence was led (2002) the Eastern Cape Department of Correctional Services was the province that was performing the worst financially. Geographically the province is vast and prisons and management that fell under the former Transkei were neglected.

4. CULTURE

The institutional culture, which the Commission observed during the hearings in Port Elizabeth, was that the St Albans Management Area is rife with corruption and maladministration. The problems within the Management Area also had political connotations. A further complication is the division between employees. The Eastern Cape as it is currently recognised in terms of section 103 of the Constitution includes districts which were formerly part of the

⁵ See St Albans transcript Volume 4 at page 367.

Transkei and Ciskei homelands, and the Republic of South Africa. Consequently, the employees of the Department are from those areas. Notwithstanding the fact that the members now belong to the same province of the Eastern Cape, they still subscribe to the old apartheid divisions and decisions are scrutinised according to whether they favour one or the other of these old geographical regions.

There is also strong trade union rivalry, which affects the functioning of the Management Area.

5. CONDITIONS

Evidence was led before the Commission regarding the conditions at St Albans. Mr Marcus said that on one occasion he found three (3) prisoners sleeping in the toilet when he visited Medium A at 3am. On investigating the issue the following morning Mr Marcus was told that the cell could not accommodate the prisoners because the toilet facilities did not work and he immediately contacted the building group to attend to the problem.

A prisoner claimed to have found maggots in his food and had also taken the Department of Correctional Services to court due to a lack of water in Medium B Prison. Mr David Ashley Price, a former attorney, who was incarcerated at St Albans Medium B Prison at the time of the hearings in Port Elizabeth, said that on one occasion when they were locked up without water it was over the weekend.

“We were without water from 9 o’clock, roughly on the Saturday morning until 9 o’clock on a Sunday morning and it was a particularly still day and a very hot and humid day. There was only one member who was prepared to come into the single cell section because of the stench. You can imagine the toilets not being able to be flushed and the food that we get, you can ask any inmate that comes to testify, your

*supper that you get at about 2 o'clock in the day, you cannot, for example if you put it in a Tupperware dish and put a lid on it and open it an hour or two later, it stinks. It has the same stench as faeces, and so there was this left over food and people having used the toilets and not a drop of water to drink, to wash your hands after you'd used the toilet, nothing.*⁶

Mr de Villiers said that the staff shortage hampers the ability of staff to provide three meals a day for the prisoners. As a result lunch and supper are provided together in the bigger units so prisoners either take supper to their cells to eat later or eat it in the dining room with their lunch. The prison is locked up at 4pm, and the majority of staff members work from 7am to 4pm.

The Commission found during its inspection of St Albans that the kitchen has the latest equipment for preparing meals. Approximately 2 600 plates of food per day are prepared, which amounts to 300 000 plates of food per month. There is a big dining room, which appeared to be very clean. Everything, including the plates, is stainless steel, and prisoners are only allowed to eat with spoons.

Mr Mshungane said that some prisoners are washing clothes for other prisoners because there is no laundry for 1 400 inmates to wash their clothes. He said the prisoners who attend school on weekdays ask other inmates to wash clothes in return for payment of some kind. He raised a concern that this promoted smuggling because prisoners would, for example, give a fellow prisoner dagga in return for washing clothes.

The Commission heard from Mr Marcus that dagga is found in St Albans almost daily. In addition, he testified about a case that is before the court in which a warder brought a knife into the prison for an inmate.

⁶ See St Albans Transcript Volume 32 page 3 341.

The Commission found that access to Medium A is through pleasant gardens, which contain ponds and an aviary where visitors can sit and wait until they are able to see the prisoner they have come to visit. It is especially pleasant for children who are there to visit prisoners. The prison also tried to make this wing more “user friendly” by referring to the cells as “Housing Units A, B, C” etc. instead of “Cell A, B, C”. They also have a “special care unit”, which consists of single cells for troublemakers, prisoners who are studying and other prisoners, who are kept in this section for their safety.

The Commission also inspected the area where identity parades are held. The room has one-way glass and when the lights are out, prisoners cannot see who is identifying them. Previously prisoners had to be transported to the police station for identity parades. This was an enormous strain on staff as it depleted the number of members on duty at the prison and there are often insufficient prisoners to hold an identity parade at the police station. Apart from the money saved by not transporting prisoners to police stations, it is also easier to hold the identity parades at the prison because other prisoners can be used. The room was a new addition to the prison at the time of the Commission’s inspection on 5 September 2002.

There is also a courtroom at the prison, which was used up to January 2002. However, it appears that magistrates and attorneys are reluctant to use the court because it is quite far to travel. The attorneys are apparently of the view that if they have a number of clients appearing in court, they prefer that the prisoners come to them. This is causing problems for the prison authorities because staff and transport have to be allocated to take the prisoners to court in Port Elizabeth or surrounding areas. The prison court is used only for postponements but prison authorities are hoping to use the court for high profile cases, including those involving prisoners who have previously escaped, or attempted to escape from custody.

As in the Johannesburg Management Area, there was also chaos in the keeping of proper records at this Management Area and the Commission noted that the two (2) meal serving plan had been implemented.

6. ASSAULTS AND DEATHS

The Head of Medium B Prison, Mr Mzwamandla Ngxisha, said that statistics showed there had been twenty five (25) assaults of members on prisoners for a period of eighteen (18) months. He attributed this mainly to gangsterism and to gangsters not accepting authority. However, he said that the level of assaults may also be due to high stress levels.

“Just recently there was a member who assaulted a prisoner in front of an independent prison visitor. According to the information from the independent prison visitor and other members, there was actually nothing that provoked that member. I just assume that it was just a frustration on the part of the member otherwise there was nothing that demands that.”⁷

Mr de Villiers said that there had been a number of cases of member-on-prisoner assaults reported over the twelve (12) months prior to him testifying before the Commission. However, as far as he was aware not one prisoner wanted to proceed with the case.

Ms Ayanda Bonani told the Commission that there were on average three (3) deaths per month at St Albans. The figure was high because St Albans is the regional hospital in the province and, as a result, all prisoners who require 24-hour medical care are referred to St Albans. Of the twenty five (25) deaths at St Albans between January and August 2002, seventeen (17) were HIV related. Mr Mzwamandla Ngxisha said there were fifty seven (57) natural deaths between August 2001 and August 2002.

⁷ See St Albans transcript Volume 4 at page 393.

7. AMAGQUGULA

The Commission heard about Amagqugula, which colloquially referred to gatherings in garages, and was made up of a network of people who acquired positions of power, which they used to determine who could continue to occupy positions of authority in the Department. They held secret meetings where policy and practice was resolved and the fate of individuals determined. They removed people from positions by intimidating them or manipulating the disciplinary process to ensure that some people were protected while others were targeted. When they did not like someone who was occupying a position and they could not get the person out by manipulating the system, they simply sent in their “storm troopers” and bypassed any legitimate process to achieve their own ends.

The Commission heard evidence from Correctional Official Mr Thembile Goodman Matshoko, who was a shop steward for Popcru until 1999. He was subsequently expelled from the union. Mr Matshoko testified before the Commission on the grounds that the information that he provided was not used to incriminate himself.⁸

7.1 Mrs N. F. Tseane

One of the victims of Amagqugula was the Eastern Cape Provincial Commissioner, Mrs Nokulunga Felicia Tseane, who was visited in her office by the “storm troopers” and told in no uncertain terms that she was to leave the province. Mr Matshoko told the Commission that Mr Mpemva and Mr Nweba deemed Mrs Tseane as a stumbling block to transformation in the province. The level of involvement of the National Commissioner is evident in Mr Matshoko’s testimony before the Commission. He said:

“I remember in a secret meeting which was held where we were going to do the action the next morning, in that meeting then Mr Mpemva told

⁸ For more details see the Chapter dealing with Historical Background.

us that the time has come now that we go and unseat Mrs Tseane from her office at the provincial office. Whilst he was talking to us a cell phone rang and he attended to the cell phone and he talked, and he went outside and he came back. He informed us that it's Commissioner Sithole that he was talking with and Commissioner Sithole doesn't have any problem with us doing the action provided we are going to do it with discipline, we are not going to touch her and so on.⁹

Mrs Tseane was appointed as Provincial Commissioner in March 1997. In September 1998 a meeting to discuss resources in the prisons was about to start, but was interrupted by four men from Popcru who said the provincial delegation must leave because they wanted to speak to people from head office. The provincial officials did leave and Mrs Tseane later heard that their demands included her transfer from the province.

