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CSPRI Research Paper No. 4

2003

Cape Town

This publication was funded by the Open Society Foundation (OSF) and the Ford Foundation.

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A Review of Civilian Oversight over Correctional Services in the Last Decade

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Introduction

Over the last decade, South Africa has been establishing and testing the tenets of democracy - an important element of which is the principle of accountability. The Constitution establishes that accountability, responsiveness and openness, are some of the core founding values of the democratic system.[1] While external accountability should apply to all government departments, the particular nature of prisons world wide gives it a unique significance. Prisons are closed institutions, maintaining a distance from the public eye. Communications with the outside world are regulated and controlled. Prisoners' access to families, lawyers, religious workers and councillors are subject to a rigid set of rules. Access by the media and to the media is equally controlled and restricted. The inmates' daily lives are heavily regulated by the prison rules, and by the discretion of the prison staff.

The restricted and hidden nature of the prison regime was dramatically apparent in apartheid South African where prisons shunned outside scrutiny and engagement in all correctional matters. The correctional system was an inherent part of the political apparatus which upheld the apartheid state. Prisoners were segregated according to race, and the staff hierarchy echoed similar racial lines (Dissel, 2000). Prison legislation expressly limited all prisoners' rights, but further restricted the rights of security prisoners. Prisoner's access to news and newspapers was restricted. Media reporting on conditions in prison was restricted, and prisoners sought to make use of the courts to publicise conditions of detention, as well as to change repressive conditions (Van Zyl Smit, 1992).

Bowing to increasing external pressure, the prison regime slowly began to open up in the late 1980's and early 1990's and to encourage community involvement. Various legal challenges began to shape a new human rights discourse in prisons, but it was only with the landmark judgment of *Minister of Justice v Hofmeyer* in 1993 (1993 3 SA 131 (A)) that prisoners' rights were given full recognition. The adoption of the Bill of Rights in firstly the interim and then the final Constitution in 1993 and 1996 finally established the right of prisoners to be treated with human dignity and set out the mandatory minimum rights of people deprived of their liberty and those held in custody. These guideline principles, later amplified in the Correctional Services Act of 1998, seek to define how the Department of Correctional Services (DCS) should implement its correctional mandate in keeping people in custody.

Recognising the importance of accountability and oversight mechanisms in respect of public institutions, the Constitution created vehicles for civilian oversight. Mechanisms were also created to focus exclusively on prisons. A decade after this transition, it is timeous to evaluate how these mechanisms are functioning, and to what extent they are serving their envisaged purpose. This paper aims to outline several of these oversight

[1] Section 1 of the Constitution of the Republic of South Africa, Act 108 of 1996.

mechanisms and their responsibility in prisons during the period from 1994 to the end of 2001 when a new Commissioner of Correctional Services was appointed. This paper presents a separate discussion of each of the oversight bodies, and ends with an overall conclusion and recommendations for how these bodies could work together or better with civil society to strengthen their impact.

What is accountability?

Before subjecting the prison regulatory bodies to scrutiny, one must understand their broader mandate and what accountability entails. Maguire, Vagg and Morgan (1985) argue that if basic democracy is to be achieved then the directors of state agencies must be accountable to outside bodies for the running of their departments. In their view, accountability includes providing satisfactory answers to questions about the use of public funds and the implementation of policies required by the legislature. In other words, accountability means

> '… 'to give account' of actions or policies, or 'to account for' spending and so forth. Accountability can be said to require a person to explain and justify – against criteria of some kind – their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future'(Corder, Jagwanth and Soltau, 1999:2)

The object of accountability is thus to ensure that the actions by the authority charged with the implementation of policy (the correctional services) complies with the policy, legislative and Constitutional guidelines established by the body to which it is accountable. The actions and decisions should be congruent with the values and priorities of the body to which it is accountable. It is also to encourage open government and to ensure that the government is responsive to the needs of the people it governs.

Constitutional democracy requires that there should also be an element of 'independence' in the oversight, and that administrative or executive exercise of power is checked by being held accountable to an organ of government that is distinct from it. Governments should not be free to do as they please and there should be a system of checks and balances based on the concept of the rule of law. There should be ways for the electorate to ensure that their money has been properly spent, that official practices are not arbitrary, and that they do not result in discriminatory practices or cruel, inhuman or degrading treatment (Vagg, 1994). For this to happen, there needs to be scrutiny of the prisons by people who are not involved in the chain of command, and who can make evaluations based on norms and values rooted in humanitarian values.

Oversight may be located in central government or parliament, in the form of select committees, or it may be handed over to separate governmental organisations, such as an inspectorate. It may be turned over to community bodies, such as lay visitor schemes, or may be entrusted to constitutional or state bodies, such as a human rights commission. Some or all of these systems may operate. In addition, under the concept of the 'rule of law' the prison administration may also be subject to legal scrutiny by the courts.

Accountability exists on macro and micro levels. On a micro level, accountability refers to the different systems of relationships that exist which govern decisions within and across the prison institution. This would operate at a level of instructions given by the senior management to their staff, or by warders to the prison inmates. On a macro level, accountability refers to the relationship between the heads of state agencies, and external oversight bodies.

Altbeker argues that it is helpful to distinguish between two different forms of accountability: positive and negative. The notion of positive accountability recognises that government must establish an enabling environment in which the state institutions must do their work. The primary mechanisms for assuring positive accountability are the granting of powers to elected officials to set policy direction, objectives and rules, and to appoint personnel. The democratic nature of this depends not on the way that the correctional services are formed, but on the way that government is formed and the sets of rules that determine what is and is not permissible.

Negative accountability, on the other hand, refers to the idea that state institutions are bound by a higher set of rules and norms which they cannot violate. Negative accountability is designed to prevent the institutions of government from exceeding the powers that are granted to them. In other words, positive accountability is concerned with what the correctional services do, and negative accountability with how they do it (Altbeker, 2000).

Professor Hugh Corder and colleagues argue that the notion of oversight is broader than that of accountability and refers to the crucial role of legislatures (or other bodies) in monitoring and reviewing the actions of executive organs of government. The term describes a large number of activities carried out by legislatures in relation to the executive (Corder, *et al*., 1999).

It should also be noted that the term 'accountability' has different meanings in different contexts, and different oversight bodies may be asking questions of the state authority from different angles.

> 'Accountability is a diffuse concept, and one that is mobilized by different groups for very divergent purposes. In the discourses of prison reform it is often held out as a tool in the business of making prisons more just and more humanitarian. In the hands of governments it is used as a justification for increased cost-efficiency and control over staff. In all these uses, however, it is in practice solely associated with the concept of control, and usually denotes a concern and scrutiny over the structure and exercise of controls.' (Vagg, 1994:132)

The practice of accountability is complicated by the complexities of interpreting policy and the intention of policy makers. Administrators are called upon to account for policies which may be vague or complex in nature, and of different interpretations. In addition, the changing political climate and the activities of different pressure groups may rapidly alter perceptions and generate differing views of what the policy is meant to achieve. Policy is often always gradually evolving and changing, and even where it is set down in legislation it is subject to changing interpretations.

In addition to the difficulties in deciding what to hold the authority to account for, there exist several practical difficulties. Maguire, *et al.* outline three practical problems for outside agencies when assessing an agency's performance:

1. The evaluation of judgments taken by professionals requires a degree of technical expertise or knowledge which the oversight body often does not possess. To overcome this, the regulatory bodies may attempt to acquire those skills themselves, but more often may rely on evaluations made by peers and colleagues.

2. The process of calling for account involves a continuing relationship between public agency and watch dog. This may result in both sides considering the effects of demands or criticisms on their long term relationship. For example, the overseer may decide to overlook minor issue for the sake of long term cooperation.

One of the dangers of long term cooperation is the problem of 'regulatory capture': that the regulatory bodies may find themselves co-opted by the values and goals of the organisation they are required to regulate, thus losing the critical eye of the observer. It is also difficult to maintain their own credibility within the social and political environment in which they must operate.

3. The third aspect is that effective scrutiny from the outside requires a well organised system of *internal* accountability, with decision makers having properly defined goals and responsibilities, to which major decisions should be attributed.

What should the Department of Correctional Services be held accountable for?

The broad framework that should govern how the DCS carries out its mandate is set out in the legislation and Constitution. The Constitution establishes the human rights framework that should be applicable to prisoners. Section 10 recognises that everyone has inherent dignity and the right to have their dignity protected and respected. The Constitution also establishes the right to freedom and security of person which includes the right not to be treated in a cruel, inhuman or degrading way. Section 35 sets out the minimum rights of detained, arrested and accused persons which includes the right to be held in conditions of detention that are consistent with human dignity, including exercise, the provision of adequate accommodation, nutrition, reading material and medical treatment at state expense. Importantly, the Constitution represents a concerted break from the values and practices which underpinned the apartheid past, and represents a future where human rights are protected and where the values of accountability and transparency are supported.

The legislative framework is slightly more complicated in that there are two existing Correctional Services Acts. The prevailing Act 8 of 1959 has been amended several times to take into account the constitutional imperatives but it does not establish a holistic framework for the treatment of prisoners within a human rights framework. To deal with this, a new Act was drafted and promulgated in 1998 (Act 111 of 1998) that seeks to change the law governing correctional services and give effect to the Bill of Rights. The Act recognises international principles on correctional matters and sets out certain mandatory minimum rights that are applicable to prisoners. The Act was passed in such a way that is allowed for the partial implementation of sections, and as of October 2003, only limited sections had been brought into effect. These are the sections that make provision for joint venture (private) prisons; independent oversight by means of the Judicial Inspectorate and Independent Prison Visitors; and for amendments governing the National Council on Correctional Services.

Despite it not being implemented, as an overarching framework, the new Act does at the very least set out the intention of the correctional services, and sets a useful guideline for what the Department should be aiming to achieve. The Act sets out that the threefold purpose of the correctional system is to contribute to maintaining and protecting a just and safe society by enforcing the sentences of the courts in the manner prescribed by the Act; detaining all prisoners in safe custody whilst ensuring their human dignity; and promoting the social responsibility and human development of all prisoners and persons subject to community corrections (S 2). One of the Department's aims is to rehabilitate offenders so that they return to society and live safe and crime-free lives.

The constitutional and legislative frameworks establish broadly the principles and values to which the Department of Correctional Services should be striving towards in its treatment of offenders, and the implementation for which it should be held accountable to the oversight mechanisms. This is situated within the broad policy framework established by the South African government, as well as international and regional norms and standards. The Department's role is to interpret this framework and make it applicable within this

context. The Department would also be responsible for implementing laws and policy determined by other legislation.

However, one cannot set out the very noble aims of the law without recognising the reality in which it must be applied. Perhaps the largest challenge is the growing problem of overcrowding. The numbers of prisoners serving sentences and being held in custody awaiting trial has risen dramatically since 1994 (from 113 856 in December 1994 to 188 307 in February 2003), reflecting the increasingly punitive attitude of the public and law makers. Since the available accommodation for prisoners has not increased significantly over the same period, conditions in prisons are overcrowded, and services and staff are thinly stretched. Under these circumstances, the Department's ability to implement its strategic objectives and to ensure the attainment of human rights standards is severely compromised.

Systems of accountability

There exist several forms of oversight over the South African correctional services. Essentially, there are those that exist by virtue of the Constitution, and those that exist by virtue of the correctional services legislation. Constitutional bodies include Parliament, consisting of the National Assembly and the National Council of Provinces (NCOP). The National Assembly has legislative power and oversight over the exercise of national executive authority, including the implementation of legislation, and any organ of State. This oversight role is usually manifested through the Parliamentary Portfolio Committee on Correctional Services. The NCOP deals with provincial affairs and has the power to consider, pass, amend and propose or reject any legislation before the Council, and to initiate legislation falling within its functional area (Section 68 of the Constitution). The NCOP also operates through committees, of which the Security and Constitutional Affairs Select Committee deals with correctional accountability.

