



**A REVIEW OF THE JUDICIAL INSPECTORATE
OF PRISONS OF SOUTH AFRICA**

by

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The Civil Society Prison Reform Initiative is a joint project of NICRO (National Institute
for Crime Prevention and the Reintegration of Offenders) and the Community Law Centre (CLC)
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The aim of CSPRI is to improve the human rights of prisoners through research-based lobbying
and advocacy and collaborative efforts with civil society structures. The key areas that CSPRI
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non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing
the rate of recidivism through improved reintegration programmes. CSPRI supports these objectives by
undertaking independent critical research; raising awareness of decision makers and the public;
disseminating information and capacity building.

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1. Introduction

Under the previous legislative scheme regulating prisons, there was very little provision for outside review with the exception of direct application to the High Court, a procedure that was rarely used.¹ This was in line with the spirit of the old legislation under the apartheid era, which envisaged a closed, draconian and primarily retributive penal justice system, heavily regulated and controlled and shielded from public scrutiny and community involvement. In the course of the 1990's, however, when much of South African law and policy was being overhauled, political debate on the correctional system became more prevalent and included discussions on including a system of independent oversight of prisons in new legislation. The idea of an independent oversight body is based on the premise that openness, transparency and accountability are key features of a democratic order, requiring that the exercise of executive power be checked by an organ or body that is distinct from and independent of it.² In a democracy, many different bodies, including Parliament, human rights commissions, ombuds, specialised inspectorates and community organisations play an oversight role. This report focuses on the South African Judicial Inspectorate of Prisons as an oversight body.

Independent prison inspectorates and the oversight of prisons by laymen are designed to contribute towards improving prison conditions and protecting the human rights of prisoners. The South African model, the Judicial Inspectorate of Prisons, is no exception, and forms part of an array of independent institutions set up to bolster and support democracy and human rights. This report examines and assesses the work carried out by the Inspectorate since its inception in 1998 in terms of its contribution to prisoners' rights and improved prison conditions, and increased civilian involvement in prison reform. It examines the Inspectorate's legal mandate, including the impact of recent legislative amendments in this regard and the functional and structural arrangements currently in place to execute the mandate. It also looks at the nature and extent of the powers of the Inspectorate, assesses its independence and examines liaison and co-operation with other governmental and non-governmental institutions. The report contains a brief comparative analysis of similar prison oversight bodies in other parts of the world, and concludes with a discussion of and recommendations for enhancing the effectiveness and impact of the Inspectorate. The overall conclusion of this report is that the Inspectorate is making a significant contribution to improving the human rights of prisoners in

* Associate Professor of Law, University of Cape Town. I am grateful to the many people who gave their time to be interviewed for this report and who filled out questionnaires, and to the staff of the Inspectorate, all of whom patiently endured my presence in the office and generously shared their time and experiences with me. I am grateful to Annika Larsen for conducting some of the interviews and to Karla Saller for both conducting interviews and for her significant contribution to parts of this report. Thanks also to Gideon Morris, Lukas Muntingh and Julia Sloth-Nielsen for their comments on an earlier draft. As always, I am indebted to Fred Soltau for his constant intellectual and emotional support and for his comments on earlier drafts.

¹ D Van Zyl Smit 'South Africa' in D van Zyl Smit and F Dunkel (eds) *Imprisonment Today and Tomorrow* (1999) 596.

² See generally H Corder, S Jagwanth and F Soltau *Report on Parliamentary Oversight and Accountability* (June 1999). Available on the web at: <http://www.pmg.org.za/bills/oversight&account.htm>

South Africa, but there are several areas of its work that need to be improved and modified in order to maximise its effectiveness.

2. Methodology

This report is based on interviews conducted with staff of the Inspectorate, including a small number of Independent Prison Visitors and Regional Co-ordinators, members of civil society, institutions set up to support constitutional democracy under Chapter 9 of the Constitution, senior staff of the Department of Correctional Services, members of Parliament, as well as the first Inspecting Judge and persons involved in the drafting of the Correctional Services Act.³ In some cases, respondents filled out detailed questionnaires and in others they were interviewed orally. The list of people interviewed is not disclosed here for reasons of confidentiality. This report is also based on an analysis of documents developed and used by the Inspectorate, including reports and records of complaints. It also draws on some academic sources. The research design was finalised in consultation with senior staff of the Inspectorate. The work of the IPVs is covered extensively in another research paper in this series and must be read together with this report for a composite picture.⁴

3. Background To The Establishment Of The Inspectorate

The idea of having an independent body to oversee prison conditions in South Africa was formally proposed after the Department of Correctional Services (DCS) issued its white paper on prison reform in 1994. A number of civil society organisations involved in penal reform, acting under the rubric of the Penal Reform Lobby group (PRLG), found that the white paper 'failed to address the central problems of the correctional system in South Africa'⁵ and subsequently prepared an alternative white paper on correctional services. The alternative white paper proposed the establishment of an independent prisons inspectorate to be entrusted with overall responsibility for visiting prisons and investigating prisoners' complaints, monitoring police investigations of crimes committed in prison and to advise on policy issues. It also recommended the establishment of a lay visitors' scheme.⁶ It pointed out that the lack of independent inspection of prisons is not only contrary to the principles of the Constitution, but also those espoused in Principle 29(1) of the Principles for the Protection of all Persons under any form of Detention or Imprisonment, and Rules 55 and 35(2) of the UN Standard Minimum Rules For the Treatment of Prisoners. The alternative white paper also observed that a lay

³ Act 111 of 1998.

⁴ See Jacqui Gallinetti *Report on the Evaluation of the Independent Prison Visitors System CSPRI* Research Paper series.

⁵ Penal Reform Lobby Group *Alternative White Paper on Correctional Services* unpublished (February 1995) Introduction and Summary. Copy on file with author.

visitor scheme, in which members of the public would examine and monitor conditions in prisons, would complement the work of the prisons inspectorate and would allow the community to become more involved in corrections.

While there was no official departmental response to the alternative white paper, it marked the start of the process of reforming legislation dealing with prisons both within government and in civil society. In 1995, the Transformation Forum on Correctional Services was established. The Forum consisted of non-governmental organisations and senior members of the Department of Correctional Services. Carl Niehaus, the then chairperson of the Parliamentary Portfolio Committee on Correctional Services first headed the Forum.⁷ A number of task teams, including one on independent oversight and lay visitors, were set up to investigate and make recommendations on penal reform. While the Transformation Forum was short-lived,⁸ a final report on recommendations for a prisons inspectorate was submitted to the National Advisory Council on Correctional Services (NACOCS) in August 1996.⁹ The Report contained detailed recommendations on the staffing, powers, functions and independence of the proposed prisons inspectorate and lay visitors scheme. Subsequently, three members of NACOCS,¹⁰ Judge Mark Kumleben, Advocate Neil Rossouw and Professor Dirk Van Zyl Smit were appointed to advise the government on drafting new correctional services legislation. Judge Kumleben was briefed to research and investigate the idea of including in the new legislation provision for an independent prison inspectorate, which included a study tour to the United Kingdom to research the feasibility of adopting the English model in South Africa. The English model proved influential, and the final recommendations on an independent prisons inspectorate included many of its features, but with some important differences. The most notable of these was the appointment of a judge to head the inspectorate.¹¹ All those involved in the drafting of the new Act noted that although it was not common for prisons inspectorates in other countries to be headed by judges, this model was chosen for South Africa after much debate because of the independence, stature and credibility that a judge would bring to the Office.

In terms of section 85(1) of the Correctional Services Act (the Act), the Judicial Inspectorate of Prisons is 'an independent office under the control of the inspecting judge.'¹² Its objective is to 'facilitate the inspection of prisons in order that the Inspecting Judge may report on the

⁶ Ibid at paras 24.2-24.3.

⁷ D Van Zyl Smit 'South Africa' in Van Zyl Smit and Dunkel note 1 at 597.

⁸ Ibid. See also J Sloth-Nielsen *Overview of Policy Developments in South African Correctional Services 1994-2002* CSPRI Research Paper Series 1 (July 2003) 9.

⁹ Lawyers for Human Rights *Final Report on Recommendations for a Prisons Inspectorate and Modification of the Correctional Boards to Incorporate an Inspecting Function* unpublished (August 1996). Copy on file with author. The report was written with input by and on behalf of a number of civil society organisations.

¹⁰ Established by section 7 of Act 122 of 1991.

¹¹ The features of the English prison inspectorate are discussed further below in section 10.

¹² The Inspectorate was initially formally established with effect from June 1998 in terms of an amendment to section 25 of the Correctional Services Act 8 of 1959.

treatment of prisoners in prisons and on conditions in prisons.¹³ Judge JJ Trengove took office as the first Inspecting Judge in June 1998 until his resignation in 2000. When he took office, ‘the Judicial Inspectorate existed in name only, as it had not yet been established yet. The Inspectorate had no human or financial resources and it had no physical infrastructure, such as office accommodation or equipment at its disposal.’¹⁴ His first task, therefore, was to set up the Office and appoint staff. Mr Gideon Morris was seconded from the DCS as Secretary of the Inspectorate, and presently holds the post of Director. Though the process was subject to many delays, by early 2000 the Office had been set up and nine inspectors and ten administrative staff had been appointed.¹⁵ In appointing staff, a balance had to be struck between maintaining independence from the DCS and the perception thereof by making appointments from outside the ranks of correctional officials, while simultaneously appointing people who had experience with and inside knowledge of the Department and who were in the best position to advise on how the correctional system worked. Consequently, the Inspectorate is currently staffed by former members of the DCS, as well as people who had no previous experience of prison inspections.¹⁶ Training in matters of prisoners’ rights had to be provided, which was done primarily by outside agencies such as the South African Human Rights Commission and non-governmental organisations.¹⁷

According to Judge Trengove, there was very little awareness at the time about the establishment or work of the Inspectorate amongst both correctional officials and prisoners. Thus, one of the early tasks he undertook was to consult with and inform various individuals, organisations, correctional officials and prisoners of the work of the Inspectorate and its powers, functions and duties.¹⁸ In addition, a plain language brochure on the work of the Inspectorate was prepared and distributed widely in prisons. The early initiatives of the Inspectorate to consult and inform members of the public, including prisoners and officials of the DCS, are to be commended, because much of the credibility it enjoys today is in part due to those initiatives. Judge J Fagan, the present Inspecting Judge, as well as members of staff have also put enormous effort into publicising the work of the Inspectorate, which has produced important results. This report outlines some of those activities in detail.

4. The Legislative Framework

4.1 Background

¹³ Section 85(2). Before the amendment of this section by section 31 of the Correctional Services Amendment Act 32 of 2001, the Inspectorate was also required to report on corrupt and dishonest practices in prisons. This amendment is discussed further below in section 8.

¹⁴ *Inaugural Annual Report of the Judicial Inspectorate (2000)* 4 (hereafter *Inaugural Annual Report*).

¹⁵ *Inaugural Annual Report* 7.

¹⁶ Just over 14% of the present staff were previously members of the DCS.

¹⁷ For more details on the training provided for new staff, see the *Inaugural Annual Report* 8.

The establishment of the Judicial Inspectorate of Prisons¹⁹ must be seen against the backdrop of the South African constitutional order as well as the aims and objects of the Act as a whole. The Act attempts to regulate the correctional system to give effect to the Bill of Rights - particularly as it affects prisoners²⁰ - and international law and principles on correctional matters.²¹ It must also be seen as giving effect to the principles of accountability, responsiveness and open governance that are embraced by the Constitution.²²

Under the Act, the purpose of the correctional system is to ensure a just, peaceful and safe society by the detention of all prisoners in safe custody whilst ensuring their human dignity.²³ The Act also has a general focus on promoting the 'social responsibility and human development of prisoners.'²⁴ An important component in encouraging the success of this system is the existence and proper functioning of an independent oversight body to ensure that the purposes of the legislation are fulfilled and that conditions in prisons are in line with our constitutional framework and democratic practices. As one of the key 'independent mechanisms to investigate and scrutinise the activities of the Department of Correctional Services'²⁵ the Judicial Inspectorate of Prisons plays a crucial role in maintaining the objectives of the Act, and safeguarding the constitutional requirements of the correctional system.

4.2 Inspecting Judge and Staff

The head of the Judicial Inspectorate of Prisons, the Inspecting Judge, must be appointed by the President and must be a judge or retired judge of the High Court.²⁶

To ensure independence, the Inspecting Judge continues to receive the 'salary, allowances, benefits and privileges attached to the office of a judge.'²⁷ Under section 87, the Inspecting Judge has the power – after consultation with the Commissioner of Correctional Services (the Commissioner) - to appoint person/s with legal, medical or penological expertise as Assistants

¹⁸ See the *Inaugural Annual Report 5* for a list of the people and organisations consulted.

¹⁹ Also referred to in this report as the Office of the Inspecting Judge of Prisons (the Office).

²⁰ The constitutional rights of prisoners have been recognised in many cases, including *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C), *August v Electoral Commission* 1999 (4) BCLR 363 (CC) and *Minister of Correctional Services v Kwakwa* 2002 (4) SA 455 (SCA). For a discussion of these cases and the impact of litigation on prisoners' rights, see P De Vos *Prisoners Rights Litigation in South Africa since 1994: a Critical Evaluation* CSPRI Research Paper Series 3 (November 2003).

²¹ See for example the UN Standard Minimum Rules for the Treatment of Prisoners, adopted in Geneva in 1955. See too European Committee for the Prevention of Torture and Inhuman or Degrading Punishment established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment of 1987, which has the power to make planned or random inspections in states' prisons; and the work and reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa. See also R Murray 'Application of International Standards to Prisons in Africa: Implementation and Enforcement' PRI Africa Newsletter Issue 12 March 2000. Available on the web at: http://www.penalreform.org/english/article_stafrica.htm

²² See for example section 1(d) and chapter 10 of the Constitution.

²³ Section 2.

²⁴ Section 2. See also generally chapters III and IV of the Act.

²⁵ See the preamble to the Act. For an overview of other oversight mechanisms, see A Dissel *A Review of Civilian Oversight Over Correctional Services in the Last Decade* CSPRI Research Paper Series 4 (November 2003).

²⁶ Section 86(1).

from time to time. Assistants may be appointed for a specified period or for a specific task, and while they remain under the overall authority and control of the Inspecting Judge they have the same powers, functions and duties as the Inspecting Judge.²⁸ The salaries and conditions of service of Special Assistants are determined by the Inspecting Judge after consulting with the Commissioner and in consultation with the Director-General of the Department of Public Service and Administration.²⁹ Since the inception of the Inspectorate, the Inspecting Judge has made use of this power on one occasion only.³⁰

In terms of section 89(1) of the Act, the Inspecting Judge must determine the staff complement of the Inspectorate in consultation with the Commissioner. The Inspecting Judge must then appoint inspectors and other staff within this complement.³¹ Employees of the Inspectorate are deemed to be correctional officers seconded to the Inspectorate for administrative purposes, but are under the control and authority of the Inspecting Judge.³² For the purposes of administrative management and control of employees, the Inspecting Judge has the same powers and duties as the Commissioner.³³ While the conditions of service of employees in the Inspectorate are regulated by the Act, their salaries and allowances are regulated by the Public Service Act.³⁴ Thus, under the Act, employees of the Inspectorate are given the same remuneration and benefits as other public servants. In practice, some of the staff members in the Inspectorate have been seconded from the Department of Correctional Services, therefore the provisions in section 89 of the Act allow them to retain the remuneration, benefits and other allowances they received as public servants.

4.3 General Powers, Functions and Duties

Under section 90(1), the overarching function of the Inspecting Judge is to inspect or arrange for the 'inspection of prisons in order to report on the treatment of prisoners in prisons and any corrupt or dishonest practices in prisons.'³⁵ The Inspecting Judge is required to submit a report on each inspection to the Minister of Correctional Services.³⁶ He or she must also submit an annual report to the President and the Minister of Correctional Services, who must table the

²⁷ Section 86(3). See also section 88, which covers the conditions of service of retired judges.

²⁸ Section 87 (2) and (3).

²⁹ Section 87(4).

³⁰ This occurred when Dr Cohen, a dental surgeon in the Western Cape, volunteered his services to conduct a survey on dental care in the Western Cape prisons. Interview with Mr Gideon Morris, 25 August 2003.

³¹ Section 89(2).