The National Head of Corporate Services, Mrs Kgotsidintsi, was delegated to handle the matter and suggested Mrs Tseane talk to the unions. Two days prior to the meeting with the union Mrs Tseane was about to start her address in a meeting in Pretoria when Mrs Kgotsidintsi spoke to her about allegations against her that came out of a meeting with the national structure of Popcru and the National Commissioner. Mrs Tseane was accused of being ethnocentric and partial in handling promotions, neglecting the former Transkei and Ciskei prisons including in the training of personnel and failing to consult with members. After the meeting Mrs Kgotsidintsi indicated to Mrs Tseane that she would be transferred to the North West and that Mr Mataka had been earmarked for the Eastern Cape position. The subsequent meeting with Popcru ended amicably and a follow-up meeting was scheduled.

Mrs Kgotsidintsi in the meantime came to Port Elizabeth for a meeting and while the two women were in Mrs Tseane's office a group of people entered. Mrs Tseane said:

⁹ See Port Elizabeth transcript Volume 14 at pages 1 430 – 1 431.

“They got into the office without being invited in and they demanded that Mrs Kgosidintsi should leave and I should also pack my bags and leave ... The demeanour was, it was frightening.”¹⁰

The two left for the airport in Mrs Tseane’s car and were followed by some of the Popcru delegation. When Mrs Tseane returned to her office she found it occupied by Mr Speelman, the Director of Human Resources.

Later she had a conversation with the Commissioner. She said that the National Commissioner wanted to know if she was harmed, but did not sound surprised and did not give her any guidance. Mrs Tseane stayed at home for the next few days, but was called to attend a management meeting. Although the management usually have lunch together, that day the Commissioner and the CDCs said they were meeting with Popcru president Mr Cebekhulu and they returned with him. Mr Cebekhulu apologised for the incidents in the Eastern Cape and KwaZulu-Natal.

The National Commissioner told Mrs Tseane that the options were to either engage with Popcru or consider redeployment. The following day she was served with a letter indicating that there was an intention to transfer her. Although she made several requests, she never received any reasons and was subsequently told to report to the North West. Mrs Tseane was never asked to make a statement about the incident.

Mr Matshoko said the instructions from Mr Mpemva and Mr Nweba were to go to Mrs Tseane’s office and tell her to pack her things and never come back to the province. The two ringleaders were not involved in the action and the “storm troopers” were told that if they saw Mr Mpemva and Mr Nweba they should not talk to them. About twenty five (25) Popcru shop stewards were involved and on their arrival at the provincial office Mr Matshoko and Mr Michaels were told to call Mr Speelman who was the PCO personnel at the time.

¹⁰ See Port Elizabeth transcript Volume 19 at pages 1 965 and 1 966.

Mr Matshoko said:

“When we arrived at the office of Mrs Tseane our comrades were singing now songs and chanting slogans ‘away with her’ and we appointed Mr Speelman as the Acting Provincial Commissioner at that moment, and she went out – she was already out when we arrived with Mr Speelman. Then Mr Abersalie told him that we’ve just told Mrs Tseane to go and, ‘Now we are appointing you as the Acting Commissioner in her absence until a provincial commissioner is appointed’.”¹¹

Mr Matshoko said that no action was taken against him for his involvement in removing Mrs Tseane from her office and he was never approached to make a statement in this regard.

When asked if they were dressed in a manner to prevent recognition, Mr Matshoko replied:

“I was there for everyone to see. No, it was not a question of ... we were in power. I have to tell the Commission that we were in power. As Popcru we were in power, we were not afraid of anyone. If our bosses tell us, like Mr Mpemva and Nweba, they give us instruction to do that we will do it.”¹²

At the time of the Commission hearings in Port Elizabeth Mrs Tseane had not been re-instated to her post as Provincial Commissioner after this incident. Her post was temporarily filled by Mr Speelman until he retired. Later Messrs Baloyi and Mataka took the reins.

¹¹ See Port Elizabeth transcript Volume 14 at page 1 449.

¹² See Port Elizabeth transcript Volume 14 at page 1 452.

7.2 Mr J. P. Baxter

A Popcru member, Mr James Patrick Baxter was also victimised after he dared to challenge Mr Nweba and Mr Mpemva. His transfer was discussed at an urgent igqugula held at Mr Mpemva's house and Mr Baxter was subsequently transferred to Middledrift as the Area Manager. It was alleged that Mr Baxter wanted Mr Nweba and Mr Mpemva removed from their posts and that he was a back stabber. A memorandum written on a Popcru letterhead in the hand of Mr Cornelius Abersalie called for the removal of Mr Baxter to Middledrift as well as the transfer of another official, Mr Piet Steyn, to Umtata management area. Mr Baxter was transferred to Middledrift, but the Provincial Commissioner at the time, Mr Modise, denied that the removal was related to the memorandum. Mr Baxter said the reason for the transfer to Middledrift was to frustrate him and encourage him to eventually leave the Department.

During its investigation into the St Albans Management Area, the Commission came across a number of allegations regarding the role which was played by the Department's Provincial Office which was then stationed at St Albans Prison, with regard to the Middledrift Management Area. The Commission was faced with the decision to pursue the investigation or to abandon the serious allegations which were coming through, because the Middledrift Management Area did not fall within the Commission's Terms of Reference. In this regard, a decision was taken to hear whatever evidence, which might be led by the members, which had a bearing on the manner in which the Provincial Office was conducting its work, as it was alleged that such actions were a general indication of how the Department was being run in the Eastern Cape Province.

The main thrust of the allegations was that whenever a member fell out of favour with the Provincial Commissioner or the senior members of the Department, he would find himself being transferred to the Middledrift

Management Area. The Middledrift Management Area was the Eastern Cape Province and regarded as the “last outpost”. Whoever was not in the Provincial Commissioner’s good books or in Popcru’s good books, would exit the Department through the Middledrift Management Area. In this regard, a number of people who had to be thrown out of the Department had been transferred to Middledrift and eventually left the Department. The one member who had resisted such exit from the Department, was Mr Baxter.

Mr Baxter, as the Area Manager of Middledrift, had numerous run-ins with the union¹³ during his tenure. The evidence before the Commission indicated that Mr Baxter was a *persona non grata* at Middledrift, as he was not regarded as “the son of the soil”.¹⁴

This once again points to the fact that in the Eastern Cape Province, there were still a lot of ethnic or tribal divisions within the Department. These divisions on their own, were affecting the manner in which the Department was functioning. This clearly shows not only divisions in terms of the former geographical areas of Transkei, Ciskei and the Republic of South Africa, but also even within those geographical areas. Unless one is from a particular area or region, problems would be encountered in trying to manage a Management Area, in particular, the Middledrift Management Area.

Ethnicity and racism need to be fought within the Department.

7.3 Mr B. S. Puwani

Mr Buyisile Samson Puwani was temporarily transferred to Middledrift with a brief to tighten and strengthen security because of the frequent escapes from that prison. However, he told the Commission that in February 1999 Mr

¹³ See St Albans transcript Volume 20 at pages 2 074-2 090.

¹⁴ According to the evidence before the Commission “the son of the soil” was a person who had been born and bred in the area around Middledrift or if one wanted to used the old apartheid geographical areas in the Ciskei area.

Mpemva instructed him to apply for the post of chairman of the Parole Board at Kirkwood Prison.