Chapter Nine of the Constitution established seven independent state institutions to support constitutional democracy. These institutions are accountable to the National Assembly and must report annually on their activities. The most important in this context include the Public Protector which has the power to investigate any conduct in state affairs or in the public administration that is alleged or suspected to be improper or to result in any impropriety or prejudice (S182). The other important body is the South African Human Rights Commission (S 184) that is charged with the promotion, protection and monitoring of human rights and a culture of human rights within South Africa.

Legislative bodies include the National Council for Correctional Services (NCCS), established in terms of the Correctional Services Act 111 of 1998. This body is a continuation of the National Advisory Council on Correctional Services, established under the former Act. The primary function of the NCCS is to advise in developing policy in regard to the correctional system and the sentencing process. The Minister of Correctional Services must refer draft legislation and major proposed policy developments to the national council for its comments and advice (S 82 - 83). A Judicial Inspectorate was introduced in 1997 (Act 102 of 1997) which has the duty of facilitating the inspection of prisons and reporting on the treatment of prisoners and on conditions of prison. The Judicial Inspectorate is assisted by Independent Prison Visitors who perform regular prison visits and receive and record complaints of prisoners.

A new mechanism was established in terms of the Public Finance and Management Act (PFMA Act 1 of 1999). Government departments are required to establish measurable objectives in respect of each main division of their budget and to submit it to Parliament. Measurable objectives are defined as quantifiable results that can be achieved within a reasonable time frame. Parliamentary Committees are also supposed to examine these

objectives and to engage with the departments on their measurable aims and achievements. This process is being applied to the 2003 Budget for this first time, so is not included in this report.

This paper aims to look at the oversight role of these bodies over the correctional services since 1994, with the exception of the Judicial Inspectorate and the Independent Prison Visitors, which is dealt with elsewhere.[2] In essence, the report aims to highlight to what extent that the oversight bodies helped to frame a policy environment within which the Correctional Services could fulfil its Constitutional mandate, and secondly, to what extent did the bodies hold the Minister and Correctional Services to account for how it went about fulfilling that mandate – for what decisions and actions were taken, and for the outcomes.

Methodology

The brief of the study was to look at how the oversight mechanisms had functioned from the time of the new democratic government in April 1994 to September 2001 when the current Commissioner Linda Mti was appointed to head the Department. While the report focuses on this period, at times it has been necessary to refer to later developments so as to reflect on discussion and decisions taken place during the earlier period.

The study provides an overview of the legislative and Constitutional mandate in respect of each body. This study is based on interviews with key role players in the oversight bodies under scrutiny, mainly with former and current members of the mechanisms. It also makes use of publicly accessible documents, minutes and reports produced by them. In respect of the Portfolio Committee on Correctional Services there are no official minutes of the meetings, or of Study Group meetings, and no accessible reports by the Committee. We relied instead on the unofficial minutes of the Parliamentary Monitoring Group (PMG) which are published on the internet. The minutes are written by the PMG and supplemented by reports handed in at the Committee meetings, but they are not signed off or checked by the chairperson of the Committee, and thus while they give an overview of the discussions, they may not necessarily represent a completely accurate or full record of discussions. One of the shortcomings of a study of this nature is that it is conducted by someone outside the mechanisms of oversight that are being researched and so consequently relies on the views of people within the system and on reviews of what little written material there is available.

In respect of the National Council on Correctional Services, the meetings are confidential, as are any recommendations made to the Minister as well as the minutes of the meetings. In this case, the conclusions reached in the study are based almost exclusively on interviews with past and present members of the committee, as well as the limited research dealing with its mandate.

Finally, to review the workings of an oversight body over an almost ten-year period is a difficult task, and all of the issues handled cannot be dealt with fully. Instead, I have selected examples of these issues in the hope that they illustrate how the body functions and its likely impact.

[2] The CSPRI has commissioned separate reports on the functioning of the Judicial Inspectorate and the Independent Prison Visitors.

Portfolio Committee on Correctional Services

The powers of the Portfolio Committee as an oversight body

The ultimate political accountability over government lies with the electorate in terms of democratic theory. Section 42(3) of the Constitution provides that the National Assembly is elected by the people in order to ensure government under the Constitution. Its roles include passing legislation and scrutinizing and overseeing executive action.

The National Assembly of Parliament is obliged to provide mechanisms for ensuring accountability. It must do this in order to ensure that all executive organs of state in the national sphere of government[3] are accountable to it. It must also maintain oversight over the exercise of national executive authority,[4] including legislation and other organs of State[5] (S 55(2)). The National Assembly appoints different portfolio committees to shadow the work of different government departments. Each portfolio committee has between 15 and 40 full-time members, and several alternative members.

Of all the bodies having an oversight role over corrections, the Portfolio Committee has the most extensive. The Rules of the National Assembly set out the functions of Portfolio Committees. In terms of these, a Portfolio Committee (S201(1)):

- Must deal with bills and other matters falling within its portfolio
- Must maintain oversight of:
    - The exercise within its portfolio of national executive authority, and the implementation of legislation
    - any executive organ of State falling into its portfolio
    - any constitutional institution falling within is portfolio; and
    - any other body or institution in respect of which oversight was assigned to it.
- May monitor, investigate, enquire into and make recommendations concerning the executive organ or other body or institution, including the legislative programme, budget, rationalization, restructuring, functioning, organisation, structure, staff, and policies of such organ of state, or other institution.
- May consult and liaise with executive organ or constitutional institution; and
- Must perform any other function, tasks or duties assigned to it in terms of the Constitution, legislation or Parliamentary rules.

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[3] This would include cabinet and any body or institution under its control via the relevant minister, such as the Department of Correctional Services.

[4] National executive authority is vested in the President of the Republic who exercises authority by: implementing national legislation; developing and implementing national policy; coordinating the functions of state departments and administrations; preparing and initiating legislation; and, performing any other executive function provided by the Constitution or legislation (S 85 of the Constitution). The President may assign powers and functions to a Minister.

[5] An organ of state refers to any department of state or administration in the national, provincial or local sphere of government; or any other institution exercising power or performing a function in terms of the Constitution, or exercising a public power or performing a public function in terms of any legislation (S 239 of the Constitution).

In terms of S 201(2) bills and amendments that are referred to a portfolio committee must be considered by it in accordance with Chapter 11 of the Rules.

This framework establishes the oversight responsibility over the Minister of Correctional Services and over the Department of Correctional Services for which he is responsible.
Ministerial responsibility implies that the Minister must answer and give account for his Department and be subject to scrutiny by Parliament. The Minister must provide Parliament with full and regular reports concerning matters under their control. He has a duty to answer questions and explain actions and decisions taken. He has the duty to provide financial accounts demonstrating government expenditure. There is also the obligation to redress grievances by taking steps to remedy defects in policy or legislation (Corder, *et al*., 1999). The Portfolio Committee also has an oversight responsibility over the Judicial Inspectorate which must report to the Minster of Correctional Services. No Constitutional bodies report to the Committee.

In order to fulfil its function, the committee has the power to summon any person to appear before it, give evidence or produce documents. It may require any person or institutions to report to them, invite representations and submissions for the public, and receive petitions (S138).

The committee is accountable to Parliament and must report to the National Assembly annually on its activities, and on all decisions taken by it (S137(2)).

Although its powers are limited to investigation and inquiry, it can make recommendations to state and other bodies and it can be a persuasive and influential body representing the electorate. The committee has a very important role to play in law making, and through constructive and detailed engagement with legislation could affect the eventual form and outcome of legislation, through its representation in the national legislature. It also plays an important role in financial accountability.

This section of the report looks at the role that the Portfolio Committee on Correctional Services has played in terms of its mandate, as well as in transformation of correctional services, and in helping it to meet its objective of humane treatment of offenders.

Interpretation of mandate

The Portfolio Committee on Correctional Services has seldom publicly grappled with its understanding and interpretation of its mandate and how it fulfils its functions seems to be very dependent on the personal understanding and outlook of the Chairperson of the committee. This was well illustrated by the role that was taken by the first chairperson of the Committee, when the committee took a very vibrant view of its role and was somewhat controversial in its operations.

The constituents of the portfolio committee must necessarily follow the make up of the rest of government. Dominated by the African National Congress (ANC), the Government of National Unity was established in 1994. This meant that any party winning five percent of the national vote would be eligible for representation in the cabinet, as well as representation in parliament. The Correctional Services portfolio was given to the Inkatha Freedom Party (IFP) and filled by Dr Sipo Mzimela. While the ANC had its own broad agenda for transformation in South Africa, Dr Mzimela had his (see Giffard, 1997: 28).

The Portfolio Committee, on the other hand, was representative of the political parties, and was headed by an ANC member, Carl Niehaus. In the early years their political differences was one of the factors central to ongoing conflict between the Minster and the chair of the committee. This difference of outlook was reflected in the interactions between Niehaus and the Department of Correctional Services that consisted mainly of members appointed under the former regime.

As the first Chairperson, Carl Niehaus, actively sought to engage the Department of Correctional Services in debate, and to hold them accountable for their actions. He also played an important role in encouraging civil society input into the debate. The Committee saw its role as making a direct contribution towards the transformation of correctional services. Frustrated with the limitations of the Committee process some of the important policy work was done through the Transformation Forum on Correctional Services which brought civil society and the correctional services together, ostensibly with the single aim of transformation.

The Transformation Forum had the overly ambitious goal of influencing every aspect of reform in correctional services, and immediately ran into practical problems regarding the wide scope of the objectives. While Giffard argued that the Forum failed in its intention to influence transformation overall (Giffard, 1997:30), it did successfully engage with and make recommendations in some of the key policy debates of the time. Recommendations were made on the establishment of a lay visitor's scheme, an independent prisons inspectorate and a change management team. It also worked closely with members of the Department on issues of demilitarization, health (particularly HIV/Aids), and human rights training. These inputs had a strong influence on policy around these issues.

It was during the Transformation Forum that the Portfolio Committee had the most direct engagement with the DCS, as well as working closely with representatives of civil society. A study tour to Denmark, Holland and the United Kingdom in May 1995, attended by Committee members representing the major political parties, NGO representatives, and senior members of the Department of Correctional Services, served the important function of establishing trust between the various stakeholders concerned with corrections in South Africa. For the first time, the Department was investigating other systems of corrections, and debating the issues with their former adversaries of civil society. As Giffard concludes, "[T]he trip was a major step forward in the broad process of reconciliation in South Africa, and the more specific process of prison transformation. Both in terms of relations between those involved in the process, and the immense value of what was learned in all three countries."(Giffard, 1995 (b)).

Following ongoing conflict with the Minister, Carl Niehaus resigned 1997. Since then, the Committee has had five different chairpersons. Each appears to have had a different interpretation of the mandate. Committee members see their mandate broadly as one of oversight over executive plans, policies and budgets, and DCS implementation of them. They interpret this as a need to see how the policies are being applied on the ground, through monitoring, prisons visits, and through receiving regular reports from the Department. Some members however, felt the role is more activist in the sense that the Committee should guide the Department and the Ministry, while one member stated that it has a role in driving transformation of the correctional services. One member indicated that the committee should actively be taking issues and debating them in Parliament, representing the public and holding the Department accountable for its actions. The following sections look at how the Committee functions in this role.