³² Section 89(3).

³³ Section 89(4) as amended by section 32(b) of the Correctional Services Amendment Act 32 of 2001. The Inspecting Judge may delegate these powers and assign duties to an employee holding a post at the level of Deputy Director-General or higher.

³⁴ Section 89(5) as inserted by section 32(c) of the Correctional Services Amendment Act 32 of 2001.

³⁵ It is noteworthy that section 90(1) was not amended in line with section 85(2) to remove the issue of 'corrupt and dishonest practices' in prison. Interpreted together with section 85(2), therefore, section 90(1) must be understood to include corruption and dishonesty when it impacts on the treatment of prisoners in prisons and on conditions in prison. This is discussed further in section 8.

³⁶ Section 90(3).

report in Parliament.³⁷ Since the establishment of the Inspectorate, four annual reports have been submitted – all of which are available on the Inspectorate's website.

The Inspectorate receives prisoners' complaints via the National Council For Correctional Services, the Minister of Correctional Services, the Commissioner or a Visitors' Committee. In cases of urgency, a complaint can come directly to the Inspectorate from an Independent Prison Visitor (IPV). The Inspecting Judge may also deal with any complaint of his or her own volition.³⁸ In addition, a judge or a magistrate visiting a prison within his or her area of jurisdiction in terms of section 99(1) may interview any prisoner and bring a matter to the attention of the Inspecting Judge.³⁹ In practice, the Visitors' Committees refer most of the complaints that the Inspectorate deals with. The passage of a complaint, and the systems and processes designed to facilitate resolution of complaints are dealt with below.

Hearings and enquiries may be held for the purposes of conducting investigations.⁴⁰ The Inspecting Judge may delegate any of his or her functions to inspectors, except the power to hold hearings. Under section 90(8), the Inspecting Judge may, after consultation with the Director-General of the Department of Public Service and Administration, appoint 'persons with appropriate qualifications from outside the Public Service to assist in any specialised aspect of inspection or investigation.'⁴¹ The Inspecting Judge also has the power to make rules that are considered necessary or expedient for the effective functioning of the Inspectorate.⁴²

An important function of the Office of the Inspecting Judge is the appointment of IPVs, who visit prisons and receive, record and monitor complaints directly from prisoners.⁴³ Public nominations and consultation with community organisations must precede the appointment of IPVs. The Inspecting Judge has significant powers relating to the work of IPVs, including the power of suspension or termination of their services⁴⁴ and determination of the period of office they serve.⁴⁵ In addition, the Inspecting Judge may make rules concerning the appointment of IPVs and on any aspect of their work.⁴⁶ IPVs are required to submit a quarterly report to the Inspecting Judge, which must include information on the duration and number of prison visits carried out and the number and nature of complaints dealt with or referred to the Visitors'

³⁷ Section 90(4).

³⁸ Section 90(2).

³⁹ Section 99(2).

⁴⁰ Section 90(5). At a hearing, the provisions of sections 3, 4 and 5 of the Commissions Act 8 of 1947 apply. Only one public hearing has thus far been held by Judge Trengove, the first inspecting judge, on mass assaults in the Johannesburg Medium B Prison in July 1998. A report was submitted to the Minister of Correctional Services in February 1999 (*Inaugural Annual Report 5*).

⁴¹ Section 90(8).

⁴² Section 90(9).

⁴³ Section 93(1).

⁴⁴ Section 92(3).

⁴⁵ Section 92(2). In practice, IPVs hold office for a period of 2 years. The limited appointment period is designed to guard against the danger that IPVs may, over time, become too institutionalised and too close to officials at the prison at which they work and thus less vigilant and effective in monitoring prisoners' complaints.

⁴⁶ Section 93(6).

Committee.⁴⁷ IPVs must be given access to a prison and to any documents or records, and the Head of Prison must assist IPVs in the execution of their powers, functions and duties.⁴⁸ Should the Head of Prison refuse a request from an IPV relating to the his or her functions, the dispute must be referred to the Inspecting Judge who may make a final ruling on the dispute.⁴⁹

A related function of the Inspecting Judge is the establishment of Visitors' Committees in particular regions.⁵⁰ The Visitors' Committee consists of the IPVs in that region, the Regional Co-ordinator and community members and meets at least quarterly.⁵¹ The functions of the Committee are to consider and attempt to deal with unresolved complaints, and to submit to the Inspecting Judge those complaints that cannot be resolved by the Committee. They also organise a schedule of visits to prisons and 'extend and promote the community's interest and involvement in correctional matters.'⁵²

4.4 Powers and Functions Relating to Mandatory Reports and Prohibited Publications

The Act also sets out a number of other specific functions and roles for the Inspecting Judge and his or her office. Section 15 provides that any death in prison must be reported to the Inspecting Judge 'who may carry out or instruct the Commissioner to conduct any enquiry.' Procedures set up by the Inspectorate for the reporting of deaths under section 15 are discussed below. Under section 25 of the Act, a penalty of solitary confinement imposed on a prisoner at a disciplinary hearing must be referred to the Inspecting Judge for review. The Inspecting Judge must consider the record of the disciplinary proceedings and a report from a nurse or doctor on the health status of the prisoner concerned, and may confirm or set aside the decision or penalty and substitute an appropriate order in its place. The Inspecting Judge must review the record and make a decision within three days. A penalty of solitary confinement cannot be implemented unless confirmed by the Inspecting Judge.⁵³ In addition, any segregation of prisoners made under section 30 of the Act must be reported immediately by the Head of Prison to the Inspecting Judge.⁵⁴ A prisoner may refer his or her segregation to the Inspecting Judge, who must 'decide thereon' within 3 days of receipt of the referral.⁵⁵ Similarly, the Head of Prison must report the use of mechanical restraints (except handcuffs or leg-irons)

⁴⁷ Section 93(7).

⁴⁸ Section 93(2)-(3).

⁴⁹ Section 93(4). The question of whether this section provides the Inspecting Judge with the power to consider the merits of the complaint of a prisoner in the matter concerned, or whether it allows him or her to simply adjudicate on whether the dispute falls within the functions and duties of the IPV has not been resolved. This question, which was put to Mr C Paxton, Director Legal Services, Department of Correctional Services in a letter from Mr Gideon Morris of the Inspectorate on 23 August 1999, relates to the broader issue of the powers of the Inspecting Judge under the Act, and is dealt with more fully in section 6 of the report.

⁵⁰ Section 94(1). In 2003, there were 36 Visitors' Committees. See Judicial Inspectorate of Prisons *Annual Report* (2002) 14 (hereafter referred to as *Annual Report* (2002)).

⁵¹ In practice most Visitors' Committees meet monthly.

⁵² Section 94(3).

⁵³ Section 25 is not yet in effect.

⁵⁴ Section 30(6). Section 30 is not yet in effect.

⁵⁵ Section 30(7).

to the Inspecting Judge.⁵⁶ A prisoner subjected to mechanical restraints may appeal against the decision to the Inspecting Judge, who must decide thereon within 3 days of receipt of the appeal.⁵⁷ Then, in relation to prohibited publications, the Inspecting Judge must, on referral by an affected person, confirm or set aside a decision of the Commissioner of Prisons refusing that person permission to publish details of an offence for which a prisoner or person subject to community corrections is serving a sentence. An affected person may refer the matter to the Inspecting Judge within 10 days of being informed of the Commissioner's decision.⁵⁸ With the exception of the provisions relating to prohibited publications, at the time of writing none of these sections had been put into effect.⁵⁹

4.5 The Passage of Complaints under the Act

In terms of section 21 of the Act, every prisoner must be given the opportunity daily to make complaints or requests to the Head of Prison or another authorised official. The Head of Prison or authorised official must record the complaint or request, deal with the matter promptly and record and inform the prisoner of the steps taken in response to the complaint or request. If the complaint is one of assault, the prisoner must undergo a medical examination immediately and receive the prescribed treatment. A prisoner who is not satisfied with the response to his or her complaint or request may convey the reasons for his or her dissatisfaction to the Head of Prison, who must refer the matter to the Area Manager. If the prisoner is still not satisfied after the Area Manager has responded to the complaint or request, he or she may refer the matter to the IPV.

The IPV interviews the prisoner in private, and records complaints in an official diary.⁶⁰ He or she must continuously monitor the manner within which complaints are dealt. The IPV must first attempt to resolve the matter internally by discussing complaints with the Head of Prison or another authorised prison official. The Act therefore envisages that the IPV will play the role of an intermediary. Prisoners' complaints must be resolved, if possible, internally by mediation before resorting to outside intervention. If the IPV is unable to resolve the matter or deal with the complaint internally, he or she must refer the matter to the Visitors' Committee in that region. The Visitors' Committee will also attempt to resolve the matter by mediation and will often involve local community members including local magistrates and prosecutors in its work. The members of the Visitors' Committee also identify trends in the area and provide information to the Office and other relevant institutions and individuals. If the complaint remains unresolved after the Visitors' Committee has attempted to deal with it, or if there is no Visitors' Committee in that region, it must be referred to the Inspecting Judge. The Office has put in place a number of

⁵⁶ Section 31(4). Section 31 is not yet in effect.

⁵⁷ Section 31(5).

⁵⁸ Section 123(4). A decision by the Commissioner regarding giving access to a prison for the purposes of filming a documentary, *Focus on Freek*, was overturned by the Office under this provision.

⁵⁹ These are sections 15, 25, 30 and 31.

⁶⁰ Section 93(1).

internal functional and structural arrangements to deal with complaints, which are discussed in the next section.

5. Functional And Structural Arrangements

The Office of the Inspecting Judge is made up of 35 staff members, excluding the IPVs, and is divided into four different but related sub-units, viz. the IPV Unit, Legal Services, Inspections and Administration. Each is discussed separately below, as are the individual efforts of the Inspecting Judge. The system is designed in such a way that the work of each unit is informed by that of the others, so that they complement one another. Therefore, having teamwork and synergy between the various branches is essential for maximising the effectiveness of the Inspectorate. Mechanisms that have been put in place to ensure there is an easier flow of information and good co-ordination between the units are discussed below.

5.1 The Inspecting Judge

The first Inspecting Judge, Judge Trengove, spent a great deal of his time in office setting up the Inspectorate, appointing staff, publicising its work amongst prisoners, officials of the DCS and civil society organisations, and consulting with others involved in prison reform. This process of consultation and publicity meant that a strong foundation was put in place for the future work of the Inspectorate.

As the second Inspecting Judge, Judge Fagan is known best for his activism in the area of overcrowding. His view is that most of the problems relating to prison conditions, such as restricted living conditions, spread of diseases, and poor sanitation and hygiene, can be attributed to overcrowding.⁶¹ Thus, the limited resources of the Inspectorate can be put to use most effectively by tackling the problem of overcrowding. Judge Fagan has been vocal on the issue of overcrowding, and has effectively used the media to increase public awareness of conditions in South African prisons. His focus has been on reducing the size of the prison population, and he has initiated several important steps in terms of legislation and policy that are designed to ameliorate overcrowding and address conditions in prisons. He has lobbied and campaigned within governmental and non-governmental bodies, the legal profession and the media to highlight and reduce the large prison population. As the Inspecting Judge, Judge Fagan is visible in his work and frequently addresses public gatherings, calls and attends meetings with role-players in the criminal justice process, and is often in the media spotlight. He

⁶¹ See for instance Judicial Inspectorate of Prisons *Annual Report* (2001) 3 (hereafter referred to as *Annual Report* (2001)). This view is shared by experts in prison reform. Van Zyl Smit observes that 'overcrowding is reaching a level where it is virtually impossible, even with the best intentions, to implement regimes that meet minimum standards of human dignity' (D Van Zyl Smit 'South Africa' in Van Zyl Smit and Dunkel note 1 at 606).

also attends meetings of the National Council on Correctional Services. Judge Fagan also frequently makes both scheduled and unannounced visits to prisons.

Some of those who were interviewed for this study expressed concern that Judge Fagan had adopted an overly conciliatory and non-confrontational approach towards the DCS. The view was expressed that such an approach tended to undermine the stature and independence of the Inspectorate, and that the Inspecting Judge should maintain some distance from the DCS so that the perception of independence would be maintained. The question of the independence of the Inspectorate is discussed more fully in section 7 below. Most of those people who were interviewed, however, described Judge Fagan as courageous, energetic and compassionate and saw his individual efforts on behalf of the Inspectorate as extremely effective. In 2003, he was awarded an honorary doctorate by the University of Cape Town for the 'superb work that he has done and is doing as the Inspecting Judge and head of the Judicial Inspectorate of Prisons.'⁶² Judge Fagan was credited with turning the Inspectorate 'into an institution that has contributed enormously to improving the difficult lot of prisoners of South Africa.'⁶³ There is no doubt that Judge Fagan's tenure as Inspecting Judge has been very successful, and that his work has been important in that it has raised the visibility of the Inspectorate and helped gain publicity not only for its work, but also for the issue of prison reform in general.

5.2 IPV Unit

The IPV Unit is responsible for appointing, training, managing and supervising IPV's. IPV's are appointed on a two-year contract and allocated to prisons across the country with more than 100 prisoners.⁶⁴ Nominations for IPV's are called for at public meetings after consultation with community organisations in the area concerned.⁶⁵ Candidates must complete a customised nomination form that solicits specific information about them, including their language proficiency and history of community and NGO involvement.⁶⁶ Volunteer workers enter this information into an electronic database, which automatically allocates scores to the applicants according to weighted criteria. The sheer number of applications means that only the top scoring candidates will be considered and invited for interviews in the regions.⁶⁷ The interview panel makes recommendations for appointment to the Inspecting Judge, and unless there is evidence of a lack of fairness and due process, the appointments are confirmed.⁶⁸ All IPV's must undergo a three-day training course before they commence their duties.

⁶² From the citation read by Professor D Van Zyl Smit, 10 December 2003.

⁶³ Ibid.

⁶⁴ *Annual Report* (2002) 10.

⁶⁵ In 2002, 47 public meetings calling for nominations of IPV's were held (*Annual Report* (2002) 8). The work of the Inspectorate and the role of IPV's in prisons is also publicised at these meetings.

⁶⁶ *Nomination for Independent Prison Visitor* (Form JI 104).

⁶⁷ For example, in 2002, the Office received 18 486 nominations (*Annual Report* (2002) 8).

⁶⁸ The Director of the Office audits the process on the papers for fairness.

At the end of 2003, there were 236 IPVs nationally. Because IPVs are appointed for a two-year period only, it also becomes necessary to regularly appoint and train new IPVs.⁶⁹ Collectively, the IPVs process a large number of complaints each year. For example, in 2002, IPVs received 190 167 complaints from prisoners. Unresolved complaints are referred to the Legal Services Unit in the Office, but the vast majority of complaints are resolved without the need for referral to the Office. For instance, in 2002, only 217 unresolved complaints were referred to the Office.⁷⁰

IPVs are supervised and supported in their regions by Regional Co-ordinators. Regional Co-ordinators serve as a link between the IPVs and the Office, and have been included as part of the staff component to provide a stronger link between the IPVs and the Office. In addition to providing support and supervision, Regional Co-ordinators are involved in the selection and ongoing training of IPVs, and in conducting quarterly performance and financial audits, on which they report to the Office. They attend meetings of the Visitors' Committee, expedite and assist in the resolution of complaints and facilitate public awareness of and involvement in prisons.⁷¹ They also capture unresolved complaints on the electronic reporting system, and follow up on all outstanding complaints. Normally, Regional Co-ordinators are based in the regions, but presently two are based in the national office in Cape Town. In 2002, Regional Co-ordinators conducted 87 in-service training sessions and 205 performance audits of IPVs.⁷²

5.2.1 Analysis, Obstacles and Problems

The work, impact and effectiveness of the IPVs is considered in detail in a separate report, and only a few observations, particularly as regards their relationship with the Office, are made here. The IPV Unit carries a heavy workload, but management structures and systems designed to support and supervise the IPVs appear to be efficient and well-organised. Policy documents and manuals regulating the appointment and work of the IPVs and Visitors Committees contain helpful and comprehensive information.⁷³

However, interviews with both staff and outsiders reveal that there are some problems with the present system. An issue that persistently arose was the absence of regional offices and the need for a greater institutional presence in the provinces. At present, there is only one national office based in Cape Town. IPVs and Regional Co-ordinators expressed the view that their work was made very difficult by the absence of a supporting administrative infrastructure. Some Regional Co-ordinators and IPVs work out of their cars, in the passages or courtyards of the

⁶⁹ New IPVs had to be appointed and trained for prisons in Limpopo, Mpumalanga and Gauteng at the end of 2002 (*Annual Report* (2002) 10).