"I informed him that I was not interested in the post. He then called me again on the following Saturday and asked if I had applied for the post at Kirkwood Parole Board. I again told him I was not interested. He told me that I should apply for the post as I was unpopular at Middledrift Prison with the Popcru members. When I got to Middledrift on the following Monday I was approached by members who jeered at me and shouted, 'You are going to Kirkwood'. On 17 February I received a Memorandum from the Popcru members. On 26 March I was given a letter and told that I was being transferred to Kirkwood."¹⁵

7.4 Mr B. Mnguni

Mr Bongile Mnguni, who worked at the provincial office, was accused by Mr Nweba and Mr Mpemva of being behind newspaper articles and being involved in the United Democratic Movement. The two ring leaders instructed shop stewards to tell the Head of the Maximum Prison not to allow Mr Mnguni to work weekends at the prison. Mr Mnguni worked alternate weekends and as a result earned himself about R2 000 extra every month. Mr Matshoko, who was one of the people who instructed the head of the prison, Mr Barnard, not to allow Mr Mnguni to work weekends said: "Mr Barnard agreed because every manager was afraid of us because they knew if they were not doing the right thing that we were saying they were going to be transferred to remote areas and their lives would be made miserable."¹⁶ Mr Mnguni subsequently left the Department out of sheer frustration.

Mr Matshoko detailed numerous appointments to the Department of Correctional Services that he regarded as controversial. These included individuals who were appointed after taking a package from another

¹⁵ See Port Elizabeth Exhibit 'AA.'

¹⁶ See Port Elizabeth transcript Volume 15 at page 1 513.

government department, the appointment of family members of officials and the appointment of unqualified individuals to particular posts.

8. ESCAPES

The Commission heard evidence on escapes¹⁷ from St Albans and also from other Eastern Cape prisons, in particular Middeldrift. Some of the escapes were carried out during fairly serious hostage situations and a number of escapes from Middeldrift were termed mass escapes because there was an average of six (6) to ten (10) people escaping on each occasion.

Mr Mataka's testimony was that there had been no mass escapes from St Albans in the three years prior to his giving evidence before the Commission but that there had been about ten (10) escapes in that same period.

Firearms used in hostage situations and escapes were often smuggled into prison by warders or visitors. The prisoners who escaped were usually deemed to be high profile prisoners and the escapes occurred largely from the maximum security wing of the prison.

9. DISCIPLINARY INQUIRIES

The Commission heard extensive evidence about the manner in which disciplinary inquiries are handled at St Albans. It is evident that many cases are withdrawn after significant delays.¹⁸ In one instance, charges against a warder, Mr Kumm, who was charged with receiving money from a prisoner, were withdrawn because minutes were not properly written and the cassette was lost, and there was nothing for a newly appointed chairperson to base his decision on.

¹⁷ For a more detailed discussion of escapes see the Chapter on Prison Security.

¹⁸ See the Chapter on Disciplinary Inquiries for a more detailed discussion.

Evidence was also led which gave the impression that specific people are selected for disciplinary procedures in order to gain a particular outcome, especially where someone needs to be removed from the system.

10. CORRUPT USE OF REMISSION PRACTICE

The Commission heard that warders would be paid to manipulate the remission practices of prisoners. In one instance warders allegedly planted objects such as guns and dagga for a prisoner to “find”. As a result the prisoner, who was to have served a four-and-a-half-year sentence, was given remission and only served eight months.

At the time of the Commission’s hearings, accused warder Mr Thamsanqa Khoza, was facing criminal charges, but had not been charged departmentally. A member of the South African Police Service, Mr Welile Jongolo, told the Commission that Mr Jackson Maqutyana claimed to have paid Mr Khoza an unspecified amount of money (which was claimed by Mr Maqutyana to be about R4 500). Mr Khoza was subsequently arrested for fraud in November 2001 and the case was being investigated by Captain Mbhele of the Anti-Corruption Unit. Once the investigation was complete the docket was to be returned to the Director of Public Prosecutions for a decision whether to prosecute Mr Khoza.

Mr Maqutyana said that he had not been asked by any official of the Department to make a statement in relation to this matter.

When asked if it was fair to conclude that there was widespread corruption in remissions of sentences, Mr Mataka replied:

“It is grossly unfair for the 4 300 other officials to be judged on between 20 to 25 officials who are being dishonest in the process.”¹⁹

¹⁹ See Port Elizabeth transcript Volume 1 at page 110.

11. USE OF TRANSFER SYSTEM

It was alleged that officials in the Eastern Cape who do not toe the line are threatened with transfer to remote or outlying areas in the province. Similarly, prisoners are threatened with transfer to other prisons, in particular those that are far from their families. The Commission also experienced first-hand the removal of prisoners who were to have furnished the Commission with information so that they became inaccessible to investigators. It was apparent that this took place when warders perceived that certain prisoners may have some damaging information against warders, or would be prepared to assist the Commission with investigations.

Mr Mataka told the Commission that the National Commissioner at the time of his appointment to the Eastern Cape, Mr Mbethe, requested that Provincial Commissioners rotate senior management to ensure that no one remained in a management position for more than three (3) years.

Mr Mataka said that in terms of policy, warders are given an intention to transfer which should give the individual at least seven days in which to make a submission to accept or reject the transfer. Asked what happened if the individual was not happy about a transfer, Mr Mataka replied:

“The policy makes provision for the interest of the State, that we have to weigh what is it, in the interest of the State or in the interest of the individual. The policy requests that the interest of the State will always supersede the individual’s interest.”²⁰

Mr Marcus said that there was no consultation with managers when ground level staff are transferred. Managers are simply approached by a warder who has a letter instructing the manager to accommodate the warder. When asked whether this matter had been discussed with Mr Mataka, Mr Marcus replied:

²⁰ See Port Elizabeth transcript Volume 1 at pages 30 – 31.

“Mr Mataka is a very difficult man. He does not consult. He does his own things.”²¹

With regard to the transfer of inmates, a prisoner, Mr David Price, said the norm in Correctional Services is that if a prisoner gives a problem, he is transferred to another prison.

“When they decide they’re going to get rid of you, it’s the easiest way, anyone who kicks against the system, they ship him off to another prison or make his life an absolute misery until he applies for a transfer to another prison.”²²

12. RECRUITMENT

The Commission heard that there was controversy relating to the 1998/1999 recruitment drive²³ which resulted in a number of family members receiving appointments. This followed the appointment of a new short-listing committee after the initial short-listing and interviewing process had been completed. In addition, the order of the list of the 60 best candidates for the 2001/2002 recruitment drive was changed.

There have been allegations about officials in the Eastern Cape selling jobs in the Department. A newspaper article claimed that an official in the Provincial Commissioner’s office was given jobs in lieu of payment of amounts between R900 and R1 300. In addition, the wife of the Premier told Mr Mataka that three women in the King William’s Town area claimed to have stayed with an official who they believed was going to arrange their employment with the Department.

²¹ See Port Elizabeth transcript Volume 3 at page 258.

²² See Port Elizabeth transcript Volume 32 at page 3 350.

²³ See Chapter on Recruitment for more details.

13. ABUSE OF POWER

The Commission heard testimony about how the Department of Correctional Services in the Eastern Cape failed to take action against a fairly senior official who allegedly sexually harassed several female colleagues.²⁴ A criminal case was pending until about two weeks prior to the Commission's Port Elizabeth hearings.

One of the women resigned and another was medically boarded as a result of the victimisation that they suffered after making the allegations. The third continued to work in the Department, but was subsequently made to face a disciplinary inquiry and was dismissed. At the time of the hearing she had lodged an appeal against her dismissal and the finding of misconduct.

14. THE BROILER PROJECT

The Broiler Project at St Albans provides a facility for chickens to be reared for sale to other prisons in the Eastern Cape and for consumption at St Albans Prison. Allegations were raised in a newspaper article about two weeks prior to the Port Elizabeth hearings of the Commission that chickens were being sold to farmers in the area.

Mr Mataka argued that the newspaper report was grossly inaccurate. It claimed that about 3 900 chickens were left in a freezer which stopped working. It was claimed that the chickens went rotten, something which has to be certified by a doctor, but they were later found in the possession of a farmer and some prisoners. Mr Mataka said there was uncertainty whether the fridge had in fact been out of order and that about five (5) officials had been internally implicated.

The Commission inspected St Albans Prison, together with the Provincial Commissioner, Mr Mataka, on 5 September 2002. The Broiler Project at that

²⁴ For a more in-depth discussion of the harassment issues see the Chapter on Abuse of Power.

time had 4 500 - day-old chickens, 4 500 - 22-day-old chickens and 4 500 - 36-day-old chickens. The chickens are fully grown and ready for slaughter when they reach forty two (42) days old.