Legislative oversight

One of the most important roles for the committee is its oversight role in law making. It must scrutinize bills and amendments and report to Parliament on its decisions. During the last ten years there have been several legislative amendments to the Correctional Services Act 8 of 1959, as well as the drafting of a completely new Act 111 of 1998, and subsequent amendments and regulations. The following is an outline of how the Portfolio Committee dealt with some of these issues.

The most important of these was the development of the new Act for correctional services which aimed to bring the Department in line with Constitutional and international standards and norms for corrections. The Department of Correctional Services appointed external consultants to assist with the drafting and called for comments on the Act. The NGO Human Rights Committee also facilitated a process of civil society consultation and held a workshop in 1997.[6] The Portfolio Committee was also involved in this process and held public hearings around the draft Bill. They received a number of briefings from the Department on the Bill and were regularly updated on its progress. The comments elicited from civil society were compiled into a document and discussed and suggestions made for amendments.[7] Several of the recommendations made during this period were incorporated into the final legislation.[8] This legislation was crucial to setting the legal framework for correctional services in the new democracy. It is an expansive and detailed expression of the law that sets out the protections of fundamental human rights, as well as stipulating the department's obligations for development of prisoners.

The legislation was assented to on 27 November 1998 and certain sections of the Act came into effect in February 1999, however, substantial sections of the Act were not made applicable as the relevant regulations had not yet been drafted or amended. To date, five years later, only the sections applicable to the National Council on Correctional Services, the Judicial Inspectorate and Prison visitors, and joint venture prisons are in force. From time to time, about once a year, the committee did enquire into the delay in implementing the Act, and it was advised that firstly the new regulations had to be drafted.

The second factor was that the new Act provided for the establishment of parole boards comprised of representatives from civil society, Justice and Safety and Security.[9] The committee received reports on the progress being made with the parole legislation in 2000, and indicated that it would look at reasons for the delay, as part of its oversight role.[10] The committee again discussed the issue a few months later and again the chairperson indicated that the proposals should be discussed in depth.[11] This matter was not discussed again

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[6] Personal recollection.

[7] The Portfolio Committee spent 7 days considering the Correctional Services Bill in 1998, including one day of Public Hearings. In comparison, the Justice and Constitutional Development Portfolio Committee spent 20 days in 2003 considering the Child Justice Bill of which 4 days were by way of public hearings (PMG minutes). Both pieces of legislation sought to introduce a new framework for responding to the issues they dealt with.

[8] See the Parliamentary Monitoring Group Minutes, 25 February 1998; 27 July; 5 August; 12, 19 and 28 August, and 2 September 1998 www.pmg.org.za/docs/1998.

[9] Following recommendations from the National Advisory Council new provisions regarding parole were drawn up and passed into legislation in 1997 (Parole and Supervision Amendment Act 87 of 1997). This sought to create an expanded parole board consisting of a wide range of stakeholders including the police, officials from the Department of Justice, and members of the Community. It also sought to regulate when a prisoner was eligible for parole. The Act was never implemented, and was incorporated and superceded by Act 111 of 1998.

[10] See the minutes of 24 April 2000, www.pmg.org.za/doc.2002/viewminutes.php?id=1518.

[11] See the PMG minutes of 10 October 2000, www.pmg.org.za/docs/2000/viewminute.php?id=10)

until April 2002[12] when the committee again expressed concern over the delay in implementing legislation affecting parole. The DCS assured them that they were proceeding as fast as they could, and outlined steps taken to speed up the legislation. They indicated that the Boards should be in place by December of that year. This issue has still not been finalised. The finalisation of the regulations to the Act was also delayed, as they were only finally discussed and adopted by the committee in August 2003 after they had been presented for comment in November the previous year.[13] Only the ANC made written comments. The Portfolio Committee was requested to make recommendations to the Minister before he could sign the regulations.

The failure of the committee to ensure a speedier implementation of the Act, and its often distanced engagement with it, is a problem in terms of its oversight role. According to one committee member Mr Dennis Bloem, MP for the ANC, "There has been a lack of oversight from society and the Portfolio Committee. We have neglected the Act. This is a very serious concern. We have raised it with the Portfolio Committee and we are going to look at each and every section in the Act that is not implemented. We have raised it with the national Commissioner and even with the Minister to say we are going to get serious about all the sections not yet implemented."[14] He indicated that the pressure needs to start with the committee, but that it should be supported in its efforts by civil society. Mr Fihla, also of the ANC, added that the slowness in terms of implementation impacted on the way that inmates are treated. In particular, confusion about the application of the parole laws often meant that incorrect decisions were made at the local level.[15]

Although the Correctional Services Act is not yet fully in place, amendments were made to it in 2001. The amendments dealt with a range of minor issues where the language of the Act was vague or unclear. It made changes to the interval between meal times, details regarding the labour of children, and disciplinary issues. It also amended the parole provisions which were not yet in force. Another issue raised was proposed amendments to the mandate of the Judicial Inspectorate. The Inspectorate was of the view that provisions stipulating that it should investigate corruption in the correctional services be removed. There was some resistance from the Committee and concern that there should be an independent body to investigate corruption. However, despite this, the mandate was removed from the inspectorate in the Amendment Act (S85 amended by S31 of Act 32 of 2001).

An issue which was discussed more fully by the committee was an addition to Section 81 of the Act which allows the Minister to release prisoners if the prison population is reaching such proportions that the safety, human dignity and physical safety are being affected materially (S 81 of the principal Act amended by S 30 of Act 32 of 2001). The draft of the section also allowed for the release of unsentenced prisoners by the head of prison (S 81(4)). Here the Portfolio Committee on Correctional Services was assisted in its role by the Justice Portfolio Committee that took constitutional advice on this issue and recommended to the Correctional Services Committee that this section be scrapped as it constituted judicial interference of decisions regarding bail. The Correctional Services committee accepted the recommendation.[16] However the final amendment was made with the effect that the Minster of Correctional Services could release prisoners with the concurrence of the Minister of Justice. Apart from this, there was very little discussion in the Committee about the proposed amendments. They had been brought to the committee in draft form a year previously, although the minutes do not reflect detailed discussion on the issue. Again, the delays in finalizing the amendments are of some concern.

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[12] PMG 30 April 2002.

[13] See the PMG minutes of 12 August 2003 and 1 April 2003 where the Commissioner expressed his concern that although the draft regulations were given to the committee in November, they had still not received any comment.

[14] Interview with Mr Dennis Bloem, 20 July 2003.

[15] Interview with Mr Ben Fihla on 10 September 2003.

[16] PMG Minutes, 10 October 2001.

One committee chairperson, Mr Carl Niehaus, extended the role of the committee from one of oversight to one of law making. He initiated a controversial legislative move in relation to the detention of young children. In 1994, the Minster of Correctional Services proposed an amendment to S29 of the Correctional Services Act[17] in response to the concern for the numbers of unconvicted young people being held in prisons and police cells. The effect of the amendment was that no person under the age of 18 years could be detained in a prison, police cell or lock-up. This resulted in practical problems as there were insufficient facilities outside of the criminal justice system to house young offenders, and they were not equipped to handle those charged with serious offences. A crisis emerged that was exacerbated by media reports of children 'running wild and attacking staff in places of safety' (SA Law Commission, 1999:15). Other reports cite children escaping from custody.[18] In response to the public outcry, Carl Niehaus introduced a Private Member's Bill in 1996 to amend the legislation[19] that would give the courts a limited discretion to order the detention of unconvicted young persons accused of serious crimes. The Bill was opposed by the Correctional Services Minister and the IFP who warned that the question of these young people's lives would be on the consciences of parliament.[20] The Bill, supported by the ANC was eventually passed. The amendment was meant to be of a temporary nature, and to be reviewed after one year, or to allow for Parliament to extend the legislation for a further year. Parliament did extend its operation, but the legislation did not lapse after the specified time period as the infrastructure had not been put in place and its provisions are still applicable.

Financial oversight

The inspection of financial returns and determination of future budgets is one of the most important ways that Parliament can ensure that public funds are applied according to policy and that public powers are not misused. This involves a scrutiny at the basic level to ensure firstly that funds are not misappropriated, and secondly, that funds and resources are being spent efficiently (Maguire, *et al*., 1975: 2). The primary way that the committee does this is at the time of the annual budget vote when the Minister of Correctional Services presents his report for the year and the DCS presents its budget allocation for the next period before presenting it to parliament which must approve it. This presents the opportunity for the committee to measure the objectives of the previous period against the reported success and expenditure on the endeavour, as well as to look at future spending and priorities. The committee may also receive interim reports on policy development or implementation and expenditure reports.

In one meeting to discuss the Minister's budget speech, the committee engaged in a rare attempt to grapple with the purpose of their discussions and their mandate. The chairperson at the time, Ms Capa, advised the committee members to link the Minister's speech with what the Department promised to deliver in terms of time frames, and by whom it was meant to be delivered (PMG, 23/05/2000). Another member added

> It is important that members identify critical issues within the departmental strategy that are not being addressed. He said that there are many critical areas, for example the overcrowding in prisons, capacity of prisons, delays in Electronic Monitoring System. He said that until the committee has learnt to identify and pursue these critical areas, it will not be of any use to talk about them in an *ad hoc* basis and thus leave them unfinished. He suggested a quarterly report by the department on the progress of the identified crucial issues… in this way the committee will be exercising its oversight responsibility." (Mr Durand (NP) PMG, 23/05/2000)

[17] Correctional Services Amendment Act 17 of 1994, became operational on 8 May 1995.
[18] "Niehaus does U-turn on Juveniles in prison" *Citizen* 30/01/1996.
[19] Act 14 of 1996.
[20] "Minister fails to block Bill giving court power to hold children in jail", *Star* 28 March 1996.

At this meeting, the committee resolved to divide into special interest subcommittees in order to examine the policies and performance in specially identified areas. Despite support for this proposal, the sub-committee system did not come into effect.

This approach of identifying certain key areas of non-delivery may be one way of tackling issues in more depth, but it may lead to neglect of other areas, or of the overall budget. For instance in 2000 the Committee discussed the delay of electronic monitoring which was approved in principle in 1997, and also a delay in implementing the private prisons system (PMG, 04/04/2000). However, it completely neglected to look at other aspects of the budget, including various percentage increases and decreases for certain items.

Generally the ability to hold a body accountable depends on the information being made available and this is especially so in relation to financial accountability. If financial information is to be used for purposes beyond merely checking overspending, it must be presented in such a manner, or coupled with additional information about the objectives of government spending, so that the Committee can make an assessment of whether that spending is happening effectively and in accordance with stated objectives (Corder, *et al*., 1999). However the budget is often presented in very broad terms with an outline of allocation per programme area. Sometimes further explanations are provided, or colourful but confusing diagrams are presented, or the Committee is given insufficient information for make a judgement on the report. Alternatively, Corder's research on Parliamentary oversight revealed that often the budget information provided to committees is very lengthy but that crucial information may be missing or obscured. Another common concern among the committees was that often the financial figures were too general to allow for an understanding of what the money was being spent on (Corder, *et al*., 1999).

The Committee may have had additional difficulty in scrutinizing budgets as it had no financial experts and had not received training to deal with financial matters and budgets. Without a sound financial understanding or background, the committee relies on the Department to explain what the budget means and to interpret it for them. Certain aspects of the budget are also highlighted by the Department, but in so doing, other aspects may become hidden or neglected. Consequently, the committee often has fairly superficial engagement with the budget, and may only ask questions around long-standing concerns, such as electronic monitoring.