⁷⁰ *Annual Report* (2002) 14.

⁷¹ *Ibid* 12.

⁷² *Ibid* 11.

⁷³ See for example the *IPV Manual* and the *User Manual for IPVs for Submission of Electronic Reports*. In addition, policy documents such as the *Appointment of IPVs and the Establishment of Visitors' Committees* (Form JI 6/2) and *Suggestions and Guidelines for Interviewing Prospective IPVs* contain helpful guidelines and principles to direct the work of the IPV Unit.

prisons. In some cases, they are allowed to use rooms in the prisons, but this is not common. They do not routinely have access to desks, stationery or telephones. In light of the fact that the Office has adopted an electronic reporting system and is pursuing a paperless environment, the lack of access to PCs has proved to be particularly problematic. Outsiders interviewed for this study also commented on the absence of regional offices and pointed out that the impact of the work of the Inspectorate was not felt outside the Western Cape region. Some raised the problem that the Office was inaccessible to those segments of the public with a legitimate and real interest in the welfare of prisoners, such as family members. That the Office remained physically far removed from most people exacerbated this problem.

A second related problem was the perception on the part of many people who were interviewed that that the Inspectorate consisted of two branches working in isolation from one another. The perception was that the IPV system operated largely within the prison system and in direct contact with the prisoners and prison personnel. On the other hand, the Inspecting Judge and staff at the Office were seen to fulfil a very different function that was independent of the IPV process. This perception was prevalent amongst people from various sectors, including staff of the DCS who were interviewed. It would appear that this perception stemmed from the fact that most people who were interviewed only interacted with the Office, and partly from a concern that the IPV system did not function effectively in transmitting problems beyond the prison system. Knowledge of the work of the IPVs was largely limited to general information and most people who were interviewed could not provide specific information on the IPV system.

The IPVs – including the Regional Co-ordinators and the Visitors' Committees - form an integral part of the work of the Office of the Inspecting Judge, particularly as they are the first point of contact with prisoners and local communities, and are responsible for directing information to the Office, both in relation to the resolution of individual complaints and the identification and monitoring of trends. They form the link between the prisons and the Office. Unlike many other international models of prison oversight, the South African system includes both an inspectorate and an individual complaints process, in the form of the IPV system, as part of the same scheme, and the public should see them as such in order to use the system to its fullest extent.⁷⁴ Part of the reason for the perception that IPVs are separate from the Inspectorate may be the absence of regional offices in areas beyond the Western Cape. The work of the Inspectorate is relatively well-known in the Western Cape where it is based, and a good network of contacts with NGOs and other organisations has been established in this region. However, outside the Western Cape, its work is less visible, and ways of establishing a national presence need to be considered.

⁷⁴ This is in contrast to the English model that has an Inspectorate, which is responsible for inspections and oversight of general conditions in prisons, an ombudsman who is responsible for dealing with individual complaints, and a separate lay-visitor scheme.

Another problem identified in relation to IPVs is their two-year tenure. Some expressed the view that IPVs should be required to serve for a longer period to gain a greater benefit from the time and work that is invested in training and appointing them. The high turnover of IPVs also means that the Unit spends a great deal of time on appointing, recruiting and training, and not enough on identifying and responding to problem areas and trends identified in the Regional Co-ordinators' reports. It was suggested that the IPVs' tenure should be extended to three years, so as to strike a balance between the need to guard against institutionalisation on the one hand, and the need to address the high turnover of IPVs on the other.

Responses concerning the effectiveness of the IPVs varied considerably. Most people were of the opinion that the very presence of IPVs in prisons impacted positively on prisoners' rights and provided an additional avenue for dealing with prisoners' complaints. However, the view was also expressed that, despite the presence of IPVs, conditions in South African prisons had not changed substantially. The point was made that if IPVs were working effectively, then some of the issues that came to light during the Jali Commission of Enquiry⁷⁵ would have been communicated to the Office and civil society organisations, and been reported and dealt with much earlier. Another concern was that IPVs did not possess sufficient understanding of the context and systemic issues pertaining to prison reform for them to be able to intervene and report effectively. Many of those interviewed also voiced the need for greater understanding on the part of IPVs of their role in reporting on conditions in prisons, thereby establishing a much-needed ongoing reporting mechanism. In this regard, ongoing training and more support, particularly from outside organisations working in the field, are essential.

Some of those interviewed raised the concern that IPVs relied on their relationship with the prison authorities for an effective discharge of their mandate. The IPV is forced into a very difficult position, because he or she has to rely on the authorities for their co-operation, but also has to deal with prisoners' complaints that implicate the authorities in most instances. Even if this difficult line were walked successfully, the concern that prisoners perceive the IPVs' relationship with the prison authorities as lacking independence would remain. The solution envisaged by those who raised this problem was that the Office should strive to visibly support IPVs, by allowing them to draw on the stature of the Inspectorate for persuasive authority. This in turn would rely on the ability of the Inspectorate to jealously guard its independence.

To conclude, the work of the IPVs is invaluable not only to the Inspectorate, but also to other organisations working in the field of prison reform, as they have the potential to be a reliable and immediate source of information on what is happening on the ground. They also have the potential to directly change the conditions of individual prisoners and provide much needed and continuous on-the-ground oversight and monitoring. Every effort should be made to support and

⁷⁵ Many people gave the example of the conditions and treatment of prisoners at the Bloemfontein prison that the Jali Commission of Enquiry brought to light.

maximise the effectiveness of their work, and to ensure that the link between them and the Office is strengthened and publicised.

5.3 Legal Services Unit

The Legal Services section of the Office is responsible for two main areas: general (individual) complaints and mandatory complaints, and is accordingly divided into two sub-sections each dealing with these areas.

5.3.1 General Complaints

The general complaints division deals with complaints that have not been resolved by the IPV, Regional Co-ordinator or the Visitors' Committee. In addition, this division receives some complaints directly from prisoners, primarily in the form of referrals to the Office by non-governmental organisations, including NICRO, the South African Prisoners Organisation for Human Rights, the South African Human Rights Commission, the Public Protector and family members.⁷⁶ Regional Co-ordinators send unresolved complaints to the Office via the electronic complaints system. Case Officers thereafter enter the details of the complaint into a database. During this process, cases are classified according to a list of set categories, which allows the Office to ascertain 'adequate information about trends that may exist.'⁷⁷ Most of the complaints received by the Office are filed electronically, which is also designed to facilitate the collection and analysis of information and the identification of trends that can be prioritised and addressed. The electronic system operating in the Office is discussed more fully in section 5.

In a straightforward case where the law or policy on the matter is clear-cut, the Case Officer will make a recommendation on how the complaint should be resolved. Other cases are referred to the Case Manager who will make a recommendation. The recommendation is then returned directly to the IPV and the Head of Prison. In many cases, more information is requested, and the Case Officers may be required to investigate a matter before it can be taken further. In the event that the Case Manager is unable to make a recommendation, or if he or she requires further guidance, the matter is referred to the Complaints Committee. The Complaints Committee, which comprises the Director of the Inspectorate, the heads of the sections and

⁷⁶ In the year 2002, 3 734 such complaints were received and 3 235 were resolved, while 614 were referred to IPV's for follow-up consultations (*Annual Report* (2002) 14). For the purposes of this report, examples including documentation and correspondence of typical cases were requested and examined. Typical examples of cases included complaints by prisoners that items of clothing and personal effects were unlawfully seized by DCS members, the time allocated for family visits, requests for transfers and sizes of food rations. In many cases, the Office refers to existing DCS rules or policy to guide its decision-making.

⁷⁷ *General Circular on Dealing with Categories of Complaints* (June 2003, Form JI 1/6). The categories of complaints are: appeal, assault (inmate on inmate and member on inmate), bail, communication with families, conditions, confiscation of possessions, conversion of sentences, corruption, food, health care, inhumane treatment, legal representation, medical release, other, parole, remission, rehabilitation programmes and transfer.

Case Managers, meet weekly to discuss difficult and unresolved matters. The Complaints Committee develops policy and procedures regarding the resolution of complaints. The Complaints Committee also has the responsibility of identifying problem areas and trends from general complaints and determining whether on-site investigations or inspections should take place.⁷⁸

According to staff of the Inspectorate, the vast majority of cases that are referred to the Office are dealt with by mediation.⁷⁹ In a small number of cases where the matter cannot be resolved in this way, 'rulings' on the complaint are made either in favour of prisoners or the DCS.⁸⁰ Once a 'ruling' is made, it is available on the electronic communication network, so that the IPV can immediately communicate it to the prisoner and the Head of Prison. It is also communicated via fax to the Head of Prison, and its implementation is monitored by the IPV. Because making decisions in the manner described here is a relatively recent practice, no accurate statistics were available on the extent to which the DCS has complied with them. However, most staff at the Office reported that 'rulings' on general complaints, which are sent to the Head of Prison under cover of a letter signed by the Inspecting Judge, generally are complied with.

5.3.2 Mandatory Reports

The second leg of the Legal Services Unit deals with mandatory reports. These cover matters, which, in terms of the Act, must be reported to the Inspecting Judge by the prison authorities. As noted above, deaths in prison, instances of segregation and the use of mechanical restraints must be reported, and penalties of solitary confinement must be confirmed by the Inspecting Judge. A major difficulty for the work of this sub-unit is that none of these provisions have yet been put into effect, and consequently systems for reporting on solitary confinement, segregation and the use of mechanical restraints are not fully operational. However, the Inspectorate has instituted an electronic reporting system for Heads of Prison to report deaths under section 15 of the Act, despite the fact that the provision is not yet in operation. One of the reasons for the introduction of the electronic reporting system, which is accessible via the Judicial Inspectorate's web page, is the increasing number of deaths in prison. The system was also introduced in preparation for the implementation of the sections of the Act. After a pilot project in the Western Cape from August to November 2001, the Inspectorate contacted Heads of Prison throughout the country, firstly, to request that they file reports of death electronically and, secondly, to determine what training they needed in using the electronic system. The

⁷⁸ The *Annual Report* (2002) 13 states, for example, that the most common complaint amongst prisoners related to transfers.

⁷⁹ According to a senior staff member of the OIJ, about 80% of cases have been so resolved (interview, 25 August 2003).

⁸⁰ Despite the use of the term by staff at the Office, it does not appear that the Inspectorate has the power to make 'rulings', and 'recommendations' is the more accurate term to be applied in this context. See further section 6 below.

Inspectorate reports that Heads of Prison generally reacted favourably to the request, with the vast majority of them now using the electronic system when reporting deaths under section 15.

There are many advantages to the introduction of the electronic reporting system, including facilitating the synthesis of information and patterns in individual cases and in particular prisons, and the determination of trends in regions and across the country. In addition, the provisions relating to solitary confinement, segregation and mechanical restraints would all require decisions to be made within 72 hours. When these sections are in operation, electronic communication would allow information to be communicated to the Office immediately so that a timely decision can be made. It is estimated that when these sections are in operation, approximately 40 000 reports will be generated.⁸¹ To assist in processing these reports, the Legal Services Unit is also working on setting up partnerships with universities, in particular law and medical faculties, and other legal and medical professionals. Pilot projects are being planned for KwaZulu-Natal and the Western Cape. The concept is to appoint people with appropriate expertise as Special Assistants under section 87 of the Act, to assist in determining those matters that have to be reported to the Inspectorate in terms of legislation and that must be dealt with within 72 hours.⁸² It is envisaged that these Special Assistants, who will be based in the regions, will have legal and medical backgrounds, and will be appointed on a remunerated but ad-hoc basis. Persons with legal backgrounds will be required to review DCS decisions to audit compliance with legislation and other rules and regulations, while medical professionals will be called on to determine health and related matters, and review death reports. It was reported that, for the purpose of pursuing this goal, discussions with universities, magistrates and prosecutors were already underway.⁸³

In the event of a death in prison, the DCS conducts an internal investigation to determine the cause of death and issues a report. In addition, however, the Inspectorate, through the IPV in the prison, conducts an independent assessment of the DCS report.⁸⁴ Information on the death is sent via the electronic reporting system to the Case Officer, who makes an initial determination and a recommendation to the Case Manager for mandatory reports. The IPV in the region may be asked to collect more information. At the time of the interview with the Case Manager for Mandatory Reports, the Inspectorate had made no findings on unnatural deaths.⁸⁵

⁸¹ *Report on the Results of the Pilot Project: Converting to an Electronic Work Environment: Judicial Inspectorate of Prisons* (31 March 2002) 2.

⁸² In particular sections 25, 30 and 31, relating to solitary confinement, segregation and mechanical restraints.

⁸³ Interview with the Head of Legal Services, 25 August 2003.

⁸⁴ The independent assessment is done by filling in the pro-forma details required in the *Record of Consultation: Death Notification* (JI document, unreferenced). This document is designed to get all the necessary information on the circumstances surrounding the death. According to the Case Manager for Mandatory Reports, the document is still a work in progress and may be modified before finalisation (interview, 10 September 2003).

However, the Inspectorate is also concerned about determining reasons, trends and statistics in relation to the high number of natural deaths in prisons and finding ways to prevent this phenomenon.⁸⁶ Staff at the Inspectorate report that they are using both the Head of Prison and IPV reports on deaths to assist them in this task and to determine longer-term priorities, both for the Inspectorate and the DCS, in relation to health care and other conditions in prisons. Related to the issue of natural deaths is the release of prisoners on medical parole under section 79 of the Act, which provides that if a prisoner is diagnosed as being in the final phase of any terminal illness, he or she may be considered for placement under correctional supervision or medical parole, 'to die a consolatory and dignified' death. Although the Inspectorate technically has no legal mandate to intervene in decisions made under section 79 of the Act, the link between deaths in prison and release on medical parole has resulted in it becoming involved in monitoring and developing policy guidelines regarding medical releases.⁸⁷ In particular, the weight to be attached to questions such as whether the prisoner will be a threat to society if released, and the medical treatment and facilities in prison, must be properly determined. The Inspectorate sees as a priority the development of a policy to prevent the high rate of deaths in prison, but here too, its work is hampered by the fact that section 79 has not yet been put into operation, therefore releases are still regulated by the old Act.

5.3.3 Analysis, Obstacles and Problems

The Legal Services Unit is responsible for a large volume of work of the Inspectorate, including the processing, resolution and analysis of all complaints and mandatory reports. The systems and arrangements that are in place to facilitate the work of the Unit appear to be well considered and functioning properly. The electronic reporting system, including section 15 death reports by Heads of Prisons, is especially commendable and timely, and will better equip the Unit to deal with the volume of work that will be generated when all the provisions dealing with mandatory reports are in effect. The plan to establish partnerships with community organisations and universities is to be welcomed.

However, some problems and obstacles were also evident. Firstly, it takes too long to resolve a complaint that cannot be mediated. Despite speedy communication enabled by the electronic reporting system, a complaint, particularly if it is referred to the Office, typically takes about three months to resolve. The process of attempting mediation with the Head of Prison, followed by referral to the Visitors' Committee which meets only monthly, and thereafter referral and resolution by the Office, often means that the complaint is stale by the time a decision has been

⁸⁵ The Case Manager for Mandatory Reports reported that 99, 9% of the cases were natural deaths where the findings of the medical practitioner in this regard had been corroborated (Interview 10 September 2003). The fractional number of remaining cases is presently being investigated.

⁸⁶ In 2002, there were 1389 natural deaths in prison (*Annual Report* (2002) 21). The number of deaths in prison increased dramatically from 737 in 1997, to 1087 in 2000 and 1169 in 2001. See *Annual Report* (2001) 19. The Office reports that most of the deaths are due to HIV/Aids related illnesses (*Annual Report* (2001) 19).

made. This may result in loss of confidence in the system, particularly where the complaint relates to immediate or urgent concerns such as medical treatment, food or the provision of sufficient blankets in winter.⁸⁸ While some of the procedures in processing a complaint are unavoidable, consideration should be given to developing guidelines for the circumstances under which an IPV may refer a matter directly to the Inspectorate under section 90(2) of the Act. Consideration should also be given to using the electronic system to keep staff at the Office informed of the progress of dealing with complaints, so that guidance can be provided on an ongoing basis. This route will be helpful particularly where there are clear-cut rules or policies that can be applied to the situation.⁸⁹ If regional offices are established, they may also be able to play a role in the speedier resolution of disputes. The Inspectorate needs to address the issue of the life-cycle of cases, as quick and effective responses to prisoner complaints would not only increase legitimacy and confidence, but would also be in line with the spirit and objectives of the Act.