The Commission found that St Albans has a modern plant for slaughtering, gutting, cleaning, cooling, freezing and storing. There is a walk-in freezer and once the chickens are frozen they are loaded onto transport and sent to the freezers at Logistics. They are subsequently distributed throughout the province to other provinces by logistics.

15. IRREGULARITIES : PROVINCIAL COMMISSIONER R.E. MATAKA

The Commission investigated claims made in terms of the senior employees' motor vehicle scheme in terms of which employees are required to purchase their own cars and make claims for official distances travelled of more than 500 km per month.

The Commission's investigators found that Mr Mataka claimed about R62 000 for the period from 8 January to 23 May 2002. While Mr Mataka claimed that he had travelled 25 294 kilometres on official trips, the car's odometer showed that the vehicle had travelled about 12 000 km during that time. The Department paid him R62 013.71. According to the Commission's calculation, Mr Mataka overclaimed by at least R34 919.69.²⁵

In addition, evidence was put before the Commission, which suggested that the Department of Correctional Services on at least one occasion paid for an airplane ticket for Mr Mataka to attend his own criminal trial which had been in Gauteng. In addition, he claimed for pay in respect of days when he was not at work but at the trial. On one occasion he gave a medical certificate to the

²⁵ See the Sixth Interim Report for further details and the Commission's findings and recommendations regarding Mr Mataka's conduct.

court indicating that he could not attend his trial because he was sick in hospital, but Departmental records show that he was on duty on that day.²⁶

16. THE “MR BONES” MATTER

On 16 October 2002, whilst the Commission was busy with investigations at St Albans, one of the senior correctional officials, Mr Michael Harold Melvin Bones, made defamatory allegations against one of the Commission investigators, Mr M. Magigaba. He alleged that on 16 July 2002, he went to the Training Centre to consult with Mr Magigaba and that Mr Magigaba had pointed a finger at a photograph of the Provincial Commissioner, Mr Mataka, on the wall and asked him “do you know this rubbish?”²⁷ He then responded and said “I don’t personally, but I know he is my Commissioner”. Mr Bones testified that Mr Magigaba thereafter asked whether he knew Mr Nweba, to which he replied that he knew him at work. When he was asked about Mr Mpemva, he told Mr Magigaba that he did not know Mr Mpemva.

When this complaint was received by the Commission, the Commission proceeded to investigate it since Mr Magigaba was involved in a number of investigations at St Albans. Some investigations involved Mr Mataka. Under cross-examination, it transpired that Mr Bones, who is an investigator in the Department, never wrote a statement about this incident, but allegedly merely told Mr Nweba. Thereafter, he did nothing about it until 16 October 2002, when he mentioned it at the hearing.

On 17 October 2002, the Commission went to St Albans on an inspection-in-loco of the said Training Centre where the conversation allegedly took place. Inside the room used by the Commission investigators, there were three (3) posters, one (1) white board and mounted pictures. There was no photograph

²⁶ Mr Mataka was dismissed. He appealed and the Appeal was dismissed. As at the time of drafting this report his arbitration was pending before the Bargaining Council.

²⁷ See Port Elizabeth transcript Volume 26 page 2 825.

of the Provincial Commissioner, Mr Mataka or that of the Minister, as Mr Bones had claimed in his evidence.²⁸

When Mr Bones was confronted with this discrepancy in his evidence, he then changed his version and said the meeting was not at the Training Centre but at the Conference Room. He also changed the date and the circumstances surrounding the said conservation with Mr Magigaba.

The Conference Room is in another building where the Area Manager's Office is situated. To get there from the Training Centre, the Commission had to use a car. In the circumstances, one could never make such a mistake. In his own words, this happened in an office used by the Commission investigators. The Commission investigators used the Training Centre and not the Conference Room.

The Commission reached the conclusion that it could not believe the evidence of Mr Bones. Not only was Mr Bones untruthful and unreliable, but he also tried to discredit the investigator, Mr Magigaba, unfairly and unjustifiably.

This was once again a waste of valuable Commission time and diverted the Commission's attention away from its work in the Eastern Cape to deal with a side issue.

²⁸ See Port Elizabeth transcript Volume 27, pages 2 919-2 921.

CHAPTER 43

LEEUWKOP MANAGEMENT **AREA**

CHAPTER 43

LEEUWKOP MANAGEMENT AREA

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CHAPTER 43

LEEUEWKOP MANAGEMENT AREA

1. INTRODUCTION

Leeuwkop Prison comprises five (5) correctional institutions: Medium A, Medium B, Medium C, Maximum and Community Corrections, which are based in Randburg. Medium A houses medium category prisoners with a low escape risk. Most of these prisoners are participating in trade and skills development programmes with a focus on agriculture, artisanship and formal education. Medium B is the juvenile centre where inmates between the ages of fourteen (14) years and twenty (20) years are kept.

When Mr M. Z. I. Modise, the Provincial Commissioner of Gauteng was testifying in Gauteng regarding the activities of the Union Popcru and its leadership in Gauteng, a legal representative was appointed to cross-examine Mr Modise. Mr Modise withstood the cross-examination. However, when the time came for the Popcru leadership to testify, they started to testify but then abruptly ended their co-operation when they were being cross-examined by the evidence leader. They then left the hearings. Subsequent to that the Union gave a statement to the media stating that they had not been given a fair hearing.

They had elected to avoid cross-examination, something which all other witnesses had to endure.

Thereafter, they came back to the Commission and applied to lead evidence by way of an affidavit. This obviously was an attempt to avoid being cross-examined at the Commission. The Commission investigators opposed the application and they never pursued same. Popcru as the *domus litis* in this

application, neither filed a reply to the investigators' opposition nor set the application down for hearing.

Accordingly, the Commission accepted the evidence of Mr Modise as the truth about the manner in which the Popcru leadership had operated in Gauteng province.

2. POPULATION

Levels of overpopulation were high in all the sections except Juvenile, but were most acute in Maximum Security. The breakdown of inmate populations as at June 2003 was:

Medium A:	1 227 (134.69% full)
Medium B (Juvenile):	679 (93.91% full)
Medium C:	1 153 (166.62% full)
Maximum Security:	1 473 (193.05% full)

3. STAFFING

The staff complement at Leeuwkop Prison is 1 440 members, who are stationed as follows:

Area Commissioner's Office	855	(43 vacant)
Medium A	233	(13 vacant)
Medium B	118	(10 vacant)
Medium C	132	(4 vacant)
Maximum Security	178	(6 vacant)

4. GENERAL CONDITIONS

Mr Molife Benjamin Modisadife, who was Head of the Maximum Section from August 2000, and subsequently Acting Area Manager, told the Commission that when he arrived at Leeuwkop he found that some members were mixing their uniform and private clothes, officials were in possession of cell phones in the sections, prisoners were moving as they wished from one section to another, prisoners were wearing private clothes and pastors were taking letters out of prison for inmates.

Inmate Mr David Nkuna gave the Commission an overview of some of the conditions in Leeuwkop Prison. He said that in 2000 the prisoners went on a hunger strike against Mr Modisadife, who had banned prisoners from playing football on the prisoners' football ground and from the gym, among other things. In addition, visits were reduced and television and telephone usage limited.

Mr Nkuna was accused of inciting prisoners to take part in a hunger strike and put into isolation.¹

Mr Nkuna said that gang-related crimes in Leeuwkop included assault, rape and robbery. He said that some members of the Department of Correctional Services promote gangsterism, sell drugs and engage in sodomy. In addition, he said that when prisoners ask to be taken to reception or to the psychologist, for example, a warder will ask for R5 in return for taking the prisoner where he wants to go. Mr Nkuna also claimed that it was common practice for medium status to be sold to prisoners for about R30 to R40.

Mr Nkuna said that knives are also quite common in the prison and that when they are confiscated they are not destroyed. Instead they are passed around and members even give knives to certain prisoners to stab troublesome prisoners.

¹ See the Chapter on Treatment of Prisoners for a discussion of detention in isolation.