A good example of where the committee seemed to interrogate the budget in depth was in 1999. The Department gave an initial briefing on the budget, and the committee presented it with a detailed list of questions asking for explanations of line items and related budgets. They also asked questions to account for various increases and decreases in budget line items. During the two sessions that it took to deal with the budget, many aspects were fully dealt with (PMG, 17/02/1999, 24.02/1999). The Committee was also concerned that the Department were budgeting for 10 000 less prisoners in the following year and were concerned that the expected reduction of prisoners would not occur and that the Department would thus be forced to request additional funds. In hindsight, the Department's response was naïve and incorrect. It indicated that the prisoner population was expected to decrease due to the introduction of electronic monitoring, the amnesty given during 1998, the effectiveness of the implementation of the national crime prevention strategy, and improvements in the justice system accounting for shorter delays in awaiting trial. In fact, the implementation of electronic monitoring was delayed, and the delays in prosecution of offenders increased. Not only did the numbers not reduce, but the prison population continued to increase by 10 000 inmates that year (DCS Annual Report: 2001/2002). Despite their misgivings about the budget, it was adopted formally by the committee. Consequently, the following year the DCS indicated there was a financed daily average prisoner population of 150 000, whereas the current population was 157 000, necessitating a request for additional funds. However, the problem of the previous poor projection was not highlighted during the discussion (PMG, 07/03/2000).

On the whole, budgetary oversight may improve with the implementation of the Public Management Finance Act, although it should be recognised that the Committee has almost no ability to influence budgetary decisions as by the time they are presented to Parliament they are complete and cannot be altered.

Privatisation

One issue that indicates the difficulty in maintaining oversight over budgets and policy is in relation to the APOPS (Asset Procurement and Operation Partnership System) contracts. Privatisation of state assets was part of government programme from 1996, and was introduced in the correctional sphere in 1997. The programme was introduced with some haste by the former Minister, Dr Sipo Mzimela, and the process was rushed through Parliament. Giffard states that, to the annoyance of the Portfolio Committee, tenders for the first five prisons were short listed months before the legislation allowing government to award contracts was passed (Giffard in Berg, 2001). The speed with which private prisons were introduced undermined efforts at political accountability and accurate costing, although it rapidly became clear that they cost more than anticipated.[21]

A review of the PMG minutes reflects that there was almost a total absence of debate and interest within the Portfolio Committee in the privatisation issue despite it representing a radically new direction in policy.[22] The costs of privatsation were not discussed, although there were pointers early on that the costs may be more than expected. In 2000 the Department reported that the costs of the two APOPS prisons were provided for by means of 'freezing' financed posts in the 2001/2002 and 2002/2003 financial years, although the freezing of the posts could be amended in the next budgetary process. The committee's concerns about the posts were not answered by the Department (PMG, 07/03/2000). Private prisons were not discussed again, and it was only in the February 2002 budget briefing that the committee was given proper insight into the actual cost of private prisons. The Department reported that an overall increase in the budget from the 2001/2002 to 2002/2003 was not enough as the increase would mainly go towards the cost of building the new APOPS prisons, and other projects such as rehabilitation would receive budget cuts. One member indicated that the committee had been misled on APOPS (PMG, 26/02/2002). The true cost emerged when a task team consisting of representatives of the Department and the State treasury presented a report to Parliament on the difficulties associated with the finances of private prisons. It appears that the contracts were awarded without proper costings being done. The budget for private prisons for 2003/2004 is R492 million, or six percent of the overall budget of the Department (Sloth-Nielson, 2003: 25).

Mr Fihla (ANC MP) explains that the committee was at first not aware of the costs of privatisation, perhaps because it was their first experience with such things. He said, "Perhaps we were convinced by the then specialists who came and explained to us, and how it works. And when we looked at the prisons themselves, and what was happening, we were very impressed by the construction of prisons. We could see the benefit of the prisons". The Committee was persuaded by the Department that privatisation was a good thing and in the atmosphere of expectation, they failed to examine the issue of costs. The issue points to a wider problem of failing to engage and research new policy or to invite comment from external bodies. One former opposition member of the Committee recalled that during his term in 2000 he tried to get the committee to invite Group 4 (one of the private prison consortiums) to present to them, but there appeared to be a lack of interest or willingness to hear from them. It was only once the cost of privatisation was revealed to the Committee and they

[21] For a discussion on the implementation of private prisons and a discussion of the cost implications, see Sloth-Nielson, J (2003: 25).

[22] Two private prison contracts were signed for two maximum security prisons. One in Louis Trichardt, run by SA Custodial Services, opened in February 2002, and Mangaung prison in Bloemfontein, run by Group 4, opened in 1 July 2001 (Berg, 2001:327)

apparently realised the importance of maintaining oversight over the private prisons, that the private prisons representatives were invited to address the Committee and are now frequent guests at Committee meetings.

Oversight over the Department of Correctional Services as an executive organ of State

The Portfolio Committee has an oversight role over the executive organ, the Department of Correctional Services. In addition to its role in terms of the budget and legislation it may monitor, investigate, enquire into and make recommendations on any matter within the mandate of the Department including rationalisation, restructuring, functioning, organisation, structure, staff, and policies of such organ of state, or other institution.

These provisions empower the Committee with the important ability to ensure that the Department is implementing on the broader policies set by government, the Minsiter and the DCS. One difficulty in monitoring policy against implementation is that the policies for which the DCS is called to account may be vague and complex in character, and capable of many interpretations. There may be disagreement about their overall purpose, and about whether the objectives have been met. In addition, the changing political climate and the activities of pressure groups may alter perceptions and create conflicting views of what the policy is meant to be achieving.

Another issue to remember is that the committee decisions are influenced by political concerns.

> 'Penal policy is, of course, ultimately in the hands of ministers and members of parliament, whose interests usually lie not with the detail of prison regimes but with the broader questions of public security. At this level [...] the issue of accountability is largely overshadowed by party politics.' (Vagg, 1994: 59)

The Committee, dominated as it is by one political party, may decide to interrogate an issue or not, depending on its official party policy. One member from a minority party suggested that because Correctional Services cabinet position was given to an opposition party member there is sometimes a desire not to 'rock the political boat' and challenge some key penal policies.

The Correctional Services portfolio is often not seen as a very important one, and its concerns and policies are not always taken as seriously as other are portfolios considered to be more central to government's key concerns, such as the Justice or Safety and Security Ministry's. Often the concerns for law and order, and the electorate's call for more punitive handling of offenders, may have greater influence over government decisions than the call for humane treatment of prisoners. Possibly the greatest impact of this has been on the growth in prisoner numbers that has detrimentally affected the DCS's ability to deliver in terms of Constitutional provisions for prisoners. Although some sectors of civil society support a limitation on the use of imprisonment, this has been tempered by the growing public concern that crime is growing at levels out of control, anger that suspects are being released into the community on bail, and that prisoners are released on parole or amnesty without completing their full sentences. Public debate has increasingly shifted to concerns with retribution, deterrence and incapacitation.

The response from the Justice Department was a punitive one that was restrictive in granting bail to high risk offenders, and imposing longer and harsher sentences for serious offenders.[23] The result of the new bail and

[23] The provisions regarding bail were amended in 1995 and again in 1997, which added grounds on which bail could be refused. In 1997 legislation was introduced that intervened directly in the sentencing arena by fixing mandatory minimum sentences for

sentencing legislation is that the numbers of awaiting trial and sentenced prisoners has increased dramatically. On 31 December 1994 the total prisoner population was 113 856. By June 2003 this figure had reached 185 748 while the official prison capacity had hardly increased over this period to 110 241 (Skosana, 2003).

Very soon after transition, the Department of Correctional Services alerted the Portfolio Committee on Correctional Services to the problem of overcrowding. Following a visit to Pollsmoor prison in 1995, the views of the Chairperson of the Committee were reported:

> '…[Mr] Niehaus said the overcrowding was so extreme that prisoners could take the government to the constitutional court and would probably win. Niehaus described conditions in the prisons as "entirely unsatisfactory", with cells occupied by double the number of prisoners they were built for. …Although the safety of society had to be considered, the best solution was to grant amnesty to certain categories of criminals whose sentences would be converted to correctional supervision' (in Pete, 1998:55)

Overcrowding has had a direct impact on conditions in custody and on the Department's ability to ensure respect for human dignity, and avoidance of cruel, inhuman or degrading treatment in prison. Physical conditions in prison have worsened over time. Committee member, Mr Bloem states:

> There are very bad conditions in prison. The reason I am saying this is because of overcrowding. You can't hide. Conditions have not improved since 1994. People are not treated as human beings. You know a cell that was supposed to house 20 people, 50 people are now living there. So you can't say that treatment is good. But on the other hand the attitude of the correctional officials is highly changed. They know they are dealing with human beings.

The Department then proposed to reduce the prison population by increasing the use of community based sentencing for minor offenders, and by the introduction of electronic monitoring for people released on parole. T

he Committee has regularly been briefed on decisions around early releases, although its consent is not required before a decision to release prisoners is made. In October 2000, awaiting trial prisoners who had been granted bail of less than R1000 were released, and the dates for parole were advanced by nine months. The decision to release the prisoners was made by Cabinet, and the Committee raised some concerns with how the process had been implemented (PMG: 3/10/2000). A year later the Inspecting Judge pleaded for a longer term solution to the problem of awaiting trial prisoners, and in October 2001 the amendment was made allowing the Minister to release awaiting trial prisoners if conditions in prison became intolerable.

Several times the Committee pointed to the problem with overcrowding being caused by the departments of Justice and Safety and Security, and they talked of the need for these departments to make greater use of alternative sentencing. However, it was only in 2003 that the committee attempted to get the other Portfolio Committees in the criminal justice cluster together to understand the situation in prisons. The Portfolio Committees on Justice and Constitutional Development and Safety and Security teamed up for joint visits in early 2003 to prisons in KwaZulu Natal, Western Cape and Gauteng. It is not yet clear how this will impact on prison numbers, but so far, the Committee has had little, if any impact, on overcrowding.

Aside from the issue of overcrowding, the Portfolio Committee's amendatory accountability responsibility has emerged in relation to how the prison system is administered. That the DCS had a problem in this area became painfully apparent in the exposure of former Commissioner Khulekani Sitole for corruption and maladministration

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certain serious categories of crime (Criminal Law Amendment Act (Act 105 of 1997)). The Act was unanimously passed into law by Parliament.

in 1999. The Committee at one meeting aggressively questioned Sitole directly about allegations of corruption. The chairperson, Mr Mokoena, summed up the meeting by saying, 'It strikes me that you have been arrogant and careless in the running of your department and your style of management. Do not think that you can leave this meeting thinking that everything is fine and that you are out of the woods. But this is not a kangaroo court, and thank you for coming' (PMG: 27/10/1999). No resolution or recommendation of the Committee was recorded in the minutes, but shortly thereafter the Commissioner resigned, which the Committee accepted although it would not discuss the details of it (PMG: 10/11/1999). It is not clear to what extent the Committee's probing questions influenced the response to the issue.

Following the resignation, the Minister of Public Service and Administration, together with the Minister of Correctional Services briefed the Department of Public Services and Administration (DPSA) to conduct an audit of financial and management practices of the Department. The report outlined shortcomings relating to planning and budgeting processes, organisational design, human resource management, and prison management and made recommendations for improvement in these and other areas. The report also indicated serious difficulties in the implementation of strategic plans and presented an overview of the state of prisons and overcrowding (DPSA, 2000). The report was presented to the Portfolio Committee which expressed concern about the issues raised. Members indicated that it was Parliament's responsibility to do something about the report, and emphasized the oversight role of the Portfolio Committee in this regard. The Committee resolved to establish a subcommittee to 'sift through' the issues and decide how to take them forward. They also indicated that while some of these problems could be attributed to deficits in Sitole's own management, the issues could be more deeply rooted in the Department itself (PMG, 14/04/2000, 19/04/2000). However, this is the last time that the report is mentioned in the minutes and it seems that these issues were not further discussed by the Committee. Furthermore, the Committee did not link subsequent reports by the DCS with the DPSA report, and thus failed to maintain oversight of how the issues raised in the report, particularly the financial concerns, were being dealt with in the Department.