Except for one occasion, the Inspectorate has not made use of the power to appoint Special Assistants since 2000. The reasons for this are not clear, but the use of Special Assistants is an important means of including civil society in the work of the Inspectorate. Early attempts to appoint Special Assistants by the first Inspecting Judge were largely frustrated by the administrative link with the DCS and the requirement that the processing of appointments be carried out by the Department. The Act states that Special Assistants may be appointed 'after consultation' with the Commissioner,⁹⁰ giving the Inspecting Judge more leeway and discretion in the appointment of Special Assistants than in the appointment of staff, which must take place 'in consultation' with the Commissioner.⁹¹ The Act therefore appears to envisage that the Commissioner has a greater role and input in the appointment of staff than in the appointment of Special Assistants, where the Inspecting Judge has more latitude to act. This means that civilian involvement in the work of the Inspectorate should, in theory, be more easily facilitated, as Special Assistants would normally come from the ranks of professional and civil society. The salaries and conditions of service of Special Assistants must be determined after consultation with the Commissioner and in consultation with the Director-General of the Department of Public Service and Administration. The difficulties that this requirement has led to were illustrated by Judge Trengove in his inaugural annual report of March 2000. He points out that although the Inspectorate had

'initiated consultations with the Department of Correctional Services with a view to determining the salaries and conditions of service of Assistants as far back as March 1999, these consultations have thus far proven fruitless. On a number

⁸⁷ Only 88 prisoners were released on medical parole in 2002. *Annual Report (2002)* 20.

⁸⁸ Staff gave an example of an inmate who was ill and who filed a complaint regarding the provision of medical treatment on 20 May. He died on 10 June before any progress was made with the complaint.

⁸⁹ According to the Case Manager for General Complaints, some of the complaints which come to the Office are resolved by simply identifying and applying an existing rule or policy, and can be resolved within an hour (interview, 10 September 2003).

⁹⁰ Section 87(1).

of occasions it was urgently necessary for the Inspectorate to engage the services of members of the legal and medical professions to assist in the investigation of conditions in certain prisons, but we were precluded from doing so simply because of the lack of positive response from the Department of Correctional Services to our proposals in regard to this matter. This has been a most frustrating experience. The delay in the determination of the salaries and conditions of service of Assistants is seriously hampering the Inspectorate in the execution of its functions.⁹²

Such obstacles in the way of the appointment of Special Assistants have the potential to impair the work of the Inspectorate, particularly in relation to its efforts to involve members of civil society in its projects. The problems relating to the administrative link between the DCS and the Inspectorate was commented on widely and is discussed in more detail in section 7 below in relation to the administrative and financial independence of the Inspectorate.

Some of those interviewed were questioned on what it meant to 'resolve' complaints. Cases are not always 'resolved' in favour of prisoners,⁹³ but this is not surprising or a cause for concern. However, it is also true that resolving a complaint does not necessarily lead to improved prison conditions. It was not clear how cases were resolved, what criteria were used to assess the conduct of the DCS, and how the exercise of power, particularly in relation to larger issues of prison management, was assessed. While many cases could be resolved by the application of existing rules or policy, some would involve an evaluation of the exercise of discretionary power and it was not clear what criteria or standards would be used to assess and deal with this category of complaints. In addition, even the routine application of rules or policies may not necessarily mean 'resolving' a complaint in a way that improves prison conditions, since the rules and policies may themselves reflect a culture that is not conducive to furthering the human rights of prisoners. For these reasons, it is not always the case that 'resolving' a case impacts positively on prisoners' rights or leads to improved prison conditions. A set of minimum standards of fair treatment needs to be developed and made more transparent, so that the link between improved prison conditions and the resolution of individual complaints can be assessed, both by the Inspectorate and outside bodies. In this regard, civil society could play an important role in helping to identify and develop minimum standards against which the conduct of the DCS and conditions in prisons could be measured.

Related to the question of resolution of complaints is the power of the Inspectorate to make rulings on individual complaints, which binding the DCS. Despite the fact that the Legal Services Unit operates on the assumption that they have the power to make 'rulings' on individual

⁹¹ Section 89(1).

⁹² *Inaugural Annual Report* 9.

⁹³ In relation to cases that come to the office, a typical basis for closure of files can be illustrated by the August 2003 statistics, where 49% of cases were resolved through mediation, 6% in favour of the prisoner, 11% in favour of the DCS, and 23% through outside referral, while 11% were duplications.

complaints, it is doubted that this is a correct interpretation of their legislative mandate. This is discussed further in section 6.

Finally, the delay in putting sections of the Act into operation is also a noteworthy obstacle to the work of the Legal Services Unit and the Office in general. Presently, two significantly different and often irreconcilable legislative regimes regulate the correctional services system. It was not possible to get precise dates when the non-operative sections of the Act would come into effect.

5.4 Inspections Unit

Working closely with the Legal Services Unit is the Inspections Unit, which has two core functions: investigations and inspections. Investigations are normally conducted when more information is needed to deal with complaints, and the IPV or Regional Co-ordinator is unable to get the necessary information on site. The matter is tabled at the monthly Complaints Committee meeting, and inspectors from the Unit conduct an investigation if a need for this is identified.

Inspections, on the other hand, are conducted when there is evidence of a trend or problem area that needs further examination. These trends are primarily identified by means of IPV and Regional Co-ordinators' reports that are entered into the electronic reporting and categorisation system, but other sources such as judges' or magistrates' reports on prison visits, institutions set up under Chapter 9 of the Constitution, non-governmental organisations and the press are also used. All inspections are followed by reports, which contain findings and recommendations, and that are sent to the Minister and Commissioner, as well as the relevant provincial commissioner and the Head of Prison. In the normal course of events, the response of the DCS to recommendations made by the Unit in the report is not monitored, although it is envisaged that IPVs will monitor the implementation of recommendations in individual prisons.

An important part of the work of the Inspections Unit is the conducting of inspections and the analysis of data to develop individual profiles on every prison in South Africa. The Unit has begun compiling the profiles, which will be accessible on the Internet via the Inspectorate's web page eventually.⁹⁴ This is evidently a major and longer-term undertaking, but is being made significantly easier by the introduction of the electronic reporting system. The areas that will be looked at include the suitability of accommodation, nutritional services, health and medical services, physical care, hygiene and environmental services, the provision of rehabilitative services, community re-integration initiatives and complaint processing. Trends and common problems will also be identified from these reports.

⁹⁴ According to the Head of the Inspections Unit, 25 such profiles have been completed (interview, 25 August 2003).

In the past, the Inspections Unit was used to implement various projects such as the release of awaiting-trial prisoners, the promotion of plea-bargaining amongst prisoners and training of IPVs. The Inspections Unit is also involved in important community-based projects. Presently, a programme designed to raise awareness of prison conditions amongst the youth is run at churches and schools. The programme contains an anti-crime element, and is supported by the state and big business. The programme involves prison visits that include videos and presentations by inspectors and members of the DCS.

5.4.1 Analysis, Obstacles and Problems

The work of the Inspections Unit is crucial to the achievement of the overall objective of the Inspectorate in identifying trends and problem areas for longer-term intervention. The Inspections Unit is primarily responsible for the analysis of information provided to the Office by the IPVs. By analysing information generated by individual complaints to identify broader and more prevalent problems, the role of the Inspections Unit is to ensure that prevalent systemic problems are identified and addressed. In addition, the work of the Inspections Unit and that of the other units in the Office, Legal Services in particular, is inextricably linked. However, while the latter focuses primarily on processing individual complaints, the former is in a position to deal with larger, systemic problems. Its work could also help shape the strategic direction of the Inspectorate and other organisations involved in prison reform, since the trends and problems identified by the Inspections Unit could influence what issues are given priority in terms of intervention.

Well-considered plans, priorities and a vision for the Inspections Unit are in place, and the importance of identifying broader issues and problems by scrutinising individual complaints is recognised. The community-based initiatives are encouraging. However, there are many shortcomings in the work of the Inspections Unit. In the first place, the identification of trends and the addressing of problem areas are not being carried out as effectively as it could be despite the systems that are in place to facilitate this process. Staff members who were interviewed also acknowledged that this was an area demanding improvement. The automatic classification of complaints into categories by the electronic system was designed, in part, to allow staff to more easily determine patterns and establish the prevalence of certain trends.⁹⁵ However, at present, the system appears to be more statistical than substantive, and there is presently little information on each category. The classification system may need to be modified in order to flesh out details and highlight nuances. In addition, the vast number of cases is classified as 'other', providing little or no indication as to the trends that might underlie these

⁹⁵ See note 77 for a list of the categories.

complaints.⁹⁶ While some of the identified trends, such as transfers and an inability to pay bail are important issues that have to be addressed, more structural issues could also be tackled if trends were monitored and analysed properly and carefully.

A related problem is the content of reports, which are sometimes lacking in analysis or neglect to identify more deep-seated systemic problems in prisons. The view of many of those from outside the Inspectorate who were interviewed was that reports sometimes tended to be general and descriptive, without including deep or critical analysis. This too is an area where continued liaison with and input from civil society and academics involved in correctional services would assist greatly, as they could work together with the Inspectorate to determine areas that needed special attention. The Inspectorate should draw more heavily on these outside sources before and after inspections and in the preparation of reports. One of the ways to assess trends and write reports more effectively is to develop a full and thorough set of minimum standards by which to measure prisons. Effective oversight requires a set of criteria or standards by which actions or conditions can be monitored and reviewed and it is recommended that the Inspectorate develop minimum standards for oversight. This is a task for which experts and members of civil society can be brought in to assist. Thorough report-writing is crucial to the work of the Inspectorate, as reporting and publicising reports form a core part of its function. This aspect of the Inspectorate's work should be improved.

A further problem is that reports are not widely disseminated.⁹⁷ Publicity is a powerful tool to encourage compliance and an important way of bringing about change in a democracy. Making the reports more widely available is an important way of publicising conditions in prisons and facilitating community involvement in the correctional system. Inspection reports routinely should be sent to all civil society organisations involved in prisons, and key findings should be publicised in the local press and made known amongst local civil society organisations. All reports should be made available on the Inspectorate's web page.⁹⁸ In this way, the work of the Inspectorate may become better known, awareness of issues affecting prisons will be highlighted and partnerships with civil society might be promoted to mutual benefit.⁹⁹ In addition, non-compliance with recommendations should also be communicated to other oversight bodies such as the Parliamentary Portfolio Committee on Correctional Services and civil society

⁹⁶ In 2002 for example, 65 819 out of 190 167 (35%) complaints were classified as 'other' (*Annual Report* (2002) 13. See also the statistics for 2001 in the *Annual Report* (2001) 18.

⁹⁷ Sarkin notes that the 'Office of the Inspecting Judge is one of the most unknown human rights protection institutions in South Africa at present' and that reports should be made widely available and published in a variety of languages and be written in plain language. See J Sarkin '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' 2000 (15) *SA Public Law* 397.

⁹⁸ Even though the decision to put all reports on the website has been taken in principle, only three are presently accessible (last accessed on 12 February 2004).

⁹⁹ An example of how the work of civil society could be bolstered by making inspection reports publicly available is the use of an inspection report that recommended the separation of gang and non-gang

organisations involved in prison reform. In this way, pressure from various sources could be brought to bear on the DCS to comply with recommendations made in the reports. However, it must be noted also that to have the requisite authority and effectiveness, recommendations must also be properly informed and emanate from fully researched reports.

There is no routine follow-up by the Inspectorate on recommendations made in inspection reports. According to correspondence from the DCS to the Office, all inspection reports, including those submitted by judges pursuant to visits made under section 99(1) of the Act, are 'forwarded to the relevant Deputy Commissioner to address policy issues and to the relevant Provincial Commissioner to attend to the findings.'¹⁰⁰ But members of the DCS, including the Deputy Commissioners, Provincial Commissioners or Heads of Prison are not routinely contacted after reports have been issued to enquire about what plans are in place to implement recommended changes. IPVs in the region may, however, be asked to do a follow-up, but this too does not happen regularly or routinely. In addition, IPVs may be less suited to following up on recommendations made in reports, given that their focus is on individual complaints. The prison authorities should be asked to provide feedback within a certain period of time on what steps they have taken to implement recommendations made in reports, following which further observations may be made by the Inspectorate.¹⁰¹ Issues of urgency, such as ensuring the separation of youth and adult offenders, should be followed up more immediately by senior staff in the Office, or in appropriate cases, by the Inspecting Judge, to encourage compliance. In this way, reports will not be an end in themselves, but will be part of an ongoing process of dialogue on change. Follow-up is crucial in ensuring effective and ongoing oversight; otherwise reports become the end-point, with no further action or change being likely to result from them. The Inspectorate should also, where possible and practical, provide guidance and support to the DCS to assist in implementing recommended changes. Senior members of the DCS who criticised an approach that focused on highlighting problems without offering suggestions and guidance on how such problems might be addressed also expressed this view. Members of the DCS staff also pointed out the importance of assessing problems and solutions in the context of correctional services as a whole and not only in the context of specific issues having been highlighted.

5.5 Administration Services

This section is responsible for the day-to-day administration of the Office. It is divided into three sub-sections, viz. human resources, financial management and logistical control. The human resources section is responsible for salary administration, processing staff appointments,

members in litigation initiated by the Legal Resources Centre, a public interest law firm. In this case the mother of a youth is suing the DCS for negligence after gang members in prison killed her son.

¹⁰⁰ Correspondence from the Chief Deputy Commissioner to Judge Fagan, 17 September 2002. Copy on file with author.

¹⁰¹ This process is followed by the Committee on the Prevention of Torture in Europe. See further section 10 below.

induction, staff development and other administrative functions related to human resources such as processing leave. The financial management section is responsible for the management of all payments and records of financial transactions, including the payment of IPVs. This section also monitors compliance by IPVs with minimum standards of service delivery. The logistical control section is responsible for general operational facilities and assets, including the procurement of stationery and maintenance of vehicles and computers.

5.6. The Electronic Reporting System

A major success of the Inspectorate has been the establishment of an online electronic reporting and communication system that is used by both staff of the Inspectorate, including the IPVs, and Heads of Prison to report and communicate with the Office. The system was put in place after a pilot project instituted in the Western Cape from August to November 2001, which was designed to test and assess its effectiveness before national implementation.¹⁰² The system was introduced because of the sheer quantity of reports being received through the IPV process, and in anticipation of the large increase in the number of reports that would come to the Office when the provisions of the Act dealing with mandatory reports were in place. The online electronic reporting system can be accessed on the Internet and almost totally obviates the need for paper reports, faxes or letters. Prior to the introduction of this system, the Office was overwhelmed by the time, resources and quantity of paper the reports generated, and physical space in which to keep records of complaints in the Office was becoming a problem.

The electronic reporting system is designed in such a way that IPVs and Regional Co-ordinators in the regions can send online versions of complaints and reports directly to the Office via the Internet. The system appears user-friendly and allows all entries to be checked to ensure accuracy. It allows instant communication between the Office and the IPV and any request, decision or recommendation made by the Office is immediately available to the IPV for follow-up or for communication to the prisoner. The system immediately generates a reference number and an acknowledgement of receipt that can be given to the prisoner while the matter is being processed by the Office. The system also allows short messages to be sent to the cell-phones of certain staff members in the Office when a death has occurred in prison so that immediate steps can be taken. Short messages can also be sent in relation to other matters that require a quick response by the Office, in particular the provisions of the Act relating to solitary confinement, segregation and certain mechanical restraints that require a 72-hour response.

A major advantage of the system is that it keeps full and proper records of the number and types of complaints received from prisoners, which, as pointed out above, also makes the identification of trends and problem areas easier. A full history of the complaint is also available, including all communication between the IPV and the Office, allowing easy examination of the

¹⁰² *Annual Report (2001)* 21.

manner in which a particular complaint was handled. The Inspectorate aims to create a database of every prison in the country with details of the number and type of complaints emanating from it, as well as any other information available on the prison in inspection reports. In this way, the Inspectorate as well as outside bodies can gain access to information showing trends and areas of difficulty. Specific information can be generated, including the prevalence of particular problems countrywide, by region or for individual prisons.