5. DISCIPLINARY PROCEEDINGS

Mr Modisadife gave evidence about the problems relating to disciplinary procedures. He said that managers are often unwilling to take part in investigations against members. This was due to managers being fearful of dismissing or disciplining members, and being concerned of reprisals from colleagues who consider him or her to be “a bad person”.

6. UNRULY BEHAVIOUR BY MEMBERS

The Commission heard that the Provincial Commissioner, Mr Modise, was taken hostage by junior members on 14 August 2001 after he had held a meeting with senior staff. A junior member said that he was not allowed to leave. Acting National Commissioner, Mr Tshivase, subsequently came to the premises and addressed everyone. Mr Modisadife was asked twice to give statements, but was uncertain as to the outcome of the investigation.

7. IRREGULAR CONTACT VISITS

In its Eighth Interim Report the Commission described in detail the evidence that was heard about irregular contact visits that were expressly or tacitly authorised by members of the Department of Correctional Services at Leeuwkop. During some of these contact visits with girlfriends and/or wives prisoners were given the opportunity to have sexual intercourse with their partners on payment of an agreed fee with the Correctional Services members.

8. IRREGULAR INTERACTIONS BETWEEN MEMBERS AND INMATES

The Commission heard evidence about how members would assist inmates to access a range of goods while in prison. Mr Chad Mills, who was imprisoned in Leeuwkop's Maximum Prison from 1997 to 2003, said that one member got pizza for the prisoners from a nearby shop and would also get other food and computer parts and would draw money for the inmates from their bank accounts.

He described how a member, Mr Sithole, helped him on a number of occasions to buy radios and assisted him to get a CD player (which is not allowed in prison) into his cell in return for a payment of R50 and a tracksuit. Mr Mills said that Mr Sithole probably brought six (6) radios into the prison for him over a two to three year period. Mr Mills sold the radios to his fellow prisoners.

9. MALPRACTICES AND IRREGULARITIES IN THE PRISON HOSPITAL

Mr Modisadife told the Commission that the hospital in the Maximum Section of the prison has three cells, one which accommodates fifteen (15) to twenty (20) beds, the second eight (8) to ten (10), and the third six (6) to seven (7). About six (6) or seven (7) nurses work in the hospital, and Mr Modisadife said that when he arrived at the prison the nurses were working shifts, including a night shift from about 4pm until morning. As such long hours are contrary to labour legislation, Mr Modisadife said that a decision was taken that nurses only be on standby at night. However, the nursing staff refused to be on standby or to hand in a list of names of nurses on standby. There were several instances where prisoners needed treatment at night, but the standby nurses could not be reached. This problem persisted for about a year.

In the Eighth Interim Report, the Commission stated that sentenced prisoners, who were totally untrained and unsupervised, were made to perform medical duties that are reserved for qualified nurses and medical doctors. This is in contravention of the Correctional Services Act and Regulations and the Health Professions Act, No. 56 of 1974, which reserves the duties for qualified medical personnel. It also violates prisoners' constitutional rights and opens up the Department to major delictual claims in the event of any prisoners dying or having complications.

The Commission heard evidence that prisoner Mr Thabo Joseph Masopha injected other prisoners, cleaned and cared for HIV patients and gave medication to prisoners and, in some cases, members. With regard to the latter he would go to sections in the prison and inmates would describe their symptoms. Mr Masopha, who had no medical training, would prescribe whatever medication he had on his trolley at his own discretion.

10. PURCHASE OF VEHICLE FROM PRISONER

In its Eighth Interim Report, the Commission also described how a correctional official at Leeuwkop, Mr George Khupha Shongwe, bought a vehicle from prisoner Mr Gerald Arthur Dirksen and his wife. Although Mr Shongwe claimed that he had dealt with Mrs Dirksen because the policy of the Department does not allow members to have financial dealings with inmates, the evidence before the Commission suggested that a substantial part of the agreement was made between Mr Shongwe and Mr Dirksen.

11. IRREGULAR TRANSFER OF PRISONER

The Commission heard evidence that a prisoner, Mr Thabo Mohapi, who is allegedly the brother of the previous National Commissioner, Dr Khulekani Sithole, was transferred irregularly from Leeuwkop Prison in May 1999.

The Area Manager at Leeuwkop Prison at the time, Mr Hendrik Davids, said he was told on Saturday 29 May 1999 that the Provincial Commissioner was on his way to Leeuwkop to interview a prisoner because he had received a phone call indicating that the life of the prisoner was in danger. After the interview, during which Mr Davids was present, the Provincial Commissioner requested the prisoner be transferred to another prison.

Mr Mohapi was transferred in a normal State vehicle rather than a security vehicle and was not handcuffed or shackled. In addition, no escort accompanied the member driving Mr Mohapi to Pretoria Prison.

The Head of Medium B, Mr Nhlanhla Lucky Mthethwa, said that the prisoner was asked a number of times who the member and prisoners were who wanted to kill him, but he refused to divulge the names.

The Acting Head of Medium A Prison at Leeuwkop, in which Mr Mohapi was being held, Mr Johannes Nape Mmusi, said there were a number of unusual things about the transfer of Mr Mohapi. Mr Mmusi said he should have been informed about why the inmate needed to be transferred, he should have arranged an escort and the prisoner should not have been transferred in a car. He said it was also unusual that the prisoner was not cuffed and was transferred on the weekend. Mr Mmusi said that it had never come to his attention that Mr Mohapi's life was in danger.

CHAPTER 44

BLOEMFONTEIN MANAGEMENT

AREA

(GROOTVLEI)

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BLOEMFONTEIN MANAGEMENT AREA
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CHAPTER 44

BLOEMFONTEIN MANAGEMENT AREA

1. INTRODUCTION

The Bloemfontein Management Area consisted of Grootvlei Prison at the time of the Proclamation. However, it now consists of Grootvlei, Brandfort, Ladybrand, Fauresmith, Boshof and Wepener Prisons. The Grootvlei Prison, which is the subject of this Chapter, consists of two (2) prisons, namely, Medium A, the Maximum Security Prison, and Medium B, the Medium Security Prison. For the period February 2002 to June 2003, both prisons were overcrowded, with the Maximum Security Prison being most affected at over 200% full.

2. POPULATION

The number of prisoners at Grootvlei, as at June 2003, was as follows:

Medium A:	2 085 (227.12% full)
Medium B:	359 (134.96% full)

The approved accommodation for Grootvlei Prison was as follows:

Medium A:	918
Medium B:	220
Female:	46

The racial breakdown of the 1 872 prisoners in Medium A, as at March 2002, was:

Black:	1 672	(678 sentenced, 994 awaiting trial)
White:	31	(15 sentenced, 16 awaiting trial)
Coloured:	167	(90 sentenced, 77 awaiting trial)
Asians:	2	(2 sentenced, 0 awaiting trial)

3. STAFFING

The staff complement at the Grootvlei Prison is 1 185 members, who are employed as follows:

Area Commissioner's Office:	773	(38 vacant)
Medium A:	299	(6 vacant)
Medium B:	113	(6 vacant)

There is a great shortage of staff in all categories, particularly nursing staff, social workers, chaplain, educationists as well as correctional staff members.

4. CULTURE

The institutional culture is similar to that of the Durban/Westville Management Area, in which the Department's officials are merely interested in making money. Furthermore, videotaped evidence of corruption and the abuse of prisoners was received from four inmates.

The culture in the Grootvlei Management Area was further influenced by the lawlessness, which had prevailed earlier in the management area. The lawlessness commenced during the times of Operation Quiet Storm in KwaZulu-Natal and also what was referred to in the Bloemfontein Management Area as "Operation Thula".¹

¹ "Thula" is a Zulu word which means "be quiet." Accordingly, this might have been another reference to Operation Quiet Storm. It might merely have been a name change but the *modus operandi* is exactly the same as the *modus operandi* which was

The aforesaid culture, which has already been dealt with earlier in this report included, amongst others, invasions of managers' offices, ousting out managers if they were not wanted, intimidation and violence. In addition to this, Operation Thula also included the ignoring or encouraging contraband drug smuggling and escapes. As a result of the aforesaid culture, lawlessness was allowed to prevail.