Impact on reform and transformation in prisons

It is almost impossible to evaluate the impact of the Portfolio Committee on reform and transformation of the Correctional Services, as there are so many other factors at play in the process, and other bodies and interest groups advocating for changes to the system. There were periods when the Department was more active in policy-making than in others. However, the impact of policy is dependent on the Department's ability to implement it, and this has been constrained over the last ten years.[24] Despite this, committee members have different views as to what extent they affected this process. Those from the ruling party tended to see themselves as having played a very important part in transformation, and having had a direct impact on the way that prisoners are treated and conditions in prisons. They do acknowledge that due to the extent of overcrowding the conditions are poor, but indicate that the attitudes and behaviour of staff, towards inmates, as well as the recognition of human rights, makes up for this deficit.

One member pointed out that there have been huge changes to the law since 1994 and this resulted in the recognition that inmates have human rights and should be treated with respect. He said that the treatment from warders had also improved, and there was now recognition of rehabilitation. However, the implementation of this was being hampered by overcrowding. He also thought that the committee was only 50% effective in its role as a result of not all the members being committed. He reported that members don't visit prisons regularly, but rely on what they read in the newspaper.

[24] See Sloth-Nielson (2003) for a general overview of policy development and implementation over the last decade.

Some members from other parties were less optimistic, with one suggesting that the committee had no impact on reform. He thought that the Department did whatever it wished to do in prisons.

The Committee has received regular briefings from the Department on its various policies and practices and questioned DCS representatives following oral presentations. But its response is mainly reactive and mostly concerned with current issues that arise through the media or that are brought before the Committee. While this may be an indication that the Committee has been satisfied with the performance of the Department, it may also indicate that the Committee has seldom taken a pro-active role that allows it to influence the direction of policy. It has also not effectively made use of its authority to make recommendations to shape policy.

Visits and study tours

The Committee also receives complaints from prisoners and their families, who contact the parliamentarians as their constituent representatives. This may be infrequent and is also dependent on the parliamentarian's visibility in his or her own constituency. Another mechanism for receiving information on the state of prisons is through undertaking regular visits to prisons and reporting on conditions or taking up complaints of individual prisoners. Members of the Portfolio Committee and NCOP have the right to visit prisons at any time, and to have access to any part of the prison and any documentary record (S 99(3) Act 111 of 1998). One committee member claimed to have visited each of the 244 prisons in the country; however it was apparent that not all members carried out regular individual prison visits.

Structured visits to prison assist the committee members to understand the conditions in prisons and problems in implementing policy. Sometimes, for example during 1999, the chairperson set in place a series of visits to prisons following escapes from Pietermaritzburg, Rooigrond and Leeuhof prisons and Motetema Police Stations, and the reports were submitted to the Committee (PMG 15/10/99). The reports highlighted general conditions as well as some security concerns, and the committee was supposed to revisit the prisons, but the reports of these do not appear in the minutes. Reports of visits are given to the Minister as well as to the Department. On another occasion the committee visited the Ebongweni prison in Kokstad after it has been informed that it was still uncompleted and empty as a result of no laundry and kitchen facilities having being incorporated into the design. The committee was concerned that the prison space was being wasted while terrible conditions of overcrowding existed elsewhere. However, this is an example of where the Committee was not aware of the situation until they were informed of it by the Department (PMG, 3/10/2000), but it also relates to the broader problem that the Ebongweni prison was apparently not considered by the Committee. There is a general lack of follow up on issues following prison visits.

Study tours to other countries are an important way for the committee to become exposed to situations and conditions in different countries, as well as to new concepts and ideas concerning treatment and management of prisoners. If there is a budget available, a study tour may be approved by the Chief Whip. The Portfolio Committee has attended several overseas tours to look at general prison practice, or more specifically to observe policies such as unit management or restorative justice. One member felt that the tours assisted them to arrive at suggestions for reforms to prisons. It enabled them to 'copy' from other countries' examples.

However, how the Committee makes use of the results of tour is not always apparent. No written reports were publicly accessible, and the visits were seldom referred to during Committee meetings. Since the aim of the tours was general awareness and capacity building, the learnings did not appear to be directly incorporated into the way that the committee operates or included in its suggestions for new penal policy. Most of the tours have

been to developed countries, and one member suggested that tours should be planned to more developing countries, and specifically to countries within Africa.

Interaction with civil society

One constraint to effective oversight arises when the oversight body relies only on information presented by the body it oversees. To ensure an overall perspective is obtained it is useful to garner information from different sources. One potential source of information is to invite members of civil society or different interest groups to present to the committee. For the first few years the committee actively engaged in dialogue with civil society by inviting presentations, holding workshops, and through its participation in the Transformation Forum on Correctional Services. However, apparently depending on the approach of the chairperson, there have only been a handful of occasions for civil society presentations since then. Public hearings were held around the Correctional Services Act in 1998, and around its proposed amendments in 2001. A public workshop was held on Restorative Justice in 2001. A medical doctor from Pollsmoor prison was on one occasion invited to brief the Committee on conditions in prisons and how this inhibited proper treatment. Three NGOs were invited to make presentations between 1998 and 2001, as were POPCRU (Police and Prison's Civil Rights Union), and a representative of SA Custodial Services, that won one of the APOPS contracts, was only invited late in 2001. It sometimes appeared that civil society representatives were not made to feel welcome at these meetings, and were sometimes subject to aggressive questioning. While members acknowledged the importance of engaging in these issues with civil society they agreed that there had been limited attempts to bring them to the committee. They also mentioned that during 2003 public hearings had been scheduled but were cancelled as a result of poor coordination by the committee clerk.

While there seems to be little attempt to network with civil society and to find out what work is being done, it should also be acknowledged that there has also been limited attempt from civil society to put itself on the agenda and to ensure its concerns are raised with the Committee.

Constraints to maintaining oversight

The Committee primarily conducts its oversight function by receiving regular reports from the Department and the Minister of Correctional Services. During some periods of the committee's history, they received reports from the Department at each meeting. The reports are presented orally, and often accompanied by written presentations as well as PowerPoint presentations. The Committee also received regular reports from the Judicial Inspectorate since its establishment in 1998. According to comparative research conducted by Corder, Jagwanth and Soltau on parliamentary committees the majority of committees (35% in 1997 and 41% 1998), of which the Correctional Services Committee was one, received briefings on policy and on current affairs indicating an increasing oversight capability (Corder, *et al*., 1999).

Corder, *et al*. point out that one of the constraints facing Committee's in their accountability role is that there are no official procedures or requirements for committees to respond to reports that are submitted to them. If the reports are not lodged at an official location, the Committee can often not transmit their decisions effectively, and there is no effective way of ensuring that decisions are addressed in an appropriate manner. This also leads to a problem identified by the Correctional Services Committee members who said that decisions are not always followed up by the Committee, indicating the lack of an effective tracking system. A review of the PMG minutes reveals that the Portfolio Committee often did not follow up on its decisions, and often failed to follow up on reports from the DCS, or require them to come back to the Committee with further information on a topic.

At times the parliamentary researchers or the political party researchers may also scrutinize the documents presented by the DCS, do supplementary research and provide a summary or recommendations for committee members. However researchers often do not have the time or capacity to do comprehensive research. The Parliamentary Research Unit employs about 20 researchers with different specialties. They receive requests to do research from committee members, chairpersons or they can take on pro-active research themselves. Each researcher may serve a number of committees. Because there is not much time they usually are unable to do primary research and rely on secondary sources, such as research papers by NGO's or academics. They may also write reports on behalf of the committee, for example on study tours. The political parties, like the ANC, may also have their own researchers; however, these were often shared by different committees. However, this did not always enable members to prepare for the meetings. During the period under review, the chairperson often decided what reports were important and which to make available to members, and some were not circulated amongst all the members. Not all members read the documents which are prepared for them.

Most of the committee members sit on additional committees as well as participating in their other political duties and do not have much time to dedicate to thorough preparation for committee meetings. One member pointed to the problem of shortage of staff that can assist members with their day-to-day duties. In addition, some aspects of the material presented to them by the DCS involve a degree of technical expertise to fully scrutinize and understand the information. They are not empowered to hire external consultants to advise them, and there is not always the opportunity to consult with financial experts in the party. Although at times specific issues were referred to a special investigation or enquiry (such as the National Treasury review of public private partnership contracts in March 2003)

The Committee's engagement with policy depends on their interest in the issues, and their capacity to debate the subtleties of the issues being put before them. However, in order to properly engage with material presented to them, it is necessary for members to take the time to read documents given to them, or to seek out additional documents. But, according to a member of the minority party, not all committee members do read the documents beforehand, and this stifles debate. One member commented:

> 'And the people who sit on the committee really were not interested themselves, they went to committee meetings, they sat there, they listened, and then off they go. They didn't do anything with the information. You get the hard working MP and those that lazed about. I got the impression that most of those guys lazed about. They didn't really want to get involved in the issues.'

One member doubted whether MP's were even reading the newspapers to ascertain current events related to correctional services.

The committee is best placed to be able to ask pertinent and astute questions when it is well prepared and is aware of the issues presented to it. By the same token, some awareness of pertinent issues is necessary to detect if crucial information was not being presented. However, the Committee rarely solicits information from sources outside of parliament to inform its position or understanding, unless it is presented in the course of a Committee meeting. The depth of discussion and debate may also be influenced by the perception and guidance of the chairperson. Sometimes, the members seem to arrive at meetings unprepared on the topic at hand, and wishing only to discuss a matter of their personal interest. One former member said,

> 'I sometimes cringe when I remember the committee. I would also ask my stupid questions, but when a question comes [totally out of the blue]. It has no bearing on the issue discussed. None at all. They will ask a question about something that is bothering them, and it is not even on the agenda. It is not even an issue.'

Regularity of meetings

Of all the regulatory bodies dealt with in this paper, the Portfolio Committee perhaps has the most ongoing and extensive engagement with correctional services. It is briefed on all new policies, receives regular updates on implementation, and receives annual briefings on the budgets. However, the Committee is constrained by the amount of time and capacity that it has available to deal with these issues. The committee meets once a week during the Parliamentary term for approximately three hours. However, due to breaks in the schedule, the committee met on average 13.5 times a year in the period 1998 to 2001.[25] This is a possible reason why there is sometimes inadequate debate and interrogation of issues as well as inadequate follow up of issues previously discussed.

The ANC met each Monday before the Committee meetings to discuss issues on the agenda and to form positions. The other smaller parties, who often only had one member plus one alternative, may have had *ad hoc* meetings to discuss issues. Limited time was therefore available in meetings to fully discuss all the issues raised.

The structuring of the agenda for the meeting also determined what would be discussed and who would present at the meeting. The agenda was constructed by the chairperson, and often reflected their own personal interests. However, some of the chairpersons were more consultative and encouraged other committee members to suggest items for the agenda.

Recommendations, decisions, and following up

The majority of committee meetings consisted of briefings by the Department or another body. It was seldom that the committee made recommendations to the Department or accounting body, and even less often made a decision. Because the agenda was constructed in a thematic way, where the function was to update the members, often no decisions were required by the context. Many questions were asked during meetings, and issues discussed with varying degrees of depth. But because recommendations were seldom made, there was often no direct impact on the policy.