An electronic bulletin board, which facilitates communication between the Office and those working in the regions, is also part of the system. This allows internal communication amongst staff in the Office and regions. IPVs also fill in an electronic time-sheet that calculates their billable hours. IPVs were motivated to use the system as it drastically reduced the time it took to process payments.¹⁰³ The system is cleverly designed so that IPVs can invoice the Office for their hours only once they have read the messages on the electronic bulletin board. This ensures that messages from the Office are read, and prevents IPV from making claims that they had not received their messages.

The system is linked to the DCS database. This allows all staff to get information on each prisoner, including the nature of his or her offence and the number of previous convictions. In addition, data captured by the Department, including statistics on the prison population, are also available.

Prior to the full implementation of the electronic system, most IPVs were not computer literate and had to be provided with training. Regional Co-ordinators and Inspectors ran much of the training, and helped in negotiations to secure adequate access to computers for IPVs. The IPVs, 'without exception', willingly took part in the training and supported the implementation of the electronic system.¹⁰⁴ The European Union Foundation for Human Rights in South Africa provided funding for training and for the production of training manuals.¹⁰⁵

The electronic reporting system was evaluated in 2003 by bridges.org, an international non-governmental organisation based in Cape Town, which focuses on encouraging the effective use of information communication technology (ICT) in developing countries.¹⁰⁶ The evaluation formed part of the organisation's Case Study Series on ICT-Enabled Development. The study rated the system very highly under each of its seven 'best practice guidelines' for successful initiatives, and highlighted the advantages of the system for implementing the mandate of the Inspectorate. Indeed, there are several advantages of the system, two of which were aptly described by the Director of the Inspectorate as follows:

¹⁰³ *Annual Report (2002)* 15.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* 18.

¹⁰⁶ See the organisation's web page at <http://www.bridges.org/index.html>

'The first and most important [success] was the empowerment of our people. The Independent Prison Visitors are all appointed from the ranks of non-governmental organisations (NGOs), many of them from rural communities with no computer literacy. During the planning phase of the project many people felt that the project would fail because of lack of skills; however with its implementation the hunger of people to learn and the effectiveness of the system motivated people to acquire the skills needed. The training and new skills lifted the motivation levels of all staff and a strong partnership between the [Inspectorate] and the Independent Prison Visitors was established. The Independent Prison Visitors are appointed on a fixed-term contract of 2 years and these skills will also assist them in their work as community representatives after their contracts expire.

The second success was the savings in staff cost and increased efficiency. We have been able to reduce the administrative time it takes to calculate the billed hours and pay the Independent Prison Visitors from about 20 days to less than 5 days. We now have only 2 people dealing with all payments and reports from Independent Prison Visitors; without this system we were looking at a staff complement of about 10 people.'¹⁰⁷

The success of the electronic reporting system has also prompted the Inspectorate's English counterpart to visit the Office to assess its feasibility, success and effectiveness.¹⁰⁸ There is no doubt that the system is highly feasible, very successful and responsible for much of the effective operation of the Inspectorate. It should be highly commended. However, access to PCs, particularly in rural areas, remains a problem. The Inspectorate should consider fund-raising to increase the number of PCs available for use by IPVs and Regional Co-ordinators in the regions. More fundamentally, the electronic reporting system will have limited usefulness without substantive input and analysis. Its ability to facilitate the goals of the Inspectorate depends ultimately on the type of information and the quality of the reports generated.

5.7 General Office Structures and Staff Concerns

Even though the Inspectorate is divided into four separate units for the purposes of functional priorities, they cannot operate independently of each other and the work of each unit must be fed into and informed by the others. For instance, the Inspections Unit conducts investigations and inspections and identifies trends on the basis of the work generated by the Legal Services Unit, which, in turn, is heavily reliant on the work of the IPVs as the first point of contact with prisoners. Because of the need to ensure support and maximum collaboration amongst the units, two important committees are in place. The Complaints Committee, the composition of which was described earlier, allows for collective decision-making and policy development in the Office, and has the responsibility of ensuring that information is exchanged. It also assists in

¹⁰⁷ http://www.bridges.org/iicd_casestudies/prison_reporting/index.html

¹⁰⁸ http://www.bridges.org/iicd_casestudies/prison_reporting/index.html

resolving individual complaints, identifying problem areas for intervention, and in determining whether investigations or inspections should take place. It is an important policy-making body that receives the input of all sections of the Inspectorate so that information can be fed formally from one unit to the other. It meets weekly.

The second committee, the Policy Board, meets briefly on most mornings and comprises the Inspecting Judge and all the line managers in the Office. This body deals with management issues and is designed to get feedback on difficult and complex policy questions from the Inspecting Judge. It also allows the heads of units to communicate with and get information from each other on a structured and regular basis.

Despite the existence of these structures, some staff were of the opinion that the units in the Inspectorate still tended to operate in some isolation from each other, thus undermining their effectiveness. Although one suggestion was to merge the Legal Services Unit with the Inspections Unit, most staff agreed that the structures described above could be better utilised to ensure collaboration and interaction amongst the units. Consideration should be given to how the Complaints Committee could be used better to ensure inter-sectional co-operation in the Office. This may include revision of the agenda as well as the scheduling of a longer monthly meeting in which broader issues and policy relating to co-operation could be discussed. Some staff also felt that they were not kept completely informed as far as the longer term plans and vision for the Inspectorate were concerned. Importantly, issues of policy and the vision of the Inspectorate should be developed in consultation with all staff, and constantly communicated to them via line managers.

A related and more difficult problem is a perception amongst some staff that too much power was delegated by the Inspecting Judge to the Director, and that decision-making and management structures were undemocratic and lacked transparency. Some staff also felt that there was no clear vision for the longer-term work of the Office. In addition, the view was expressed that senior management in the Office 'lacked a human rights ethos,' and did not display a commitment to transformation and new constitutional values. Employee dissatisfaction was exacerbated by what was perceived to be an 'autocratic' management style, which it was felt did not provide for sufficient room for concerns to be aired and discussed within the Office. While both staff members and outsiders alluded to problems and concerns with management of the Office, it is also true that not all who were consulted held this view.

Further to the question of the management of the Office, the view was expressed by some that the Inspecting Judge himself needed to play a bigger role in its day-to-day running and be more responsive to the views of the staff of the Office. The perception that the Inspecting Judge was detached from the ordinary workings of the Office particularly in relation to staff dissatisfaction over the removal of corruption from the Inspectorate's mandate, as well as the concern that the

Inspecting Judge was too non-confrontational and conciliatory in his approach towards the DCS was disclosed.

The views relating to the absence of a human rights culture on the part of senior management could not be confirmed during the course of interviews and research. It did not appear that a human rights ethos was lacking on the part of senior staff or that transformational goals were being opposed. However, it is beyond the scope of this study to assess in detail issues related to internal management structures and organisational culture. Because of the frequent mention of this problem by those who were interviewed, serious consideration should be given to consulting organisational experts to ascertain the true extent of the problem and find ways to address it. The role of the Inspecting Judge in the management of the Office may also be an area requiring examination, but there can be no doubt that his individual contribution to prison reform has been enormous. He has played a significant role in lobbying, consulting and raising awareness of the work of the Inspectorate and conditions in prisons, and it is in this role that he has been most effective and for which he appears best suited. The perception that the Inspecting Judge is too conciliatory and non-confrontational in his approach towards the DCS is not in itself cause for concern, and may be relevant only in the absence of independent, effective systems and procedures to fulfil the legislative mandate. While it is clear that the efficacy of the work of the Inspectorate cannot be dependent on individual relationships, the question to be addressed is the extent to which the overall functioning of the Inspectorate can fulfil the goals of improved prison conditions and respect for prisoners' rights.

6. Power To Make Final Orders

Sections 85(2) and 90(1) of Act, which outline the object and powers of the Inspecting Judge respectively, appear to envisage the Inspectorate primarily as a *reporting* body. Thus, as recognised in the Inspectorate's inaugural annual report, 'it does not have any disciplinary powers in respect of correctional officials or prisoners'.¹⁰⁹ However, there are several other provisions in the Act, particularly related to the resolution of prisoners' complaints, which have led many staff of the Inspectorate to reject the above interpretation as being too narrow, and to operate as if the Inspectorate is endowed with decision-making powers. In particular, many a staff member in the Office held the opinion that in order to fulfil his or her function to 'deal with' a complaint under section 90(2) of the Act, the Inspecting Judge was empowered to make a final and binding ruling in the event that a complaint could not be resolved by mediation. Moreover, it was argued that the Inspecting Judge had the power under section 93(4) to make a final decision in the event of a dispute between a Head of Prison and an IPV relating to the IPV's functions and duties. Section 93(6) was also believed to confer wide-ranging power on the Inspecting Judge to make any rules relating to the work of IPV's. The argument put forward in

¹⁰⁹ *Inaugural Annual Report 4.*

support of these views was that provisions protecting the human rights of prisoners should be interpreted in a broad and purposeful fashion in order to give individual prisoners the fullest measure of their protection. The Inspectorate in general, and the Legal Services Unit in particular, operate on the basis that the Act confers powers to make rulings on individual complaints. However, interviewees also acknowledged that the legislation was ambiguous and that further clarity on this issue was necessary.

Most people outside the Inspectorate who were interviewed for this report were of the opinion that the Inspectorate was primarily a reporting body.¹¹⁰ Those responsible for drafting the Act also expressed this view, and noted that it was never intended that the Inspectorate would have decision-making powers, with the exception of those expressly granted in the Act. It was pointed out that the threat of publicity was an effective tool to ensure that the Inspectorate's recommendations were carried out. Moreover, it was felt that a judge as the head of the Inspectorate would have the influence and authority to effect recommended changes. All representatives of the DCS who were interviewed held the view that the primary remedial function of the Inspectorate was that of reporting. In particular, they expressed concern that departmental management structures would be undermined should disciplinary powers be granted to the Inspectorate. Representatives of civil society organisations also shared the view that the Inspectorate was primarily a reporting body, but also observed that the power to make recommendations was a significant one.

It appears from a reading of the legislation as a whole that the Inspectorate is primarily a reporting body with some decision-making powers in respect of certain issues. Sections 85(2) and 90(1) that set out the object and powers, functions and duties of the Inspecting Judge, clearly establish the Inspectorate as a reporting body. Therefore, section 90(2), which gives the Inspecting Judge the power to 'deal with' any complaint, must be interpreted in this light. The Inspecting Judge must 'deal with' a complaint by further investigation, arranging for an inspection if necessary and reporting on it. The present practice of the Legal Services Unit when an unresolved complaint is sent to the Office is not inconsistent with the power allocated under section 90(2), and does not have to come to an end. However, decisions on complaints emanating from the Inspectorate do not have binding effect. They should, however, have strong persuasive effect and the DCS should see them as markers of lawful and good practice.

Section 93(4) must also be interpreted in the light of the overall object of the Inspectorate and cannot be interpreted as empowering the Inspecting Judge to rule on a complaint. Under this provision, the Inspecting Judge can make a final decision in the event that a Head of Prison refuses 'any request from an Independent Prison Visitor relating to the functions and duties of such a Visitor.' It is submitted that this section confers the power on the Inspecting Judge to

adjudicate whether the dispute falls within the functions and duties of the IPV, and does not confer final decision-making power regarding the merits of a complaint lodged by a prisoner. Similarly, section 93(6) empowers the Inspecting Judge to make rules regarding the work of IPVs as set out in the Act, and cannot be construed to imply a general law-making power being conferred on the Inspecting Judge.

The Act does, however, contain a number of provisions that grant express decision-making power to the Inspecting Judge. In this regard, the Inspectorate is granted greater powers than its English or Canadian counterparts. In particular, under section 15, the Inspecting Judge may carry out or instruct the Commissioner to conduct an enquiry into any death in prison. Under section 25, the Inspecting Judge must confirm or set aside a penalty of solitary confinement, and may substitute an appropriate order in its place. The Inspecting Judge may also 'decide' on the validity of a penalty of segregation or the use of mechanical restraints.¹¹¹ The Inspecting Judge has the power, under section 123(4), to confirm or set aside a decision of the Commissioner that a publication is prohibited. Thus, under the Act, the Inspectorate has specific decision-making powers in respect of these specific issues, but reporting duties only in respect of its other areas of work.

Many staff expressed the view that reading the Act as conferring reporting powers only in relation to complaints would lead to the loss of legitimacy of the Inspectorate. The argument was that prisoners whose complaints could not be resolved through a binding ruling by the Inspectorate would lose confidence in the system. Staff noted that the DCS had thus far been largely co-operative and had complied with decisions made by the Office in respect of individual complaints, but were concerned that if the Act was interpreted restrictively, they had no legal safeguard or recourse if the DCS refused to implement a recommendation. Some expressed the view that the co-operative relationship was, at least in part, due to the Inspectorate's focus on reducing prison numbers, which was also an issue that the DCS was concerned about addressing. Others pointed out that the present Inspecting Judge had tended to go with rather than against the grain of the DCS, which had encouraged co-operation between the bodies. However, concern was expressed that the implementation of decisions made by the Office depended only on the co-operation of the DCS, and that this situation could change at any time. Having the legal power to make final rulings would guard against this danger.

As is evident from section 10 of this report, it is relatively uncommon for prison inspectorates in other parts of the world to be conferred with general decision-making or disciplinary powers.¹¹² The English and Canadian models that were largely followed in the design of our Inspectorate are primarily reporting bodies. In the UK, the Prisons Ombudsman was specifically set up for the

¹¹⁰ Judge Fagan did not express a view on this issue, noting only that the problem of overcrowding needed to be addressed before tackling the question of the extent of his statutory powers (interview with Judge Fagan, 27 August 2003).

¹¹¹ Section 30(7) and 31(5). These and sections 15 and 25 are not yet in effect.

investigation of complaints, but there is no obligation on the prison services to implement his recommendations.¹¹³ Similarly, though the Canadian Correctional Investigator investigates prisoner's complaints, recommendations emanating from the Office are not binding. This also appears to be the case under South African law. In the first place, to construe the Act as conferring decision-making or disciplinary power on the Inspectorate would involve too strained an interpretation of many of its provisions and accord little or no meaning to others. In particular, sections 85(2) and 90(1), which establish the Inspectorate as a reporting body, cannot be discounted in interpreting the Act. To read powers into the Act under these circumstances would also fall foul of the well-established principle that all power must be lawfully exercised in compliance with the empowering statute. This view is supported by the absence of rules in the Act on how such powers are to be exercised. There are no indications on whether the power is limited to a determination of whether the DCS acted contrary to existing law or established policy or rules of procedure, or whether it extends to review of discretionary decisions. Where powers to make rulings are granted in legislation, they are usually accompanied with quite detailed rules setting out the hearing procedure and the extent and boundaries of the powers conferred.¹¹⁴ In addition, while it is undesirable that the Inspectorate's recommendations may not be routinely implemented, it is true that the Act with its strong emphasis on mediating complaints does not envisage an adversarial dispute resolution structure.

It is also not entirely the case that conferring decision-making powers upon an oversight body would enhance its legitimacy. Legitimacy and confidence would not necessarily arise out of being granted more power, but from truly independent and effective structures and systems. The authority of the Inspectorate lies not in wielding a stick, but in its ability to impartially and thoroughly investigate and report on complaints, and widely disseminate the results and recommendations so that remedial steps can be taken. The Inspectorate should, if possible, provide support and an avenue for constructive debate with the DCS, and establish a solid framework in which problems may be addressed. In the final analysis, reporting, follow-up and publicity are the main avenues envisaged by the Act to change conditions in prisons. The Inspectorate can be a powerful facilitator of change in South African prisons by using its reporting functions effectively. It also plays an important role in generating and providing information on what is happening on the ground, both for its own work and for the work of others involved in prison reform, and in challenging and changing the culture of prison administration in South Africa. The power to make recommendations should not be taken lightly, and to a large degree its impact depends on the strength with which the Inspectorate can continue to defend its independence and stature. That the power to make rulings does not necessarily lead to increased legitimacy is borne out by an analysis of the Dutch experience. Though the Complaint Committee in the Netherlands has the power to make binding judgements on prisoners' complaints, 'not nearly as many prisoners make use of the right to lodge a complaint as one

¹¹² Note, however, the practice in the Netherlands, discussed further in section 10 below.