At this stage, it might be appropriate to consider the manner in which they treated Area Managers, who had been appointed contrary to the wishes of the major union, Popcru in the management area.

4.1 The Invasion of Area Manager's Offices

According to the evidence, which was led before the Commission, after 1994 two (2) Area Managers who were appointed to Grootvlei, were subjected to a revolution by Popcru members, in that their offices were invaded and they were thrown out. The two (2) Area Managers were Mrs Grace Moletedi and Mr D K M Baloyi.

The Commission will now deal with the individual incidents, which occurred:

(a) Mrs Grace Moletedi

Mrs T.G Moletedi was transferred from Leeuwkop Prison to Grootvlei Prison. At the time she was at Grootvlei as Area Manager, the Union embarked on an illegal strike. The said strike action took approximately three (3) days. The workers who were involved in the strike action invaded Mrs Grace Moletedi's office, turned the furniture upside down, insulted and intimidated her. They also threatened her with assault. Some of the members even stole money from her handbag and also took her car keys. As a result of this action, some

applied to Operation Quiet Storm. For more details in this regard, refer to the chapter on Historical Background in this report.

of the other correctional services officers who worked in the nearby offices were either evacuated from their offices or left them for their safety.

Pursuant to that, the ninety five (95) Popcru members who were involved in the aforesaid action were suspended. Disciplinary inquiries ensued and out of the ninety five (95) members who were suspended, forty nine (49) were dismissed for, amongst others, invading Mrs Moletedi's office.

However, after their dismissal Mr Damons, who was the Provincial Commissioner, at the time, decided to reinstate the members who had been dismissed. According to Mr Damons, he did this on humanitarian grounds including "leniency".²

According to the evidence led before the Commission, Mr T A Setlai was the main witness against the people who participated in the aforesaid strike and the attack on Mrs Moletedi.³

The Popcru members continued to threaten the Area Manager and other officials. As a result an interdict had to be obtained from the High Court. The interdict assisted in normalising the situation at Grootvlei.⁴

Mrs Moletedi was later transferred to the Provincial Office. Mr Setlai acted as the Area Manager in her place for sometime.

(b) Mr David Baloyi

During Mr Sithole's era as the National Commissioner, Mr D Baloyi was sent to Grootvlei to take up the post of Area Manager. His appointment to Grootvlei was not well received by Popcru members and as a result, his office was invaded and he was also thrown out.

² See Bloemfontein transcript, Volume 16 pages 1468-1 469 and Bloemfontein Exhibit 'A56'.

³ See Bloemfontein Transcript, Volume 16, pages 1467-1470.

⁴ See Bloemfontein Exhibit 'E'.

According to the evidence led before the Commission, the Head Office in Pretoria got involved. However, the Popcru members who were involved in such action were never disciplined. The evidence was “that negotiations were held and a deal was concluded” and the offenders were never dismissed.⁵ Mr Baloyi was transferred to Port Elizabeth.

The main problem with discipline in the Department, and in particular, the Bloemfontein Management Area, is the lack of consistency in discipline.⁶ For example, in the cases of the two (2) Area Managers, whose offices were invaded by members of the Department, (Popcru members), in only one (1) of those cases was disciplinary action taken. In the other case, disciplinary action was not taken. Even those members who were disciplined, were reinstated.⁷ It is the aforesaid manner of dealing with disciplinary inquiries, which according to the witnesses who testified have made the Chairpersons of disciplinary inquiries indifferent about the outcome thereof.⁸

4.2 Sexual Exploitation

It was in this Management Area where, for the first time, the Commission came across proof of the sale of juveniles to adult prisoners for sexual favours.⁹ Although this had been an ongoing complaint, which the Commission heard in the Management Areas of Pietermaritzburg and Durban-Westville, there had never been any conclusive proof of such behaviour in those Management Areas. Instances were also exposed of warders demanding sexual favours from prisoners.

⁵ See Bloemfontein Transcript, Volume 22, page 2229.

⁶ For more details on lack of consistency in discipline, refer to the Chapter on Disciplinary Inquiries.

⁷ These people were subsequently reinstated by Mr Damons, who was the Provincial Commissioner at the time.

⁸ See Bloemfontein Transcript Volume 22 pages 2 227 – 2 232.

⁹ See the Fifth Interim Report for a summary of the evidence.

4.3 Tribalism

There is also a problem of tribalism, which was evident in the way issues were dealt with. There there are two major groupings among the staff of the Bloemfontein Management Area, those who are Sotho speaking and those who are Xhosa speaking (or Nguni group). Accordingly, there was a lot of jockeying for positions along tribal lines, which affected the functioning of the Management Area.

4.4 Lax Security

The failure to comply with regulations regarding security and searching of members and visitors was also apparent in that members of the Commission were never searched on their first visit to the Management Area. It was only after the members at the gate became aware of who the visitors were, that they started to search them to give the impression that they were doing their jobs. However, it was clear to the Commission members that searching is not a priority. The usual excuse was also given, that searching was not done because there were no scanners. In the Commission's view the absence of scanners should not stop the searching from happening altogether.

Clearly, the lives of members and visitors are at risk if proper searches, are not done and there is a likelihood that somebody might get killed and this could lead to the Department being sued for negligence.

4.5 Other

Other problems encountered at the Bloemfontein Management Area are dealt with in the Fifth Interim Report of the Commission.

5. CONCLUDING REMARKS – NINE (9) MANAGEMENT AREAS

The Commission did not find a very healthy state of affairs in the various management areas. Most of these problems have been dealt with in the other chapters which deal with different subject matters, and in the Commission's Interim Reports.

The Constitution of the Republic of South Africa sets out the nature of the Public Service, which is anticipated in terms of the new order. Section 195 of the Constitution sets out the values and principles, which must guide the Public Service.

- (a) A high standard of professional ethics must be promoted and maintained;
- (b) Efficient, economic and effective use of our resources must be promoted;
- (c) Public administration must be development-orientated;
- (d) Service must be provided impartially, fairly, equitably and without bias;
- (e) Peoples needs must be responded to and the public must be encouraged to participate in policy-making;
- (f) Public administration must be accountable;
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information;
- (h) Good Human-Resource management and career-development practices, to maximise human potential must be cultivated;
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress imbalances of the past to achieve broad representation.¹⁰

¹⁰ See section 195(1) of the Constitution of the Republic of South Africa Act No 108 of 1996.

It is imperative that department officials ensure that the principles as set out herein which, amongst others, direct that the Department should put people first, are observed to the fullest.

Having considered all of the above values and principles in this report, the Commission is of the view that the Department has failed to uphold some of the principles as set out in section 195 of the Constitution.

The question that was asked was, “how did the Department end up in this state of affairs”?

The Commission hopes that in all of the above chapters it has been able to answer this major question. What is clear to the Commission, however, is that:

- a) Many senior officials turn a blind eye to transgressions.
- b) There is an unwillingness by officials to confront problems head on, whether it relates to a warder or to a prisoner, preferring instead to transfer the problem to another prison or management area.
- c) The lack of security consciousness by prison warders, generally contributes to the high incidence of escapes from the prisons, and,
- d) Above all, a state of anarchy prevails in some management areas, where in some instances it is difficult to differentiate between the proverbial puppet and the master, or the warder and the prisoner.

The Commission gets the sense that prison warders in some management areas are morally dejected and do not share a common goal with the Department. Some appear to be working in the prisons to get the most they can from the prisoners as well as the Department.

CONCLUDING CHAPTERS

CHAPTER 45

RECOMMENDATIONS

MANAGEMENT AREAS

CHAPTER 45

RECOMMENDATIONS – MANAGEMENT AREAS

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CHAPTER 45

RECOMMENDATIONS – MANAGEMENT AREAS

1. INTRODUCTION

The Commission having considered all the evidence, which was led with regard to the above-mentioned Management Areas would like to make the recommendations as set out hereinafter:

2. GENERAL MANAGEMENT

The Department should consider the improvement of the general management of each management area. In this regard, the Department should consider improving the performance by its members in respect of the management issues, which have been highlighted in this report, including:

- (a) Providing training on management issues, including:
 - (i) planning;
 - (ii) finance and budgeting;
 - (iii) human resource management;
 - (iv) negotiation and mediation skills;
 - (v) managing information systems.