There were often long delays before issues discussed at the meetings were followed up, and in some instances it might have been a year before an issue was mentioned again. This could lead to important issues falling through the cracks. At times, the committee agreed to invite someone to present to them, or to ask for information on a particular issue, but often it did not happen. There didn't seem to be a system for tracking the decisions that were taken or queries made.

Relationship between the Portfolio Committee and the Department of Correctional Services

One challenge for an oversight body is to maintain the difficult balance between a good cooperative relationship with the body it is overseeing, and on the other hand to avoid becoming co-opted into the thinking of the body and losing its sense of independence. Initially, the challenge was for the committee to develop a relationship with

[25] In comparison, the other Portfolio Committees in the security cluster met more frequently. For instance, during 2001, the Portfolio Committee on Justice and Constitutional Development met 64 times; Safety and Security met 32 times; and the Correctional Services met 16 times.

the Department. Many of the first members of the Committee were former political prisoners, while the Department was, until around 1996, still run by members of the former apartheid regime. The first years were a time of building trust and of persuading the Department of the importance and need for open engagement with civil society as well as civilian oversight over their affairs. It was also a time of challenging old ways of thinking and acting. This period was often fraught and conflictual. However, the relationship generally improved over time and better cooperation with the Department was developed. Between 1994 and 2001 there were almost as many commissioners and acting commissioners as there were chairperson's of the Portfolio Committee, and each change of leadership required a new process of relationship building and a new style of interaction. The increasing extent to which the Commissioner attended committee meetings may be an indication of the health of the relationship. The current Commissioner Mti often addresses the Committee or sends very senior members to represent the Department. The Committee also apparently developed a cordial and good relationship with the current Minister of Correctional Services.

Conclusion

While this section has not dealt with all issues handled by the Committee, it is intended to provide an overview of the type and extent of its engagement. Although the Committee has dealt with most of the major policy and administrative issues during this period, it has often done so in response to them emerging in the media or other forums. They have also seldom taken key decisions to help resolve contentious areas, nor have they driven key policy initiatives in corrections. Their role has been more to question initiatives that are underway or to query why planned policy has been changed, or has not been implemented. This has often been undermined by a failure to follow up on queries. Their engagement has not been consistent or persistent in most areas.

Their ability to take up issues was constrained mainly by limitations of capacity and ability to interrogate issues fully. For the future it is important that the Committee defines its role more clearly so that it structures its interactions with the DCS and other stakeholders more productively. Some tentative recommendations are suggested for how the Committee could improve its functioning and impact.

Recommendations

1. There are certain technical aspects of the committee's work, such as scrutiny of financial budgets and expenditure. Committee members are not always equipped with the necessary skills to understand and engage with these matters, and capacity building may be important to enhance these skills. The financial information also needs to be presented in a more accessible way, and now, must be presented in line with provisions of the Public Finance Management Act.

2. In order to make accountability more effective, it is necessary to set objectives and standards against which the Department and Ministry of Correctional Services can be measured. The Public Finance Management Act provides procedures for financial accountability, but also provides that the accounting office must submit measurable objectives for each main division in the vote. This could help to provide for some measurement of performance. However, the Committees could also encourage the Department to establish and report on additional objectives. The Committee also need to engage with the correctional issues in a proactive way, instead of responding to an agenda determined by the media.

3. Each chairperson has their own way of structuring the agenda and of tackling issues, which results in an inconsistency in the way that matters are handled, and sometimes to a lack of follow up of issues. Continuity would be achieved if good and effective chairs were appointed for longer periods of time. However, since their appointment is often subject to broader political processes, the development of guidelines for the operation of the committee needs to be developed. The guidelines could assist with concretising the objectives of the committee and help with formalising the procedures that the committee uses to achieve them. The Committee needs to establish an annual workplan that would allow them to proactively identify crucial areas of intervention and then to schedule meetings, hearings and if necessary, visits, to determine the cause and extent of the problem.

4. The Committee does not always have members who are trained in the law and therefore they can only engage with legislation superficially. They should recruit parliamentarians with legal expertise to sit on the committee.

5. Members frequently raised the concern that they should be allocated more support staff, both administrators and researchers, to assist them in their work. They also need an efficient committee clerk who can be trusted to arrange their schedule timeously.

6. The committee needs to interact regularly with civil society, NGOs and interest groups on a more sustained basis. New and crucial information is being gathered and generated by these groups which could assist the members in their deliberations. They could attend relevant seminars, workshops held outside or Parliament, as well as read the research produced by them. Conversely, civil society should take responsibility for more active interaction with the committee and its members.

National Council on Correctional Services

Composition of the Council

The role and mandate of National Council on Correctional Services has evolved in the ten years since democracy. Introduced as the National Advisory Council on Correctional Services 1991 (NACOCS),[26] it replaced the former Advisory Release Board[27] with a broader policy mandate. Its overall function was to advise the Minister of Correctional Services on policy regarding the treatment of prisoners. It also played a role in recommending the release of certain categories of prisoners. In terms of the 1959 Correctional Services Act, the Council consisted of a judge of the Supreme Court, a magistrate of the regional division, an attorney-general or a deputy attorney-general, a senior ranking member of the South African Police, a senior member of the Department of Correctional Services, a senior official of a social welfare authority, and two or more people who were not fully employed by the State, but who in the opinion of the Minister had special knowledge or experience of matters connected with the powers, functions and duties of the Department. It also allowed for the cooption of people by the Minister for any special purposes or for any particular cases.[28]

The new Correctional Services Act (Act 111 of 1998) made substantial amendments to the composition and function of the Council, now renamed the National Council for Correctional Services (NCCS). This was one of the few sections of the Act that was brought into effect in 1999. In terms of Section 83, the Minister must appoint a National Council, which now consists of two judges of the Supreme Court of Appeals or the High Court, appointed after consultation with the Chief Justice. The judges are to be appointed chairperson and vice-chairperson of the Council. The Council also consists of a magistrate of the regional division, a director or Deputy Director of Public Prosecutions, two senior members of the DCS, a senior member of the SAPS, and a senior member of the Department of Welfare.

Consequently, the Council is a heavyweight committee of many high ranking officials in government, the magistracy and judiciary. The two judges establish an overall sense of legitimacy and authority, and their knowledge of the law and the courts bears weight on corrections. Because of their authority in the justice system, they have the potential to bring other arms of the criminal justice system on board when discussing issues affecting prisons. For example, recently the current chairperson of the NCCS, Judge Desai, met with the chief justice, judge president of the Supreme Court of Appeals and the Chairperson of the Magistrate's Commission to discuss the impact of sentencing on prisons and the extent of overcrowding. The Vice Chairperson of the Council is Judge Jali, who was appointed to head the Jali Commission of enquiry into corruption in prisons. As of the time of writing the Commission is still in progress and Judge Jali has been unable to fulfill his functions on the council. The Inspecting Judge of Prisons also sits as an *ex officio* member on the Council. Although he absents himself from decision making, he actively participates in discussion on all prison related matters, and particularly raises the Council's awareness around overcrowding in prison.

The Act also provides for the appointment of two or more persons not fully employed by the State who have special knowledge of the correctional system, and four or more people are to be appointed as public

[26] It was introduced by S7 of Act 122 of 1991.
[27] The Advisory Release Board was established in 1982 following the Viljoen Commission of Enquiry into the Penal System of South Africa which recommended that a parole board chaired by a judge should be appointed. The functions were to advise the Minister on general policy regarding the release of prisoners, the remission of sentence for particular categories of prisoners, recommendations on a particular case, and any matter referred to the Board by the Minister (Van Zyl Smit, 1992: 138).
[28] See section 5B ((a) to (h)) of Act 8 of 1959.

representatives after consultation with the Portfolio Committee on Correctional Services.[29] Several highly respected experts in their fields, including in penology, prison law, child justice, human rights, social work and psychology, and health, were recruited to serve on the NCCS.

The considerable range, depth and expertise that is brought onto the NCCS through its members is perhaps one of its biggest strengths. The members represent different constituencies and so are able to engage with issues before the Council from differing disciplines and perspectives. For example the police and prosecution may have different perspectives on a decision around early release of prisoners, from a person more directly involved in penal issues. But members also have disagreements on a subject, often leading to lively debate before decisions are made. However, it is not clear that full and extensive use is made of their expertise within the Council.

The members hold office for a period of time determined by the Minister, but are appointed on yearly contracts, and their contracts may be terminated by the Minister 'if valid grounds' exist. No Council existed during 1998 and part of 1999, when the members' contracts had expired at the end of 1997, and the Minster failed to make new appointments. This was during the time between the resignation of the former Minister of Correctional Services, Dr Sipo Mzimela, and the appointment of his successor Mr Ben Skosana.

Section 83 provides that the majority of the members constitute a quorum, and a decision is made by the majority. In the event of an equality of votes, the member presiding at the meeting has the deliberative and casting vote. Those members who are not in service of the State may receive allowances that are determined by the Commissioner in consultation with the Minister of State expenditure.

Powers and functions

The powers and functions of the Council have also evolved over the ten years. In 1993 they were amended to take into account the new provisions relating to parole.[30] Section 64 (of Act 8 of 1959) established that the National Advisory Council could of its own accord, or when ordered by the Minister of Correctional Services, advise the Minister regarding general policy in respect of:

- correctional supervision
- the detention and treatment of prisoners
- the placement of prisoners on parole
- the release of prisoners
- the placement of prisoners on daily parole, and
- the effective and most cost effective management of the Department.

In addition, the Council could advise the Minister on the release, parole or placement of a particular prisoner on correctional supervision; the reintegration of prisoners and probationers into the community; the assimilation into the labour force of prisoners who had been placed on parole or released, and of probationers. It could also advise the Minister on the generation of revenue for the Department, and any other matter in the interests of the efficient running of the Department.

[29] S 83 of Act 111 of 1998, brought into effect by Proclamation No. R. 20 of 1999, effective 19 February 1999.
[30] S 61B , which had been inserted into the Act in 1982 and substituted by Act 122 of 1999, was again substituted by S 64 Act. No.. 68 of 1993.

Clearly the Council had a wide mandate to look at issues affecting the treatment of prisoners and probationers, and general policy affecting their release. Its function was only advisory and the Minister was not compelled to accept it, or to furnish a response for not accepting the recommendation. The Minister was under no obligation to forward policy matters to the Council, and thus only referred matters in his discretion.

In terms of the 1998 Act, the Council's primary functions are now to advise (at the request of the Minister, or of its own accord), in developing policy in regard to the correctional system and the sentencing process.[31] The mandate has broadened so as to be inclusive of every aspect relating to the treatment of prisoners, probationers, as well as of broader administrative policy as well. The inclusion of policy regarding the sentencing process allows the Council to look at sentencing policy itself.

In terms of the Act, the Minister must now refer draft legislation and major proposed policy developments regarding the correctional system to the Council for its comments and advice. The Council may also examine any aspect of the correctional system and refer any appropriate matter to the Inspecting Judge, and it must fulfill any other function ascribed to it in terms of the Act (Section 84).

The Commissioner must provide the necessary resources and information to enable the NCCS to perform its primary function. For this purpose, a DCS secretary has been appointed to the Council who operates from the Minister's office and who assists in the administrative functioning of the Council. However the Council does not have its own operating budget and thus has no control over its budget and expenditure and this may limit decisions in how it goes about its work.

Role in terms of prisoners sentenced to life imprisonment

Under the 1959 legislation the Minister had the discretion whether or not to refer a matter to the Advisory Council. He was, however, obliged to refer matters regarding the release of prisoners sentenced to life imprisonment. After receiving a report from the parole board regarding these prisoners, the Minster was to refer it to the Council. Their function was to consider the report of the parole board and, taking into account the interests of the community, to make a recommendation to the Minister regarding the placement on parole.[32] The Minister could, after considering the recommendation, authorise the release of the prisoner on parole subject to any condition which he could determine up to the time of the prisoner's death (Section 65).