¹¹³ R Morgan 'England and Wales' in D Van Zyl Smit and F Dunkel note 1 at 221.

might expect... Some prisoners have extremely low expectations when it comes to the results of submitting complaints; either that or they have doubts about how independent the complaint committee might be, since they think the prison governor and the committee are both part of one and the same system.¹¹⁵ Confidence and legitimacy are thus not rooted in the powers accorded to the inspecting body, but in how independent and competent it is perceived to be.

Most staff of the Inspectorate would prefer that final decision-making powers be conferred on the Inspecting Judge. For this reason, it is recommended that the Inspectorate hold discussions with civil society organisations, academics, the Parliamentary Portfolio Committee and others involved in prison reform to further discuss the question of whether the powers and status of the Inspectorate should be amended. Foreign experience in this regard should also be carefully considered. If such powers are considered desirable, then a number of issues will need to be fleshed out, including the nature and extent of the power granted and rules regulating procedure. If such powers are not to be included in the Inspectorate's mandate immediately, strategies and priorities, particularly in relation to the preparation, dissemination and follow-up on recommendations made in reports, must be re-assessed.

7. Independence

As noted above, the legitimacy of and confidence in the work of the Inspectorate depends largely on the extent to which it is perceived as independent. Section 85(1) of the Act guarantees the independence of the Inspectorate. A persistent concern raised by those interviewed was whether and the extent to which the Inspectorate was truly independent of the Department of Correctional Services. The concern arose from both the administrative and financial link between the Inspectorate and the DCS, as well as the fact that some staff of the Inspectorate were drawn from the ranks of DCS officials. Some expressed concern about the degree of independence of the IPVs, who some prisoners saw as being too close to prison officials. The perception that the Inspectorate was not independent of the DCS, or that it was a part of the DCS, was commonly held.

Under section 91 of the Act, the DCS is responsible for all expenses of the Inspectorate. In other words, funding for the work of the Office comes from the DCS. In addition, the staff complement of the Inspectorate must be determined by the Inspecting Judge in consultation with the Commissioner.¹¹⁶ Appointing Special Assistants and determining their salaries and conditions of service takes place after consultation with the Commissioner. The Commissioner thus plays a significant role in determining the staff complement of the Inspectorate, and must be consulted in the appointment of Special Assistants. The question is whether these

¹¹⁴ See for example sections 60-68 of the Penitentiary Principles Act, 1999 (Netherlands).

¹¹⁵ C Kelk 'The Netherlands' in D Van Zyl Smit and F Dunkel note 1 at 487-8.

provisions, and the way they have been implemented, compromise the independence of the Inspectorate.

Many people who were interviewed held the view that its administrative and financial links with the DCS undermined the independence of the Inspectorate and therefore needed to be revisited. This view was held largely by staff of the Office and the first Inspecting Judge, although, like members of the DCS who were interviewed, the incumbent judge did not see the link as a problem. He was of the opinion that the independence of the judge as the head of the Inspectorate contributed significantly to making it independent.¹¹⁷ 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 retired judge to head the Inspectorate was in large part due to the esteem in which judges were held, the credibility they would bring to it, and their constitutionally guaranteed independence. Some staff of the Inspectorate and many outsiders, however, believed that its links with the DCS compromised 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. It was undesirable that the 'Inspectorate is dependent on the co-operation of DCS for all its expenses.'¹¹⁸ In addition, it was observed that appointing staff under section 89(1) was a long and frustrating process, and in the past had included delays on the part of the DCS in processing appointments for staff and Special Assistants. This made it difficult to get projects off the ground and could lead to discontent amongst staff whose posts remained unconfirmed and for others who had to cope with the extra workload occasioned as a result of the delays. It was reported that some posts had been vacant for up to two years.¹¹⁹ While it was felt that these links with the DCS did not necessarily compromise the functional independence of the Inspectorate, concern regarding its financial and administrative independence was widespread. Concerns regarding perceptions of independence were also raised. Some staff were of the view that appointments from within the DCS also contributed to the problem. The interwoven staff also meant in practice that communication between the DCS and the Inspectorate occurred at different levels, sometimes with the potential to undermine management and official communication structures. According to some accounts, for years after the establishment of the Inspectorate, DCS activities such as task teams and research seminars included persons from the Inspectorate who had previously worked for the DCS. Concern was expressed that the perception of the two bodies being inter-dependent was reinforced by these practices, and that to ensure independence, staff should be appointed from outside the Department as a rule in the future.

Corder et al point out that independence has two facets:

¹¹⁶ Section 89(1).

¹¹⁷ Interview with Judge Fagan, 27 August 2003.

¹¹⁸ *Inaugural Annual Report 17*.

'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'¹²⁰

Such power, they observe, could render oversight bodies impotent through the potential denial of both financial and human resources. In *New National Party of South Africa v Government of the Republic of South Africa*¹²¹ the Constitutional Court pointed out the need for both financial and administrative independence to ensure the independence of the Independent Electoral Commission. Similar arguments may be made in relation to the Inspectorate, whose independence is required in legislation and is essential if it is to perform its functions effectively. Financial independence implies the ability to have access to funds reasonably required to perform certain statutory functions.¹²² Both the guarantee of and the source of funding are crucial. If funding is sourced from the same organ that is the object of oversight, the independence of the oversight body and the perception thereof may be compromised. The Constitutional Court has pointed out that the arrangement whereby a department makes funds available from its own budget to a public entity for the performance of certain functions is fundamentally unsuited to independent institutions.¹²³ One of the consequences of such an arrangement is that lower priority may be given to the oversight body as the Department may be slow in recognising the needs of an institution that does not form part of its core business.¹²⁴

Administrative independence 'implies control over matters directly connected with the functions that such institutions must perform.' In relation to the Inspectorate, this means, at least in part, control over processing of applications for the appointment of staff and Special Assistants, the latter often being required for urgent or specialised investigations, which have to take place without undue delay for them to be most effective.

In the *New National Party* case, the Constitutional Court suggested that to safeguard independence,

'[i]t is for Parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate.

¹¹⁹ The delay was apparently as a result of a moratorium on appointments in all public entities by the Minister of Public Service and Administration.

¹²⁰ H Corder et al note 2 at 56.

¹²¹ 1996 (6) BCLR 489 (CC).

¹²² H Corder et al note 2 at 56.

¹²³ At para 89.

¹²⁴ H Corder et al note 2 at 58.

The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.¹²⁵

It is recommended that similar safeguards should be considered for the Inspectorate. While it is true that the esteem in which judges are held brings credibility and a measure of independence to the Office, this safeguard may be somewhat fragile, is too focused on an individual and is not in itself sufficient. Tighter safeguards are also necessary to ensure independence. Ideally, the budget of the Inspectorate should not be linked to the DCS, but should come directly from Parliament. In the event, however, that this route proves difficult to implement,¹²⁶ consideration should be given to amending the Act to provide safeguards for the financial security of the Inspectorate. This could involve an amendment to section 91 of the Act, to include a clause that requires the DCS to provide funding that would ensure, in the opinion of the Inspecting Judge, the full and effective operation of the Inspectorate.

Mechanisms for administrative independence also need to be put in place. In particular, all appointments should be processed by the Office itself to avoid delays. In the past, such delays in processing appointments and requests by the Inspectorate placed obstacles in the way of implementing work-plans. Consideration should be given to placing certain core administrative responsibilities within the Office itself, with a concomitant increase in resources to cope with it. It was pointed out during interviews that an initial need to 'piggyback' on the administrative capacity of the parent department was probably unavoidable. But, unless efforts are made for administrative separation, there is the danger that an independent body is merely perceived as a directorate of the parent department both by the department itself as well as staff in the office, and the user public.

If the Inspectorate – as a reporting body primarily – is to function effectively with maximum impact, then it is important that steps be taken to safeguard its long-term independence. Full independence is necessary not only to ensure that the Inspectorate can disseminate findings and lobby with civil society for change in the prison system freely and without fear, but it is also necessary for public confidence and trust in the Inspectorate.

8. Legislative Amendment On Corruption

In its 2000 Annual Report, the Inspectorate indicated that it wished to be relieved of the mandate to investigate and report on corrupt or dishonest practices in prisons. The reasons given were (i) that the good relationship between IPVs and prison officials would be compromised and the Inspectorate's work would be hampered; (ii) the DCS already has an Anti-Corruption Unit, which investigates corrupt and dishonest practices in prisons; (iii) allegations of

¹²⁵ At para 98.

¹²⁶ During interviews with those responsible for drafting the Act, it was pointed out that the issue of funding sources was considered and debated extensively, and that Treasury had expressed the concern that it would be too difficult to fund a range of different independent organisations.

corrupt and dishonest practices in prisons are in any event taken up with the appropriate correctional officials or the South African Police Service of the Office of the Public Protector; and (iv) the presence of IPVs in prisons has an inhibiting effect on corruption and dishonesty.¹²⁷ Despite some concerns on the part of members of the Parliamentary Portfolio Committee on Correctional Services, in 2001 the Act was amended to remove corruption from the ambit of the Inspectorate's work under section 85. However, corruption and dishonest practices have been retained in section 90(1) of the Act, which covers the powers, functions and duties of the Inspecting Judge.

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 staff. In addition, many expressed the view that corruption had 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, their work would be adversely affected by the inclusion of corruption within their mandate, as they depended on the co-operation of DCS officials and Heads of Prison for the effective performance of their duties. The limited resources and constrained 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 staff of the DCS that corruption could best be pursued by a specialised body with greater powers of investigation than the Inspectorate. It was observed that neither the mediation and resolution of disputes by IPVs, nor the role of the Office in reporting and using publicity to achieve oversight lent itself to the investigation of corruption.

As events in the Jali Commission of Enquiry indicate, corruption is endemic in South African prisons. Dissel and Ellis observe that

[m]edia reports allege that prisoners are obliged to pay warders a fee for food, beds, bedding, or for a decent cell. At one prison visited by the writer, prisoners alleged that they had to pay warders to allow them to pass through the gates of different sections of the prison, even if this was to attend a rehabilitation programme. In January 1998, it was reported that prisoners were able to purchase prostitutes, alcohol and even weekends out of prison. It was also alleged that prisoners had formed criminal syndicates with warders to smuggle and steal state property. Two warders from Grootvlei Medium B Prison in Bloemfontein were convicted in October 2001 for offering to give two prisoners a key that would secure their release. The prisoners, convicted of armed robbery, and

¹²⁷ *Annual Report* (2000) 18-9.

serving eight-year sentences were offered the keys for R5000. The two warders were convicted and sentenced to four years in prison. Apparently, it is also possible for prisoners to run corruption scams at the expense of warders. One report indicated that 16 prison warders were convicted of participating in a money-lending racket with prisoners. They received a warning from the Department.¹²⁸

This description illustrates starkly the link between corruption and dishonest practices and conditions in prison. Despite legislative amendments, the Inspectorate will no doubt have to continue to deal directly with this issue in the execution of its legislative mandate. Only instances of corruption that have no direct impact on the conditions in prisons are removed from the Inspectorate's mandate. This interpretation is supported by the retention of corruption and dishonest practices in section 90(1) of the Act. This makes it clear that corruption and dishonesty, where they impact on conditions in prisons, remains part of the Inspectorate's mandate. This interpretation is important also because an outside oversight and investigating body on corruption is necessary, particularly after the Jali Commission of Enquiry has completed its work.¹²⁹ However, as observed above, the independence and effective functioning of the Inspectorate is essential if it is to fulfil this task. While the Inspectorate's concern about maintaining good relationships with the DCS to facilitate its work is understandable, full independence and effective functioning of the Inspectorate remains the key to its success and impact. In addition, more resources have to be made available for the effective performance of the legislative tasks of the Inspectorate.

9. Liaison And Co-Operation

An overwhelming number of members of civil society organisations who were interviewed were of the opinion that the Inspectorate liaised, co-operated and worked effectively with NGOs, particularly those operating in the Western Cape. Many of those who were interviewed felt that the Inspectorate had provided them with invaluable statistical information and had facilitated easier access to prisons. The Inspectorate was visible amongst NGOs and other organisations working in the field of prison reform and it networked and participated actively in meetings and forums. However, outside the Western Cape this was less so, and despite the fact that initiatives were in place in all regions, the Inspectorate's profile and level of liaison in other regions could be improved. Again, the establishment of regional offices may assist in this regard.

The Inspectorate also appears to have co-operative working relationships with institutions established under Chapter 9 of the Constitution. Because both the office of the Public Protector and the South African Human Rights Commission (SAHRC) also investigate prisoner

¹²⁸ A Dissel and S Ellis 'Reform and Stasis: Transformation in South African Prisons' CSV Research Paper Series (2002). Available on the web at <http://www.csvr.org.za/papers/papad&se.htm>

complaints and conditions in prison as part of their mandate, procedures for streamlining and referring complaints are being developed. The regional office of the Public Protector registers complaints that fall within the mandate of the Inspectorate on the latter's website. The Inspectorate is informed in writing of such complaints and given the on-line reference number. Where previously the office of the Public Protector requested feedback on matters referred to the Inspectorate, there has now been a shift towards monitoring trends rather than following up on individual complaints. A formal record of complaints received by the office of the Public Protector is compiled and submitted to the Inspectorate on an ongoing basis.

The Public Protector's continued involvement in prison issues appears to be focused on observing systemic trends in the reporting of incidents. If prisoners' complaints are addressed to the Public Protector's office, it is usually an indication that the IPV system is failing in some way or other, and it may be possible to identify the occurrence of a problem in a particular regional area. Until very recently, identified trends were communicated on an ad-hoc basis, but this is being changed, with formal statistics being compiled and forwarded to the Inspectorate. The Public Protector also acts as an institution of 'last resort' where it appears that the reason that complaints were not handled satisfactorily by the IPV system lies in the manner in which complaints were handled by the IPV or the Office. In such a case, the Public Protector will make recommendations to the Inspectorate.

Both the SAHRC and the Parliamentary Portfolio Committee on Correctional Services also receive prisoner complaints. It was reported that because the mandate of the SAHRC covers any complaint that implicated the complainant's human rights, complaints received by them are not routinely referred to the Inspectorate. However, issues such as health care, food and conflict with particular officials of the prison were considered to be within the mandate of the Office. The view was also expressed that the continued involvement of other organisations in dealing with prisoners' complaints was important because prisoners who raised concerns regarding the independence of the IPV's would want a different body, such as the SAHRC, involved in the resolution of their complaints. Complaints received by the Parliamentary Portfolio Committee on Correctional Services are forwarded to the Office. It was reported that on average, the Committee received 50 complaints per week relating to prison conditions.

While the receipt of complaints by other bodies is not to be taken as an automatic indication of failure on the part of the Inspectorate, it indicates the need to continuously evaluate the work of the Office and in particular the IPV's. Because they are based in the prisons, the IPV's, if functioning effectively, should be the first port of call for most complaints. Working together and liaising regularly with other institutions that receive prisoner complaints is therefore crucial for the Office to assess and address weaknesses in its system. Such liaison and co-operation is

¹²⁹ Ibid.

also essential because it allows all institutions involved in prison reform to pool their findings and more accurately determine systemic problems and trends.

Formal liaison and co-operation between the Inspectorate and members of the Committee takes place through briefings of the Committee. A number of such briefings have taken place in the past few years, both for the tabling of the Inspectorate's annual reports as well as to discuss trends and strategies on matters such as overcrowding and HIV/Aids in prisons. While it is clear that the committee in general is supportive of the work of the Inspectorate, the Inspecting Judge was sharply criticised by members of the Committee for statements about the rate of HIV-infection amongst prisoners.¹³⁰ However, it appears that the Committee draws significantly on the work of the Inspectorate, especially in relation to overcrowding, to determine priorities and strategies. A strong partnership between the Inspectorate and the Committee is essential. The Inspectorate's work complements the Committee's own oversight function: together with the Committee it acts as a watchdog over the Department. Secondly, the Inspectorate can support and aid the Committee in its oversight function by providing it with information that may not be derived from the Department.¹³¹ In turn, the Committee can support and aid the work of the Inspectorate by publicising in Parliament conditions in prisons and the content of reports, and using parliamentary structures as an avenue to ensure that the Inspectorate's recommendations are implemented.