- (b) The Department should provide ongoing training to its management within each management area in regard to the following:
 - (i) departmental rules and regulations;
 - (ii) human rights as enshrined in the Bill of Rights;
 - (iii) labour relations;
 - (iv) mediation skills.

- (c) Notwithstanding the main recommendations in the chapter on Disciplinary Inquiries, the Department should as an interim measure arrange with an independent specialist organisation to train an identified group of members on how to:
- (i) conduct disciplinary enquiries;
 - (ii) investigate labour relations matters;
 - (iii) present evidence before the labour relations tribunals;
 - (iv) tender of evidence in disciplinary matters.

3. PIETERMARITZBURG MANAGEMENT AREA

With regard to the Pietermaritzburg Management Area it is recommended that the Department should:

- (a) Internally charge the member, Mr Mkhize, for assault on the members of the 26 gang based on his own evidence;
- (b) Direct Mr Mkhize to undergo training as set out in paragraphs 2(a)(iii) and (iv) and paragraphs 2 (b) above;
- (c) Direct Mr King Khumalo to undergo training as set out in paragraphs 2(a) and 2(b) above;
- (d) Direct Mr D J Makhaye to undergo training as set out in paragraphs 2(a) and 2(b) above;
- (e) Direct Mr B B Mchunu to undergo training as set out in paragraphs 2(a) and 2(b) above;
- (f) Diffuse the tension between managers at Pietermaritzburg Management Area by appointing dispute resolution experts to

intervene and try to bring the warring parties within the management area together. In particular, the so-called 'A' team and 'B' team.

4. JOHANNESBURG MANAGEMENT AREA

There was a general state of chaos in regard to the keeping of records in the Johannesburg Management Area, which caused the Commission concern, as one would have expected that the records would have been up to date in the light of the fact that there are people who are in custody and thus, the Department should at all times be in a position to account for each and every inmate incarcerated.

It is recommended that:

- (a) The information systems be updated and that the Department conduct an audit of the management of information within this management area;
- (b) The Management should be vigilant in dealing with fake warrants and in particular develop a system or plan in consultation with the Department of Justice and Constitutional Development and Department of Safety and Security to detect and safeguard against same;
- (c) Mr Davis should be directed to undergo training as set out in paragraphs 2(a) and 2 (b) above.

5. DURBAN-WESTVILLE MANAGEMENT AREA

With regard to this Management Area, having considered the evidence which is dealt with in the chapter dealing with this Management Area, it is

recommended that Mr Terence Sibiya should be charged with gross negligence (Column A – clause 2.1) for failing to do his work properly.

6. ST ALBANS MANAGEMENT AREA

With regard to this Management Area, having considered the evidence which is dealt with in the chapter dealing with this Management Area, it is recommended that:

- 6.1 The records at St. Albans were in no better order than those at Johannesburg and the Commission recommends that the Department also carry out an audit of the information systems at St Albans. Due regard should be paid to the fact that precise information keeping should be held regarding each prisoner and warrants pertaining to the detention of prisoners.

7. PRETORIA MANAGEMENT AREA

With regard to this Management Area, the Correctional Services Act provides that sentenced and unsentenced prisoners should be kept separately. There has been further evidence that the unsentenced juvenile prisoners tend to be a vulnerable group and thus, they should not be incarcerated together with sentenced prisoners.

In light of the foregoing, it is recommended that:

- (a) notwithstanding the state of overcrowding, the management in Pretoria should ensure that every effort is made to separate sentenced and unsentenced juvenile prisoners;
- (b) the Department should make every effort not to keep children under the age of eighteen (18) years in prison. However, those who are in prison

should be provided with programmes to enable them to have some form of rehabilitation.

8. ALL NINE (9) MANAGEMENT AREAS

- 8.1 Department should embark upon a task of translating the various rules and regulations into the other official languages. It has become apparent to the Commission that almost all manuals are either in English or Afrikaans. There are eleven (11) official languages in South Africa. Whilst it might not be possible to translate the manuals into all the official languages immediately, an attempt could be made to translate the said manuals into official languages in a staggered manner. The Department might run into a situation where one of the officials might raise as a defence to a serious transgression the fact that he did not understand the manual or regulation because it was not in his or her language.

In particular, consideration should be given to immediately translating the following:

- (a) The A-Orders;
 - (b) The B-Orders;
 - (c) The Department's Provisioning Administration Systems Manual.
- 8.2 Whilst the Commission only found the over stating of kilometres travelled in their investigations in respect of Mr Mataka, there is a general view within the Department that a number of senior officials are doing the same.

The Commission recommends that the Department should, on a regular basis, do audits of the claims filed by senior management in the

various provinces and compare that with the actual kilometers travelled by the motor vehicles. This could further be compared with the service records of the various motor vehicles. Such audits would serve as measure to combat corruption.

8.3. The Health of Prisoners is one of the challenges facing the Department. It is recommended that:

- (a) All prisoners should be medically examined on their admission to combat the spread of serious or contagious diseases to the general prison population, which might be costly for the Department to treat at a later stage; and
- (b) A full plan should be developed by the Department as to what precautionary measures will be taken by the Department as soon as a prisoner with a contagious disease is identified, particularly with reference to the awaiting trial prisoners.

8.4. It is the Commission's recommendation that the Department should learn from the valuable experience of the Waterval siege and sabotage incidents. It is evident that the conduct of managers might be setting precedents in the Department, whereby the withdrawal of serious criminal charges against members translates into a message, to members that crime is an acceptable bargaining tool in the Department.

The Department is reminded of the fact that the negotiations regarding the Waterval siege, led to a settlement whereby it was agreed on behalf of the Department that the legal costs incurred in respect of all the interdicts would be shared between the Department and the Union. The Department committed itself to pay seventy per cent (70%) of the legal costs.

It is recommended that in matters of this nature :

- (a) Management should seek legal opinion before committing the Department to contractual obligations that have severe legal and financial implications for the Department.
- (b) The Department should draw a distinction between labour and criminal matters.

The Commission refrains from making any recommendations regarding the criminal acts committed in 1996 due to the lapse of time.

- 8.5 Evidence has been led before the Commission that anti-retroviral drugs are not being provided to prisoners in the Pretoria Management Area.¹ Furthermore, the Commission received information that in the Durban-Westville Management Area,² the prisoners who are living with HIV/Aids and would, under normal circumstances, be receiving anti-retroviral drugs, are not being provided with the drugs.

The Department has a responsibility for the safe custody of prisoners. This is a legal responsibility, which includes amongst others providing medical care for any sick prisoner. Provision of medical care to sick prisoners creates a responsibility for the prevention of the prisoners contracting any infectious and contagious diseases, including HIV/AIDS. In executing its responsibility in this regard, it will be necessary for the Department to have preventative measures³ and also curative measures to those who are already infected by the Aids virus.

Pursuant upon the Constitutional Court judgment in the matter of *The Department of Health and Others v The Treatment Action Campaign*

¹ See Pretoria Exhibit 'FFF'.

² *Sunday Tribune* of 27 November 2005 at page 5.

³ The Department is currently providing condoms for purposes of preventing the transmission of the Aids virus.

and Others.⁴ The Department of Health has started a roll-out programme of HIV treatment to the South African public. The said roll-out should also be extended to the prison inmates. Some prison medical facilities have been accredited by the Department of Health.

In the light of the foregoing the Commission shall recommend that:

- (a) The Department enter into consultation with the Department of Health for purposes of getting more prison hospitals for the Department of Correctional Services to be accredited for purposes of dispensing anti-retroviral therapy.
- (b) If the Department of Correctional Services has entered into such negotiations with the Department of Health, every endeavour should be made to speed up the aforesaid negotiations to get accreditation for an appropriate number of prison hospitals per province for purposes of providing anti-retroviral therapy as soon as possible.
- (c) In consultation with the Department of Health identify suitable prison hospitals as anti-retroviral treatment sites.
- (d) Ensure that appropriate sites are prepared for prisoners so that they can be provided with anti-retroviral drugs and treatment.
- (e) Liaise with the Department of Health to ensure that a suitable roll-out programme is implemented to provide treatment for the prisoners who need anti-retroviral drugs.