Due to the fact that the sections relating to parole and release of prisoners in the 1998 Act have not yet come into effect, S 65 relating to the Council's functions in terms of prisoners sentenced to life imprisonment still remains in force. However, it is likely that it will still remain in operation and applicable to prisoners for years to come despite the new Act, due to the legal principle that decisions regarding prisoner's sentences should be dealt with in terms of law applicable at the time of their sentencing.

The NCCS spends much of its time considering the release of life-sentenced prisoners. There were anything between 5 and 20 cases considered at a meeting, and each one entailed substantial reading of the inmate's file and lengthy discussion at the meeting. The Council's recommendations on release of prisoners serving life sentences were usually accepted by the Minister. The NCCS can only make a recommendation for parole if it believes that the prisoner is legally eligible for parole. Recently, several prisoners have challenged the NCCS's

[31] S 84 (1) of Act 111 of 1998.
[32] S 65 (5) of Act 8 of 1959.

decisions regarding when a prisoner is eligible for consideration for parole. Their decision turns on an interpretation of the many-times amended legislation, standing orders and instructions.[33]

Parole and release of prisoners

Under the previous legislation the Council was only involved in parole decisions for life-sentenced prisoners. The Correctional Services Act of 1998, however, establishes a new procedure for release from prison and correctional supervision and ensures a greater role for the NCCS. In terms of the new Act[34] a Correctional Supervision and Parole Board will consider and set conditions for parole and correctional supervision of those prisoners given sentences more than 12 months. A decision of the Board is final, except that the Commissioner or Minister may refer the matter to the Correctional Supervision and Parole Review Board for reconsideration. The record of the proceedings before the Board must be placed before the Review Board (S 75(8) of Act 111 of 1998). Members of the Review Board are selected from the National Council and it is chaired by one of the Council's judges.[35] The Review Board must consider the record, as well as any submission that the Minister, Commissioner or any person may place before them, and any other evidence, and either confirm the decision, or substitute it with its own.[36] The Review Board must give reasons for its decision, and this is intended to serve as information and guidance for future decisions.

The Act removes the specific requirement that the Council consider cases of life sentenced prisoners.[37]

The NCCS also has a role to play in respect of release of prisoners. Presently governed by Section 67 of the 1959 Act,[38] it provides that if the Minister is satisfied that the prison population is reaching such proportions that the safety, human dignity and physical care of the prisoners are being affected materially, he may on the recommendation of the National Advisory Council advance the date of placement of any prisoner on parole, subject to any condition he may determine. This section is still in place although the draft of new Act (S 81) provides that under the same circumstances the Minister must refer the matter to the NCCS. The Council may recommend the advancement of the approved date for placement of any prisoner or group of prisoners under community corrections, subject to the conditions imposed by the Correctional Supervision and Parole Board.[39] However, this is one of the sections of the Act not yet brought into effect.

Oversight role

The National Council has no executive power and may only advise the Minister. The Council has a more direct oversight responsibility over recommendations made by the DCS relating to parole and release of lifers. It has the authority to review the recommendations and make its own recommendations before the Minister can make his own decision. In practice, the Minister tends to implement the recommendations of the Council. The new

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[33] Interview with Louis van der Merwe of Lawyers for Human Rights, 3 October 2003.
[34] The provisions relating to release and correctional supervision are set out in Chapter VII of Act 111 of 1998. However, the relevant sections have not yet been brought into effect, and the existing parole provisions still apply.
[35] S 76 of Act 111 of 1998.
[36] S 77(1).
[37] In terms of S 75(1)(c) the Correctional Supervision and Parole Board must make a recommendation to the court on granting of parole or day parole or community corrections after the statutory minimum period has been served in prison. The court is empowered to make the decision on the granting or withholding of parole based on the recommendation.
[38] Amended by Act no. 68 of 1993.
[39] S 81.

Review Board will give the members who serve on the Board decision making power in the sense that they can substitute the decisions of the Correctional Supervision and Parole Board with one of their own.

The authority is slightly different in terms of broader policy issues and legislation as the Council remains a recommendatory body and its ability to make a direct impact on policy formation is more limited. Although the Minster must obtain their comment and advice, he is not obliged to act on their recommendations, or to furnish reasons for not implementing them. But the Council may take up issues of its own accord, and thus has the potential of proactively raising issues not currently before the Minister, and even of influencing the shape of policy initiatives.

Although the DCS is not obliged to report to the Council, the NCCS may request any information from it and question the decisions in order to make appropriate recommendations to the Minister.

Transformation and the NCCS

During the period under review the composition and the mandate of the Council have undergone change. Although some of the members were appointed to the Council when it was first established, new members were recruited to serve on the Council around 1995 just when the Transformation Forum on Correctional Services was established. This change in membership was achieved through an appointment process by the Minister in which the Council had little, if any, direct role. However, many of the new appointees were people who took a more activist approach and were committed to the transformation of the correctional services and the Council. Some members of the Council also served on the Transformation Forum, although not as representatives of the Council. There was thus a cross-fertilisation of ideas and information.

Although the Council became more representative of different sectors of government and civil society, it also became more gender and racially representative. Despite this, some of the members and former members interviewed for this study were concerned that the composition of the Council was still not representative enough and called for greater participation from different sectors of civil society. It was also suggested that representatives of prisoner organisations and staff trade unions should be invited onto the Council, though these suggestions appear not to have been accepted, and the membership of the Council has remained fairly stable over a long period of time.

Through the role that the Council played in drafting the new Correctional Services Act its members were instrumental in redefining the role and powers of the NCCS. The Council itself had some discussions about its internal transformation and structuring. Members also suggested the formation of sub-committees to re-organise how they did their work. While this worked for some groups, it did not work for all sub-groups and it appears that this approach has more or less been abandoned.

The Council had no active engagement with the transformation of the Department itself. It received reports on the Affirmative Action and Employment Equity policies but did not become actively involved in decision making around these issues. It has also had no role in the appointment of Commissioners to the Correctional Services, and members were only informed once a new person had been appointed. However, the Council did make recommendations in support of the 1996 demilitarisation of the Department, a move that was thought necessary to introduce a civilian character to the correctional services.

The role of the NCCS in policy formation and legislation

Due to the evolving mandate of the Council, their potential role in policy and legislation has increased over the years. Before the legislative amendments in 1998, the Minister did not necessarily refer all matters for their consideration, or matters were presented in such a way that there was limited opportunity for discussion. Members recall, for instance, that there was a briefing from the Minister's advisor on prison privatisation, but they were not fully apprised of the costs of the enterprise, and there has been very limited discussion on this issue by the Council. In other issues, the Council took on a more directive role, but it did engage with most policy and legislative issue during this period. It looked at some issues dealing with the administration of prisons, and were for example called upon to look into the mismanagement of the Ekhuseni Youth Development Centre in New Castle, and issues to do with psychologists in prison. However, both these initiatives were over six years ago. Despite its broader mandate, it appears that the Council has not really fulfilled its potential influence over legislation and policy making. The recent DCS annual reports indicate which matters the NCCS dealt with in the year under review. Only a few substantive issues are dealt with, and in many of them the NCCS is not obliged to make specific recommendations. For example, issues discussed in the 2000/01 year were:

- the release/placement of awaiting trial prisoners and sentenced prisoners to alleviate overcrowding
- the implementation of the Correctional Services Act 111 of 1998
- the HIV/Aids policy of the Department
- overcrowding in prisons, and
- development of a prison labour system (DCS, 2001)

However, a few specific interventions have been taken by the Council, sometimes in concert with other bodies, or on their own. One of the first areas of intervention arose following the report of the Kriegler Commission of Inquiry (appointed on 27 June 1994) into prison unrest which found that matters relating to release were major causes of unrest in the 1994 prison riots. One concern lay with the failure of the State President to grant amnesty as expected following its inauguration. Another concern was the administration of the general release policy which granted wide discretion to prison officials and was perceived by many prisoners as biased. This matter was referred to the National Advisory Council on Correctional Services. The NACOCS published recommendations that all sentenced prisoners should serve at least half their sentences in prison, and that the release of prisoners on parole should be subject to the consideration of newly constituted parole boards (Van Zyl Smit, 1996). The NACOCS recommended that the parole board should meet the requirements of due process; that the community should be strongly represented on the boards; and it should be independent of the DCS. The curtailment of executive intervention in prison sentences by way of amnesty was also recommended.

The recommendations were adopted as the Parole and Correctional Supervision Amendment Act, 87 of 1997. While the NACOCS had cautioned that the new parole procedures would result in people having to spend a longer period in prison before being considered for parole, this did not appear to be fully taken into account. Instead, and perhaps as a result of political intervention, an amendment was passed to the Criminal Procedure Act that a court could, when imposing a sentence of two years or longer, determine a period which a person should serve before being placed on parole. The non-parole period could be up to two thirds of the sentence,[40] thus extending the effective prison term even further. The chairperson of NACOCS had argued strongly against this provision before the Portfolio Committee on Correctional Services. The provisions of Act 87 were never brought into effect and have now been superseded by the 1998 Correctional Services Act.

[40] Section 276B of the Criminal Procedure Act 51 of 1997 as amended by section 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997.

Another area of direct intervention was in the drafting of the Correctional Services Act of 1998. Council members Prof Van Zyl Smit, Judge Kumleben and Adv Niel Rossouw were appointed to assist the DCS draft the Act. They did substantial research around it and Judge Kumleben even visited the United Kingdom to research independent inspectorates. According to respondents, the Act was discussed at the Council meetings, and members were asked for comment or advice on different sections.

At times the Council initiated projects themselves. For example, the Council dealt with the issue of Electronic Monitoring of parolees, appointing a sub-committee to look into this and make recommendations. One of the Council members also raised the issue of community corrections, and has since assisted the Department to develop a pilot Community Corrections Forum in Limpopo Province that brings together the community and representatives of the criminal justice cluster to look at community-based sentences and the release of prisoners into the community.

More recently the Council became concerned with the problem of overcrowding. They received quarterly reports on the occupancy of prisons and looked at the escalating problem over the years. The council expressed concern at the lack of synergy between the Department of Justice and Correctional Services. The chairperson initiated meetings with the Chief Justice, the Judge President of the Supreme Court of Appeals and the Chairperson of the Magistrate's Commission to raise their awareness of the problem. Together with the Inspecting Judge of Prisons, the chairperson presented the problem to Cabinet. However, it is not clear that the Council has grappled fully with the issue to the extent that it can make recommendations to advise the Minister on how to deal with the problem.

Like members of the Portfolio Committee, the Council members have the authority to visit prisons at any time and to have access to any part of the prison or to any document (Section 99(3) of Act 111 of 1998). While a few members may visit prisons on their own, prison visits were at one point structured into the regular meetings of the Council. The Council would for instance visit a prison in the nearest vicinity to the place where the meeting was held, or they could have visited a particular prison about which particular concerns had been raised, such as Ebongweni prison in Kokstad. However, these visits were seldom in the form of a detailed inspection, and no prison visits were conducted in the last year.

Impact of the Council

There have been many bodies (some of them dealt with in this report) dealing with correctional issues during the period under review and all have in some way impacted on the direction of policy reform. It would be difficult to attribute any particular shift in policy to one of these bodies alone. Another difficulty in evaluating their impact is that the recommendations of the Council are not generally public documents unless they are released as a report. During this period, only one report (on parole and release) was publicly released. Neither the recommendations nor minutes of the meetings could be accessed for this report. Another issue is that the Council seems not to have identified a particular role for itself in terms of influencing correctional policy. It responded to issues that are raised, but did not identify the major concerns in prisons and adopt a strategy for its intervention.