Positive accounts were received regarding communication between the DCS and the Inspectorate. The Chief Deputy Commissioner is the central person dealing with the Inspectorate on a functional level. This office communicates both with the Inspecting Judge (directly) and with other staff (generally) as the need arises. Interaction with the IPVs appears to be limited to briefings provided by the DCS on request. The direct communication between the Inspecting Judge and the office of the Chief Deputy Commissioner was described as 'invaluable' in establishing a working relationship between the management of the DCS and that of the Inspectorate. An example that was given is the interaction between the Inspectorate and the DCS on the issue of overcrowding. When it is at its best, the interaction between the management structures of the Inspectorate and the DCS is one of constructive debate and institutional support. A further factor enhancing this relationship is the fact that the Inspecting Judge is actively supportive of establishing a partnership between the Inspectorate and the DCS, although it was acknowledged that the legislative mandate of the Inspectorate would allow for a judge who remained aloof. In the light of the nature of the work of the Inspectorate, and the recommendations made above regarding ongoing follow-up and dialogue with the DCS about implementing recommendations in reports, the existence of such a constructive relationship between the organisations is to be encouraged. The Inspectorate also appears to have a co-

¹³⁰ Judge Fagan estimated that 60% of those released from prison were HIV-positive. See the minutes of the Portfolio Committee meeting, 28 May 2003. Available on the web at <http://www.pmg.org.za/docs/2002/viewminute.php?id=1724>

operative relationship with the Department of Justice, with which it has worked closely on the issue of overcrowding.¹³² However, a point of tension between the Inspectorate and the DCS that deserves mention was related to statements made by the Inspectorate on the rate of HIV-infection amongst prisoners. The DCS was of the view that the Inspectorate relied on unverified statistics when it claimed that approximately 60% of prisoners who were released were HIV-positive.¹³³

The Inspectorate has initiated and participated in several projects with other civil society organisations. Some of these have been discussed above under the sections covering the work of the units in the Office and only a few more examples will be highlighted in this section.

In the early stages of the Office, when Judge Trengove headed it, partnerships were entered into with a range of organisations, including the United Nations Human Rights Commission, the Centre for the Study of Violence and Reconciliation, and the South African Human Rights Commission to conduct training and workshops covering the Acts, regulations and the impact of the Constitution and international law on prisoners.¹³⁴ The Centre for the Study of Violence and Reconciliation, Lawyers for Human Rights and the South African Human Rights Commission also provided training for IPVs..¹³⁵ An IPV training manual was compiled together with the Office of the High Commissioner for Human Rights, which also provided funding for training. Judge Trengove conducted an extensive campaign of consultations with a number of government and non-governmental bodies to publicise the work of the Inspectorate and to obtain nominations for IPV positions.¹³⁶

There have been a number of other initiatives involving civil society and community organisations more recently. The plan to appoint Special Assistants discussed above is a significant development, and the Inspectorate should also consider appointing persons to assist in specialised aspects of inspections and investigations under section 90(8) of the Act. As with the appointment of Special Assistants, the Inspecting Judge may make these appointments 'after consultation' with the Director-General of the Department of Public Service and Administration, thus facilitating a quicker appointment process.

The Inspectorate is also engaged in several initiatives as part of its strategy to combat overcrowding. For example, it has attempted to facilitate the use of plea-bargaining by working with the Legal Aid Board, law societies and the Department of Justice to process these cases

¹³¹ See H Corder et al note 2 at 56 where the same argument is made in relation to Chapter 9 institutions and Parliament.

¹³² However, it does not appear to liaise regularly with other government departments. Such links are necessary especially where the work of those departments impacts directly on prison conditions, for example, the Department of Public Works, which is responsible for the provision of ablution facilities.

¹³³ Minutes of the meeting of the Portfolio Committee on Correctional Services, 28 May 2003. Available on the web at <http://www.pmg.org.za/docs/2002/viewminute.php?id=1724>

¹³⁴ *Inaugural Annual Report* 8.

¹³⁵ *Ibid* 13.

more quickly and efficiently. The role of the Inspectorate is to provide information to prisoners on plea-bargaining and identify awaiting-trial prisoners who are willing to enter into a plea-bargain. In some regions, the Department of Justice has agreed to provide a dedicated facility to support plea-bargaining,¹³⁷ and attorneys using pro-bono hours assist awaiting-trial prisoners in plea-bargaining. In May 2003, a pilot project was initiated in Goodwood Prison, whereby prisoners identified by the Inspectorate who could not afford legal representation but who wanted to plea-bargain were consulted by attorneys from the Cape Law Society. Plans are underway in terms of this pilot project to recognise the Inspectorate as a structure through which attorneys might be called upon to perform pro-bono services.¹³⁸

The Inspecting Judge and representatives of the National Council on Correctional Services convened a meeting with all Regional Court Presidents and Chief Magistrates in South Africa with the aim of finding ways to reduce the number of awaiting-trial prisoners.¹³⁹ As a result, the Lower Court Management Committee put in place a Sub-Committee on Awaiting-Trial Prisoners which has as its main objective the reduction of the number of awaiting-trial prisoners from 58 528 to 20 000. A list of 28 suggestions for reducing the number of awaiting-trial prisoners, prepared by the Inspectorate, was sent via the Sub-Committee to all courts in South Africa. The task of the Sub-Committee is to monitor and continue to provide guidance to magistrates in this regard. The Inspectorate has been asked to provide the Sub-Committee with monthly statistics of all awaiting-trial prisoners in South Africa, so that it can 'within 48 hours, review the reasons for the further detention of the detainee'.¹⁴⁰

The Inspectorate has also assisted other organisations with research into prisons, and for example has facilitated research into recidivism rates by the Institute for Security Studies.¹⁴¹ Senior staff of the DCS mentioned the Inspectorate's role in facilitating research and highlighted the Department's recent efforts to systematise the previously ad-hoc research initiatives, as well as to increase the internal research capacity of the department. A Research Ethics Committee has been established and a research policy outlining ethical principles has been drawn up. The principles deal, inter-alia, with the clearance of research for publication, based on factors such as an assessment of the methodology of the study, possible confidentiality issues and the interests of the Department. Thus, senior members of the DCS emphasised the need for an internal clearance process before the Inspectorate perform or commissions research studies. This should take into account the needs and interests of the Department and the Inspectorate. Staff of the DCS pointed out that any study into correctional services involved departmental

¹³⁶ *Inaugural Annual Report* 14.

¹³⁷ In Gauteng, for example, the Department has set aside a Saturday court for this purpose.

¹³⁸ Minutes of the Cape Law Society Constitutional Affairs and Human Rights Committee meeting, 12 August 2003. Copy of minutes on file with the author.

¹³⁹ The meeting was held at the Durban-Westville prison on 26 June 2003. Copy of minutes and other correspondence on file with author.

¹⁴⁰ Correspondence from the Lower Court Management Committee to the Inspectorate, 9 September 2003. Copy on file with author.

¹⁴¹ *Annual Report* (2002) 22.

resources and impacted on departmental interests, making it appropriate that it be assessed at least partly in terms of departmental research policy. Joint research projects, which involve outside experts and activists are also supported. While there are good grounds for the suggestion that research initiatives be discussed with the DCS, any structures put in place to regulate research, or decisions taken cannot compromise the independent functioning of the Inspectorate.

The Inspectorate has also publicised its work amongst judges and has increased judicial involvement in prison inspections. Annual Reports of the Inspectorate are sent to all superior court judges, encouraging them to conduct independent prison inspections under section 99(1) of the Act. Many judges have responded to this call, and in 2002-2003, judges who had visited prisons and submitted reports included Langa DCJ and O'Regan J of the Constitutional Court, Farlam and Howie JJA of the Supreme Court of Appeal, and several judges of the High Court. Reports on judges' visits that are received by the Inspectorate are included as sources in the identification of trends, and are sent to the DCS, which, in turn, sends them to the relevant Deputy and Provincial Commissioners.¹⁴²

10. Prison Oversight In Other Countries

10.1 England and Wales

Independent oversight of prisons in England and Wales takes place through three separate institutions, which perform different but inter-related functions: the Office of Her Majesty's Chief Inspector of Prisons (HMCIP), which inspects and reports on prisons; lay prison visitors who are attached to local prison boards and who conduct lay visits; and the Prison Ombudsman who investigates complaints from prisoners and makes recommendations.

10.1.1.HMCIP

The English model of independent inspection and oversight of prisons was influential in the design of the South African Inspectorate.¹⁴³ The HMCIP was established in 1980, and has as its primary tasks the inspection of prisons and the publication of inspection reports.¹⁴⁴ As with the South African model, the Chief Inspector reports on the treatment of prisoners and conditions in prisons.¹⁴⁵

¹⁴² See note 99.

¹⁴³ D Van Zyl Smit 'South Africa' in D Van Zyl Smit and F Dunkel note 1 at 596.

¹⁴⁴ Section 5(A)(2) of the Prisons Act, 1952 (UK). See also the HMCIP website at: <http://www.homeoffice.gov.uk/justice/prisons/insprisons/index.html>

¹⁴⁵ Section 5(A) 3.

Inspections fall into 2 categories: full inspections for which prisons are given advance notification and shorter, unannounced inspections during which specific issues are examined. In addition, the Home Secretary may also request that the Chief Inspector report on specific matters connected with prisons in England and Wales.¹⁴⁶ The HMCIP does not investigate individual grievances on the part of staff or prisoners and has no powers to make decisions or to discipline correctional officials. The Chief Inspector is independent of the prison service and reports directly to the Home Secretary. The Office has a staff of about 32 people, with varying forms of expertise on prison conditions, but also employs specialist inspectors and researchers on a consultancy basis.¹⁴⁷ The HMCIP issues annual reports, which 'have so far been published and when they contain sharp criticism, they attract a good deal of media attention.'¹⁴⁸ Publicity, therefore, is an important feature of the HMCIP's work. Like the South African Inspectorate, recent reports have highlighted the problem of overcrowding in British prisons.

10.1.2 Independent Monitoring Boards

Unlike the South African model where IPVs are an integral part of the Inspectorate, lay prison visitors are separate from and function independently of the HMCIP. A further difference is that they are volunteers. Each prison establishment has an independent monitoring board, which consists of lay visitors who provide oversight of prison conditions. There are approximately 1800 lay visitors for 146 prisons and detention centres.¹⁴⁹ The lay visitors have access to prisons at all times and they interview prisoners and correctional officials to ensure that 'prisoners and detainees are being cared for decently and with humanity.'¹⁵⁰ Each board prepares an annual report, and some boards ensure that these are widely publicised in their regions.¹⁵¹

10.1.3 The Prisons and Probations Ombudsman

Following the recommendations of the Woolf Commission of Enquiry into Prisons that an independent prisoner complaint system be implemented, the Home Secretary appointed the Prisons and Probations Ombudsman in 1994.¹⁵² The Ombudsman investigates complaints from prisoners and those subject to probation supervision. Prisoners are required to exhaust internal remedies, including attempting to resolve the matter through the local board of visitors, before lodging a complaint with the Ombudsman. Lodging a complaint with the Ombudsman is considered appropriate for serious issues only.¹⁵³ The Ombudsman may consider the merits of

¹⁴⁶ Section 5(A)(4).

¹⁴⁷ <http://www.homeoffice.gov.uk/justice/prisons/inspprison/index.html>

¹⁴⁸ R Morgan 'England and Wales' in D Van Zyl Smit and F Dunkel note 1 at 219

¹⁴⁹ <http://www.homeoffice.gov.uk/justice/prisons/imb/index.html>

¹⁵⁰ <http://www.homeoffice.gov.uk/justice/prisons/imb/index.html>

¹⁵¹ R Morgan 'England and Wales' in D Van Zyl Smit and F Dunkel note 1 at 219.

¹⁵² Ibid 221.

¹⁵³ Ibid.

a decision, including disciplinary awards, and gives full reasons for a decision regardless of the outcome.¹⁵⁴

There is, however, no statutory obligation for the prison authorities to implement his recommendations. He issues annual reports, in which he has been openly critical of the prison authorities' occasional failure to grant him access to documents and implement his recommendations.¹⁵⁵

10.2 Canada

In Canada, the Correctional Investigator, established under Part III of the Corrections and Correctional Releases Act, is primarily responsible for the investigation and resolution of complaints from prisoners. The Office also has the responsibility of reviewing and making recommendations 'on policies and procedures associated with the areas of individual complaints to ensure that systemic areas of concern are identified and appropriately addressed'.¹⁵⁶ The South African Inspectorate, which is similarly responsible for investigating and identifying trends and systemic problems that may be identified from an examination of individual complaints, was modelled along these lines. But, unlike the South African and English offices, the mandate of the Canadian Correctional Investigator is broadly framed to include 'investigations into the problems of offenders related to decisions, recommendations, acts or omissions of the Commissioner or any person under the control and management of, or performing services for, or on behalf of, the Commissioner, that affect offenders either individually or as a group'.¹⁵⁷ The Correctional Investigator can institute an enquiry on the basis of a complaint or of its own volition and has full discretion to decide when and how to carry out an investigation.¹⁵⁸ In keeping with its broad mandate, the Correctional Investigator may hold any hearing and make any such enquiries as is deemed appropriate.¹⁵⁹

Once a hearing has taken place, the Correctional Investigator can decide the matter on the basis that the action was contrary to law or established policy, or on the basis of a number of typical administrative law grounds, including unreasonableness, abuse of discretion and mistake of fact or law.¹⁶⁰ While the Office has attempted 'to resolve problems through consultation at the institutional and regional levels',¹⁶¹ any unresolved problems, together with a full set of reasons, must be referred to the Commissioner.¹⁶² The vast majority of cases are

¹⁵⁴ <http://www.ppo.gov.uk/faq.htm>

¹⁵⁵ R Morgan 'England and Wales' in D Van Zyl Smit and F Dunkel note 1 at 221.

¹⁵⁶ http://www.oci-bec.gc.ca/mandate_e.asp

¹⁵⁷ Section 167(1) of the Corrections and Conditional Release Act (Canada).

¹⁵⁸ Section 170.

¹⁵⁹ Section 171 (1). In terms of section 171(2), hearings are held in camera unless decided otherwise by the Correctional Investigator.

¹⁶⁰ Section 178.

¹⁶¹ http://www.oci-bec.gc.ca/mandate_e.asp

¹⁶² Section 178.

resolved through discussion and negotiation.¹⁶³ The Correctional Investigator may also make any recommendation relevant to the resolution of the problem that is considered appropriate.¹⁶⁴ These recommendations are not binding.¹⁶⁵ The absence of the power to make final decisions on complaints is, however, is not seen as a problem by the Correctional Investigator, because:

‘consistent with the Ombudsman function, the authority of the Office lies in its ability to thoroughly and objectively investigate a wide spectrum of administrative actions and present its findings and recommendations to an equally broad spectrum of decision makers, inclusive of Parliament, which can cause reasonable corrective action to be taken if earlier attempts at resolutions have failed’.¹⁶⁶

The Act also requires that the Correctional Investigator inform the Minister if no action is taken by the Commissioner ‘that seems to the Correctional Investigator to be adequate and appropriate.’¹⁶⁷ Reports of the Correctional Investigator must be tabled in Parliament.

10.3 The Netherlands

Supervision Committees, consisting of outside lay prison visitors with wide-ranging areas of professional expertise, have been in place in the Netherlands since 1953.¹⁶⁸ The functions of Supervision Committees are similar to those of many lay-visitor systems in other parts of the world, including civilian oversight of prisons and mediating and facilitating the resolution of prisoner complaints. In the Netherlands, however, members of the Supervision Committees play an additional role by conducting hearings and making rulings on prisoner complaints. Under Dutch legislation, if mediation has failed and all domestic avenues have been exhausted, a prisoner can lodge a complaint about any decision or failure to make a decision by the prison governor.¹⁶⁹ The complaint is heard and decided by the Complaints Committee, a sub-committee of the Supervision Committee and is preferably chaired by a member of the judiciary.¹⁷⁰ Once the complaint is submitted in the prescribed manner, oral argument is presented by both sides. Due process rules are in place, including the right of the complainant to have legal representation and the services of an interpreter.¹⁷¹ A decision must be made within four weeks after receipt of the complaint, although this period may be extended by another four weeks in exceptional circumstances. There are a number of grounds on which the Complaints Committee can make a decision, including contravention of laws and policy, unreasonableness or unfairness. In addition, the Committee may not only set aside the

¹⁶³ http://www.oci-bec.gc.ca/mandate_e.asp

¹⁶⁴ Section 179(1).