⁴ 2002 (10) BCLR 1033 (CC) at page 1 062F the court said:
“The rights that the State is obliged to ‘respect, protect, promote and fulfill’ include the socio-economic rights in the Constitution..”

- (f) The Department should give consideration to establishing a plan for the moving, with their consent, of the prisoners who need anti-retroviral drugs to prison hospitals within each province, which have been identified as suitable sites and accredited by the Department of Health for providing anti-retroviral drugs and treatment.

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CHAPTER 46

CONCLUSION

1. INTRODUCTION

This report is the culmination of three years of intensive and arduous investigations by the Commission into the Department often under extremely difficult and hostile conditions.

In order to place this Final Report in its proper context and to obviate unrealistic expectations, it is important to reiterate that this Commission's authority and mandate, like all Commissions, is derived solely from its Terms of Reference as promulgated which broadly requires it to report on the outcome of its investigations into the Department generally focusing on the nine Management Areas listed in the Terms of Reference and the Department's Head Office.

Accordingly, in this report, the Commission has dealt with all the evidence led before it in the various hearings relating to nine (9) Management Areas and Head Office. Some of the evidence led, however has already been dealt with in the eleven (11) Interim Reports, which were filed by the Commission.¹

During its investigations, the Commission has also had to consider information and complaints referred to the Commission which have not necessarily led to the formal hearing of evidence.²

¹ See volumes 3 and 4 of this report for the Commission's Interim Reports.

² These spurious complaints received by the Commission from numerous persons that were pursued but did not lead to any results are dealt with in the chapters dealing with Management Areas.

2. COMMISSION'S REPORTS

The Commission's task in preparing the Interim Reports and this Final Report has been very demanding and time consuming. The Commission was required to collate evidence from numerous witnesses, members of the Department and various other stakeholders, including prisoners, whose credibility may be questionable because of the very unfortunate circumstances they find themselves in. Prisoners remain the most vulnerable group in any correctional equation that includes the members and the Department. Their vulnerability stems from their background and their current circumstances. In considering any issue or recommendation relating to corrections, such vulnerability should never be overlooked.

Notwithstanding these challenges, the Commission has tried its best to evaluate all evidence that has been presented to it and, where necessary, sought to have the evidence corroborated by some other independent evidence.

In considering the evidence, the Commission adopted an approach that is frank, bold and impartial but always ensured that fairness prevailed and that the values of the Constitution were upheld.

The majority of Chapters in Volume One deal with issues that the Commission considered important and that the Department should deal with on an individual basis. Whilst these issues are dealt with in a particular order, it does not necessarily mean that it is the order of preference which the Department should adopt in dealing with these problems. The remainder of the evidence which is not dealt with in Volume One and the Misconduct Chapters has been dealt with in the Chapters dealing with the Management Areas.

In seeking and offering solutions, the Commission has in almost every Chapter, endeavoured to present constructive concluding remarks in respect of the subject matter discussed.

This conclusion supplements the concluding remarks set out in the various Chapters

3. THE DEPARTMENT

In criticizing the Department, the Commission has sought always to be constructive and where appropriate, has tried to make recommendations to improve governance within the Department. In doing so, the Commission has not lost sight of the fact that the Public Service as a whole has adopted a people orientated administration.³

Similarly, with regard to the Department of Correctional Services, the Commission is mindful of the fact that after the Commission's establishment, numerous changes have occurred to the senior management of the Department, with a new Commissioner and ministerial team being appointed to lead the Department in a new direction.

The White Paper on Corrections which has as its main ideal a new approach of aligning corrections with the constitutional and transformation objectives of the country and which seeks to place rehabilitation at the centre of all correctional activities, is clearly a step in the right direction.

While the Commission is encouraged by the interventions of the new management as contained in the White Paper and its various strategic documents to address the challenges faced by the Department, they remain long term solutions to the problems endemic to the Department and it may be

³ This is the principle of "Batho Pele".

many years before they have a significant impact on the conditions prevailing at prisons around the country.

The Commission's investigations have found a culture of lawlessness in many areas of the Department. Such lawlessness has been embedded in the minds of a large body of members, many of whom are corrupt. However, having said that, one should not lose sight of the fact that there are still those committed and loyal members of staff who continue to do an honest day's work under extremely difficult circumstances. They remain loyal to the values enshrined in our Constitution and are doing everything in their power to ensure that such values are upheld within the correctional facilities despite the daily challenges, like overcrowding, staff shortages and poor working conditions.

The Commission is fully aware that the life of a correctional officer is not an easy one. They are required to carry out their duties humanely yet at the same time they need to be constantly vigilant against the obvious dangers of being often in close proximity to some inmates who are manipulative, cunning and extremely dangerous. They also have to strike that difficult balance between ensuring safe custody, protecting inmates' constitutional rights and yet at the same time maintain the distinction between member and inmate.

The Commission's ultimate conclusion on the Management Areas investigated is that there is clearly a lack of synergy between the day to day operations and the vision and objectives of the White Paper which was issued by the Department to move the Department away from its militaristic approach to a Department driven by human rights and the humane treatment of all inmates.

The impression gained by the Commission is that there is also a lack of communication between senior management and the members on the ground. To the extent that members are ill informed of the various policies, the direction the Department is seeking to take is at risk, particularly the need to put the welfare of the prisoners first before anything else in the Department.

Some officials seem to forget that the safe custody of prisoners and their rehabilitation is the core business of the Department.

There is no overnight solution to changing the mindset of the prison officials who are in direct contact with prisoners. The biggest challenge for the Department is to transform the existing institutional culture of lawlessness and corruption without losing sight of the difficulties attached to the job.

A series of workshops and an intensified training programme for officials from the lowest rank upwards are essential for equipping officials with the insight into their role in the broader constitutional and human rights context. Such workshops are necessary for officials to recognise the importance of the role they play in rehabilitation, the security requirements of the Department and in the lives of prisoners generally.

It is of vital importance in an effective correctional system for each prison official to see himself or herself as a rehabilitator. The official should strive to create a cordial relationship with the prisoner without crossing the boundary and at the same time maintain high moral standards, which obviously requires a great deal of professionalism.

The major challenge facing the Department of Correctional Services is therefore the transformation of the mindset of the officials, which cannot be done in a short space of time. The White Paper on Corrections is the beginning of such a process and it gives an indication as to where the Department is going. Having said that, the White Paper is not an end in itself; neither is it the answer to all the problems facing the Department, just as this report is not the end itself.

If one considers the state of affairs that prevailed in the Department during a certain period, it compares well with a war zone. There was extreme violence, people were tortured, traumatised, assaulted, insulted, spat upon and all of this happened under the banner of transforming the workplace.

Many officials, some still in the employ of the Department, were severely traumatised and emotionally scarred by the events in that period of the Department's history. Such members were traumatised by either being personally violated or by observing the rights of other people being violated.

It is evident that unless the Department embarks on a major process to heal these wounds and offer some form of counselling to these members who have been traumatised, all its efforts directed at the rehabilitation of prisoners will remain a "pipe dream". One cannot expect traumatized officials to rehabilitate prisoners whilst they themselves are in need of help in the form of counselling and/or rehabilitation. In the circumstances, it would be difficult for them to be "rehabilitators" as the White Paper on Corrections anticipates unless their needs are taken care of.

In conclusion, the Commission is convinced that its establishment has generally resulted in an increase in the public's awareness of the lives of prisoners and that this has had a positive contribution to the strengthening of our democracy as all South Africans have been compelled to confront the fact that prisoners are also a sector of our democratic society whose rights should be equally recognised and protected like all South Africans.

The Commission has now concluded its work and leaves it to the Department to deal with the issues that have been raised in this report.

DATED AT DURBAN THIS DAY OF DECEMBER 2005.

JUSTICE T S B JALI
CHAIRMAN

ADVOCATE E J S STEYN
COMMISSIONER

ADVOCATE T A SISHI
COMMISSIONER

ADVOCATE S POSWA-LEROTHOLI
COMMISSIONER FOR THE NCOME
MANAGEMENT AREA.