¹⁶⁵ Section 179(3).

¹⁶⁶ http://www.oci-bec.gc.ca/mandate_e.asp

¹⁶⁷ Section 180.

¹⁶⁸ C Kelk ‘The Netherlands’ in D Van Zyl Smit and F Dunkel note 1 at 483.

¹⁶⁹ The Penitentiary Principles Act, 1999 (Netherlands).

¹⁷⁰ C Kelk ‘The Netherlands’ in D Van Zyl Smit and F Dunkel note 1 at 485.

¹⁷¹ Ibid.

decision, but it also has the power to substitute its decision for that of the prison governor and make a compensation order. However, because of a legitimate concern that the Complaints Committee not take over the authority of the prison governor as regards what is effective prison management, judgements are 'confined to the question of whether, in the view of all the circumstances and all the other interests which come into consideration, the prison governor was in a position to arrive at his decision in a just and reasonable fashion.'¹⁷² Both parties have a right of appeal to the Appeal Committee of the Central Council for the Enforcement of Criminal Law.

The Dutch system also contains a National Prisons Ombudsman, which, although it has no formal binding power, exerts considerable influence through the submission of public reports.¹⁷³

10.4 The European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT)

Under the ECTP, a Committee for the Prevention of Torture (CPT) is established for the purpose of paying inspection visits to States parties. The Committee, which is made up of representatives of member states to the Convention from various professional disciplines, authorises delegations to state parties to conduct inspections at prisons and detention centres and write reports. They have full and free access to prisons and detention centres, as well as to documents and medical records.¹⁷⁴ Despite the title of the CPT, in most countries it is concerned 'less with torture than with inhuman or degrading treatment, which, because of the manner in which the Committee has employed this key term, means custodial conditions generally.'¹⁷⁵ The CPT pays both scheduled and ad-hoc visits: the former on an equitable basis and the latter as required in the circumstances. The Committee attempts to submit a report to the Government of the member state within six months of the visit. Reports are confidential, but are 'clearly designed with publication in mind.'¹⁷⁶ Reports contain the background facts, as well as a set of findings and recommendations, and the overwhelming majority of member states have published them in a number of different ways.¹⁷⁷ Because the Committee views a report as a 'stage in an ongoing dialogue', it asks each member state to submit an interim response within six months of receiving the report and a final response within one year. Following that, the Committee examines the government's response and may send additional observations.¹⁷⁸

From this brief survey of other models of prison inspectorates, key features that emerge are reporting, publicity, follow-up on reports and ongoing dialogue. Independence and community

¹⁷² Ibid 487.

¹⁷³ Ibid 489.

¹⁷⁴ Articles 2 and 7 of the Convention.

¹⁷⁵ R Morgan 'European Committee for the Prevention of Torture' in D Van Zyl Smit and F Dunkel note 1 at 721.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid 725.

legitimacy are also important features. The bodies described here play an important role in monitoring prison conditions and improving the lot of prisoners in their countries. They do so mainly by providing and publicising independent, informed and objective information and recommendations on conditions in prisons. While there are many similarities in the structure and operation of many of these institutions and the South African Inspectorate, there are also practices and systems in place upon which we can draw. Some of these are included as recommendations in section 12 of this report.

11. Effectiveness And Impact

There was broad agreement that an independent oversight body on prisons in South Africa was necessary, and that the existence of the Inspectorate contributed significantly to addressing the lot of prisoners in South Africa. Virtually all persons interviewed, regardless of political or ideological affiliation, considered the Inspectorate to play an important role in the protection of prisoners' rights and in addressing prison conditions. Very little, if any, hostility was evident towards the Inspectorate and the overwhelming majority of those who were interviewed felt that its work was valuable and should continue. This is also the conclusion of this study. The Inspectorate is an important institution supporting democracy and human rights in South Africa and its work should be acknowledged, supported, and strengthened. As many pointed out, despite the problems in the system, the mere presence and visibility of IPVs is important, and prisoners have an additional avenue to address their concerns. The inspection and investigation process, despite many flaws, has the potential to provide much needed information on and publicity for prison conditions, including information on systemic problems and trends. The electronic reporting system is a pioneering effort, which is leading the way for other prison inspectorates around the world. The Inspectorate has raised awareness about overcrowding in prisons and has put the issue of prison reform into the public spotlight. It has facilitated easier access to prisons, and provides important statistical and other information relating to prisons. For a relatively new organisation, it has managed to achieve a significant amount in a short period of time.

It is in the area of attempts to reduce overcrowding that the Inspectorate has been particularly effective. It has not only highlighted and released figures on prison numbers,¹⁷⁹ but has also actively adopted and called for measures to address the problem. In 2000, the Inspectorate proposed that the government use its power under section 66 of the 1959 Act¹⁸⁰ to release certain categories of awaiting-trial prisoners, noting that they were being detained in conditions

¹⁷⁸ Ibid 726.

¹⁷⁹ For example, the Inspectorate noted that 'our 188 307 prisoners are crammed into prisons with a capacity for 110 924 prisoners (as at 2003/02/28) (*Annual Report* (2002) 24). This meant that '4 out of 1000 South Africans are in prison. We are among the countries with the highest prisoner numbers per population in the world' (*Annual Report* (2002) 26).

¹⁸⁰ Correctional Services Act 8 of 1959.

that violated South Africa's obligations under international law, and that releasing them would reduce the spread of disease, as well the stress on officials of the DCS and the financial burden on the state.¹⁸¹ The call was made to release those awaiting-trial prisoners who had been granted bail of less than R1 000 but who were unable to afford it. It was pointed out that because these prisoners had been granted bail, a court had already decided that they posed no danger to their communities if they were released.¹⁸² The Inspectorate also noted that 'their release would potentially bring about their reunion with their families, a return to the employment market, their contributing to their families' upkeep and their regaining their human dignity. Juvenile prisoners could return to school...[and the] saving to the state in not having to accommodate the prisoners would exceed R1 million a day.'¹⁸³ In September 2000, 8 451 awaiting-trial prisoners were released as a result of the Inspectorate's call.

Legislative amendments relating to powers of the police to grant bail at a police station were also largely due to efforts on the part of the Inspectorate. An amendment to the Criminal Procedure Act allows the police to grant bail to any person arrested for the theft of an article worth up to R2 500, or when found with up to 115 grams of dagga.¹⁸⁴ In addition, in 2001, again due largely to pressure from the Inspectorate, the Criminal Procedure Act was amended to allow a Head of Prison, who is satisfied that the population of the prison 'is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused', to apply to court for their release under specific conditions.¹⁸⁵ Other steps taken by the Inspectorate to reduce prison numbers include it lending support for earlier release on parole, higher maximum amounts for admission-of-guilt fines, the introduction of plea-bargaining procedures¹⁸⁶ and the possibility of a general amnesty for certain categories of prisoner.¹⁸⁷ The Inspectorate also routinely calls for shorter sentences and provides suggestions to judicial officers on alternatives to prison sentencing.¹⁸⁸

Calls for reducing the prison population have been made by the Inspectorate in the context of the widespread public perception that crime is on the rise, and that this should be met at least

¹⁸¹ *Annual Report* (2000) 13. In July 2000, there were 59 275 awaiting-trial prisoners in South African prisons, 19 218 of which were juveniles. *Annual Report* (2000) 14.

¹⁸² *Ibid.*

¹⁸³ *Ibid* 14-15.

¹⁸⁴ Schedule 2 of the Criminal Procedure Act, as amended by section 15 of the Judicial Matters Amendment Act 42 of 2001. See the *Annual Report* (2001) 9, where it is also reported that the legislation has been used well by the South African Police Service.

¹⁸⁵ Section 63A of the Criminal Procedure Act, as amended by section 6 of the Judicial Matters Amendment Act 42 of 2001. The Inspectorate, however, reports that, for a range of reasons, the introduction of this provision has not been successful in reducing overcrowding (*Annual Report* (2002) 23).

¹⁸⁶ Section 276B of the Criminal Procedure Act 51 of 1977, as amended by section 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997. See also the discussion on pro bono work in this regard in section 9 above.

¹⁸⁷ This proposal, made in the 2002 *Annual Report*, was not without controversy. The Democratic Alliance, for example, expressed the view that granting a general amnesty would undermine confidence in the criminal justice system and send the wrong message to criminals. See 'Amnesty and Crowded Jails', *Cape Argus* (28 May 2003) 9.

partly by harsher and longer sentences for criminals. Thus, 'many South Africans are unconcerned about the human rights of prisoners, and indeed would want prisoners to be treated more harshly.'¹⁸⁹ This has made the work of the Inspectorate in addressing conditions in prisons more difficult and it is frequently forced to defend its position against prevailing public opinion. For instance, members of the Inspectorate often have to point out the results of research that long sentences do not necessarily result in reduced crime rates, since it is the certainty of apprehension and punishment and not the severity of the sentence that is the deterrent. Despite these additional obstacles to the work of the Inspectorate, it has been successful in highlighting the problems in prisons and the effects of overcrowding, as well as in involving many other role-players.

There are, however, several areas that can be improved. Many of those areas have been highlighted in this report, and are issues that have to be addressed to enhance the impact of the work of the Inspectorate. A large number of those interviewed believed that the Inspectorate's success was partly due to the profile and the individual efforts of the Inspecting Judge, and that the profile and structure of the Office needed to be developed and strengthened in its own right. Some of the recommendations made in this report are designed to achieve that end. Another common response to the question of the impact of the work of the Inspectorate was that prison conditions in South Africa had not improved. Many people who were interviewed were of the opinion that while there was no doubt that overcrowding contributed to the problem of intolerable conditions, other systemic problems relating to prison conditions also needed to be addressed. Despite releases, conditions in prisons had not changed since the Inspectorate had started its work. The proceedings of the Jali Commission of Enquiry, as well as the reports of other organisations tended to confirm the view that conditions in prisons had not improved significantly and remained a matter of serious concern.¹⁹⁰

The view was also expressed that the Inspectorate needed to be more proactive in order to maximise its impact, including initiating inspections on a larger scale and making many more unannounced visits. Many people commented on the fact that they were not aware of what happened to reports after the Inspectorate conducted investigations or inspections. Presently, as detailed in this report, problems relating to the identification of trends, the production of reports, and the lack of publicity and follow-up on recommendations are major factors that limit the impact of the Inspectorate's work. It is important for the Inspectorate to begin to analyse the impact of its own work in relation to prison conditions. There are presently very few mechanisms

¹⁸⁸ See for example *Annual Report (2001)* 12 –14. These suggestions are being used in the training of magistrates. See HIV/ Aids Sentencing Manual prepared for Justice College by the Law, Race and Gender Unit (forthcoming, 2004).

¹⁸⁹ D Van Zyl Smit 'South Africa' in D Van Zyl Smit and F Dunkel note 1 at 606.

¹⁹⁰ See, for example, Law Society of South Africa Prison Report (2002), where it is stated that 'the overall picture painted by the visiting teams of attorneys is not encouraging and seems to be worse off than the previous evaluation of 2001' (at 3). This conclusion was reached after 12 prisons across the country were inspected by members of the Law Society.

in place for the Inspectorate to assess the success of its efforts.¹⁹¹ Such impact analysis needs to go beyond the production of statistics and should contain a full and frank assessment of the actual change in prison conditions, measured against minimum standards, as a result of its interventions. Experts in impact analysis and members of civil society could assist in the design of the study. Ongoing substantive impact analysis would not only lead to self-critical assessment of the Inspectorate's own work and more effective long-term planning, but would also allow civil society to more accurately assess the full picture and needs relating to prison reform.

12. Recommendations

These recommendations are a synthesis and summary of the points and suggestions made earlier, and more detail on each of them can be found in the various sections of the report. Recommendations regarding effectiveness and oversight, as well as increased civil society involvement in the work of the Inspectorate have been made.

- Complaints should be resolved more speedily. For example, consideration should be given to developing guidelines for the circumstances under which an IPV may refer a matter directly to the Inspectorate under section 90(2) of the Act, and to using the electronic system to keep staff at the Office informed of the progress of dealing with complaints, so that ongoing guidance can be provided.
- The establishment of regional offices should be considered, both for institutional support and a base for those working in the regions, as well as to increase accessibility, visibility, liaison and presence outside the Western Cape. Regional offices may also assist in more firmly establishing the IPV's as part of the Inspectorate in the minds of members of the public. They may also be able to assist in reducing the life-cycle of complaints. It is recommended that a pilot project be instituted in a selected region as soon as is practicable.
- The tenure of IPV's should be re-considered and further, ongoing and more intensive support and training, particularly concerning the social context of prisons and prison reform, should be provided with the input of civil society organisations.
- Minimum standards and criteria for substantively assessing prison conditions, and indicators of good practice for the resolution of complaints in a manner that improves

¹⁹¹ To this end, the Inspectorate has embarked on the process of applying the South African Excellence Model to measure its performance and efficiency.

prison conditions should be identified. This should be done in a consultative process with experts and organisations working in the field of penal reform.

- Systems presently in place to identify trends, such as the electronic classification system, need to be modified to enable a more substantive analysis of problems in prisons, and must be used more effectively to tackle systemic and larger scale problems.
- Report-writing needs to be improved to identify and deal with substantive systemic concerns and consideration should be given to getting outside input from civil society, in appropriate areas, in the preparation of reports.
- Reports must be widely disseminated and publicised and routinely sent to all government and non-governmental agencies directly or indirectly involved in prison reform. Publicity should also be given to substantial or significant non-compliance with recommendations. Civil society should also publicise the reports, recommendations, and instances of non-compliance.
- Recommendations in reports should be routinely followed up. Consideration should be given to implementing a system along the lines of that adopted by the European Committee on Torture, whereby the DCS and prison authorities are asked to submit, within set time frames, an interim response to the steps they have taken to implement the recommendations included in inspection reports. This may be followed by dialogue between the Inspectorate, civil society and the DCS, and a final response within a specific period of time. Such a system would encourage ongoing and constructive engagement and keep issues open after the submission of reports, so that reports would be seen as one step in an ongoing dialogue. Suggestions, follow-up guidance and assistance to the DCS for the implementation of recommendations should also be provided or facilitated by the Inspectorate.
- Mechanisms to ensure full independence, including financial and administrative independence from the DCS, should be put in place and it is recommended that the Inspectorate begin discussions about and start investigating ways to commence this process.
- The Inspectorate should measure the impact of their work, using criteria that allow an assessment of the extent to which conditions in prisons have substantively improved. The development of standards to measure conditions in prisons suggested earlier would assist in impact analysis and would allow the Inspectorate to identify areas in which it needed to improve and focus for the future.

- The appointment and use of Special Assistants is a key way of directly involving civil society in prison reform and is strongly encouraged. Special Assistants could be drawn from a range of different areas and institutions and if the power to appoint them were fully utilised, the Inspectorate could create a network of experts throughout the country who were directly involved in prison reform.
- The findings and reports of the Inspectorate are a vital resource for NGOs and others working in the field of prison reform. Similarly, the expertise and information available in these organisations could be a vital resource for the Inspectorate. The Inspectorate could facilitate access to and information about prisons. NGOs could provide the Inspectorate with assistance in more effectively identifying trends, preparing reports and developing minimum standards for measuring prison conditions and resolving complaints. Such sharing of information, expertise and resources would strengthen the work and effectiveness of all those involved in prison reform.
- Institutions involved in penal reform, as well as oversight bodies such as the Parliamentary Portfolio Committee on Correctional Services, should assist and support the Inspectorate in following up on the implementation of recommendations through a number of different avenues and strategies.
- Other institutions could also become involved in supporting the work of the Inspectorate by using their own constituencies or areas of expertise. For example, public interest law firms such as the Legal Resources Centre could use information generated by the Inspectorate to enforce the rights of prisoners in constitutional litigation, and organisations involved in public health issues could similarly use such information to take up and lobby the issue of prisoners' health and medical care. Similarly, the involvement of NGOs in the education and training of DCS staff, many of whom are not trained in a human rights culture, would aid both the Office and the DCS in improving prison conditions.

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