In some respects, as in the matters discussed above, the Council played a directive role in policy development. However, more often the Council merely advised the Minister on a matter that might not have directly impacted on policy. The Minister often referred an issue to the Department for further clarification, or the recommendations may have fed into the development of policy or practice. It was often through the questions and comments during discussion of policy with the Department that the Council could have influenced the final shape of policy,

rather than through the development of specific policy recommendations. According to a respondent, few specific recommendations were made in recent years.

The Council members believed that their comments were seriously considered by the Minister, although some of those interviewed expressed frustration that they did not always receive timeous feedback on their recommendations or comments. They did not always receive reports on how they were taken up, and some respondents did not know whether their recommendations had any effect. However, another member indicated that the Council did have an impact in that it presented the Minister with a different perspective on prison issues, and that this was likely to positively affect his decisions. Other members questioned whether their recommendations had any bearing on policy development at all.

The impact of the Council is likely to depend as much on the extent to which the Minister values the Council and their recommendations, as it does on the Minister's own viewpoint, political perspective and ability to integrate their recommendations into decisions. All respondents indicated that they had a cordial and cooperative relationship with Minister Skosana and believed that he interacted positively with their recommendations. The chairperson met frequently with the Minister for briefings and discussions.

There was the sense that at times the Department members resented the 'interference' of the Council and did not accept all its inputs. This may be partially because as part-time members the Council does not have the same insight into issues affecting the day to day running of the correctional services, and its recommendations may be inappropriate.

The impact of the Council was sometimes broader than its recommendations. For instance, the current chairperson made many presentations at public forums to increase awareness about prisons. He also interacted with senior members of the Department. Other members may also have made their contributions through other forums. For instance, one of Council members was a Human Rights Commissioner (he is now the Commissioner) and he took up the issue of C-Max prisoners on behalf of the SAHRC.

Constraints

The Council meets four or five times a year for two days at a time. Most members interviewed expressed some frustration that this did not allow sufficient time for proper discussion of all the issues. Sometimes members were required to research issues or work outside of the Council and to present their opinions for discussion in the meeting. However, not all members were able to participate in this way. The Council members were all busy and senior people in their own professional lives. Although the chairperson sometimes called a few members together for a special meeting, for example for a meeting with the Minister, most members simply did not have much time to dedicate to the Council over and above attendance at the required meetings. In addition, because many members were unable to attend all the meetings, there was often a lack of continuity in the way that they interacted with matters under discussion. One member commented that he did not prioritise Council meetings as he felt that his time could be spent more effectively elsewhere, indicating that the Council did not use its time and resources in the most effective way.

Because of the limited time available to members, they mostly did not do their own research on issues under discussion, but relied on the information presented by the Department. In this respect the Council was somewhat reactive to issues raised by the Department or the Minister, and also relied on information that was not independently collected. The Council secretary furnished them with all the Minister's speeches which outlined the key issues that the Department was dealing with, and these sometimes formed the basis for the construction

of the meeting agenda. At other times though, the research that members did in their individual or professional capacity was brought to the Council for discussion. For example, concerns with conditions facing children in prisons, or the issue of overcrowding were brought to the Council by two different members. Since the Council did not have its own budget, it was unable to contract researchers to study a particular area, and members had to do their own research, at their own cost. This limited the depth of research and the extent of different research projects. An independent research budget could also be useful to enable to the Council to contract their own research and to enable them to formulate substantive recommendations for the Minister.

Another problem raised by the respondents was that often they received documents to be discussed at the meeting only a day or a few hours before the meeting, not allowing them adequate time to prepare and engage fully with the discussion. On the other hand, they felt that the information was extensive and very well arranged. However, not all information was made available with the same haste. While the Department could provide national statistics on very short notice, more detailed information relating to individual prisons would take some time to be produced.

The Council is accountable to the Minister of Correctional Services. It provided him with minutes and regular reports on its activities. However, the Minister is not required to report on the activities of the Council, and it is seldom mentioned in his speeches or in reports to Parliament. Recently the DCS Annual Report contained of a list of matters that the NCCS dealt with in a particular year, but no indication of the advice given to the Minister was given. Due to the confidential nature of the meetings, the minutes, and documents both presented to and prepared by the Council, were not made public. Due to the limited information available on the Council, it was difficult for other organisations or bodies to interact with the Council, or to have matters inserted onto the agenda.

As a body, the NCCS had limited interaction with civil society. It did not necessarily attempt to garner civil society opinion on various policy issues, and rarely acted on concerns that civil society might have had in respect of the correctional services, nor did it receive direct requests from organisations. It certainly did not report to sectors of civil society, other than perhaps to the institutions from which the members came. Instead it purported to represent civil society through the mix of people who served on the Council, although they served in their individual capacities rather than strictly as representatives of their organisations. The Council did not advertise itself or its services to the public (although recently the Chairperson has been making use of public platforms to publicise its role) so it is unlikely that many people know of the Council or understand what it does. It is therefore unclear to what extent the Council, as it currently operates, can be said to be an oversight body that represents and acts on behalf of civil society. There is potential to develop this role if more thought were given to how it can exchange information between itself and sectors of civil society.

The NCCS also had limited interaction with other organs of civilian oversight over correctional services except in so far as there were members on the Council who were part of these other bodies (for example Jody Kollapen, chairperson of the South African Human Rights Commission, was a member of the Council). The Judicial Inspectorate perhaps had the strongest presence through the participation in each meeting by the Inspecting Judge. The Council has rarely interacted with the Portfolio Committee on Correctional Services, although during 2003 the Council Chairperson was scheduled to make a presentation to the Committee - it was cancelled due to insufficient Portfolio Committee members being present. This lack of interaction is possibly reflective of a general lack of synergy within civil society in working in a coherent and cooperative way towards penal reform in the country.

Recommendations

The Council has to a large extent been reactive to policy referrals from the Minister, and was not sufficiently proactive in identifying, researching and making recommendations on key issues concerning the correctional services. It would be useful for the Council to strategically plan a way forward for itself so that it could maximize the potential value that its members could bring to correctional reform. Once a direction is clear, it would also be able to make strong and substantiated recommendations to the Minster, as well as provide a basis for evaluation of its impact.

The Council needs to enhance its capacity to do independent research. For this purpose an independent budget would be an advantage. Many members expressed concern that there was insufficient time to engage with issues fully in the meetings. They suggested increasing the duration of the meetings, alternatively to hold meetings more frequently. However, due to the nature of the members' professional commitments this is unlikely to be possible. Another suggestion was to establish a semi permanent core of members who would have the capacity to do proper investigations, research, and who could then advise the other members at their regular meetings. In between meetings there could be more structured communication between members and the secretary.

There needs to be regular and structured communication and feedback to the members on recommendations made and on requests for further information. Possibly the person constructing the agenda, or the secretary should keep note of which issues require further information and when they should be followed up. Some members were also concerned that documents were delivered to them very late and suggested that particularly long or complex documents should be delivered well enough in advance to allow them to read them fully.

The records and minutes of the meetings are presently confidential between the Minister's office and the Council. While this may be necessary to maintain the privacy of prisoners whose parole has been discussed at the meeting, this should not apply to other policy discussions. At least, there should be a report documenting the issues discussed and possibly the recommendations made, and how these have been dealt with. The report should facilitate public engagement with the Council, which should also consider a more formal way of interacting with civil society.

The Council could encourage interaction with civil society through inviting them to make presentations to the Council on particular issues that could assist the Council in making recommendations. Civil society could also be encouraged to suggest issues that pro-actively need to be addressed by the Council.

Chapter Nine Institutions

One of the functions of Parliament, and by extension, the portfolio committees, is to provide a check on the arbitrary power of the executive. However, influenced by party politics it may not always have the political independence for complete impartiality on some issues (Corder, *et al.*, 1999). Therefore, in order to support constitutional democracy, the Constitution established several state institutions to promote and protect human rights; to look after the interests of particular sectors of society; and to ensure fair and effective state administration. These institutions are independent both of government and of party politics. These include:

- The Public Protector
- The Human Rights Commission

- The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- The Commission for Gender Equality
- The Auditor General

The Constitution establishes that they are to be independent and subject only to the Constitution and the law. They should be impartial, and exercise their powers without fear, favour or prejudice. These institutions are accountable to the National Assembly and must report on their activities and performance at least once a year (Section 181).

This section looks at the role of selected Chapter Nine institutions in relation to their work in correctional services. It also considers the mandate and function of the Youth Commission, which is not a Constitutional body, but which reports directly to the President's Office.

The South African Human Rights Commission

Of all the Chapter Nine institutions, the South African Human Rights Commission (SAHRC) is the one that has had the most extensive interest and engagement in penal issues. This is because the Commission chose to focus its mandate on vulnerable groups of which prisoners were an important feature as, in the view of the Commission, they lacked the capacity to assert their own rights. The Commission's mandate is spelled out in section 184 of the Constitution. Its three main functions are to:

- Promote respect for human rights and a culture of human rights
- Promote the protection, development and attainment of human rights, and
- Monitor and assess the observance of human rights in the Republic.

Its powers are regulated by the Constitution and the Human Rights Commission Act (Act 54 of 1994). It has the power to:

- Investigate and to report on the observance of human rights
- To take steps to secure redress were human rights have been violated
- To carry out research, and
- To educate.

Broadly, the role of the Commission is to monitor the implementation of the Bill of Rights, monitor legislation and the implementation of legislation and to hold government and service providers answerable. In relation to prisons the Commission tried to assist the Department of Correctional Services and prisoners to understand the implications of Constitutional imperatives on prisons. It helped to interpret the provisions of the Constitution but in such a way that it did not seek to compromise the efficient management of prisons (Kollapen).

The Commission initially played a far more extensive monitoring role when it received and acted on complaints from prisoners or their families. Complaints were directed to the SAHRC's Legal Services Department, which would then take up the issues with the DCS. The Commission also visited prisons and reported on prison conditions. Its role in this respect has been downgraded since the establishment of the Judicial Inspectorate in 1998, where an agreement between the two bodies determines that most of the complaints they receive should be referred to the Inspectorate. However, the Commission still deals with some complaints regarding general human rights issues.

During the first years of its existence, and before the Judicial Inspectorate was established, the Commission was more actively involved in penal issues. From 1995 it realised that it was receiving a large number of complaints from prisoners, and was increasingly called upon to attend to disturbances in prisons and the 'breakdown that regularly manifested itself in the prison system' (SAHRC, 1998: 3). Commissioners visited prisons regularly and held meetings with the Minister and senior management of the Correctional Services to work out a system of cooperation. A good relationship was developed between the DCS and the Commission, and a protocol for visits by Commissioners was agreed upon to allow commissioners to make unannounced visits to prisons.

However, soon the Commission was inundated with complaints, and in a move to become more proactive, the Commission initiated a series of public hearings at specific prisons. The first one was conducted into incidences of violence at Leeuwkop Maximum prison in Gauteng in December 1996. The inquiry found that measures to prevent violence in the prison were virtually non-existent while measures to contain it were characterised by excessive use of force. They also found that gangs were a well established phenomenon in the prison. Allegations by prisoners that warders were involved in the supply of dagga and knives were supported by their findings. Generally, the commission also found a lack of sound management of the prison, with effective control not being held in management. The Commission made a range of recommendations that included that the prisons must move towards becoming centres for rehabilitation; improvement of conditions in prison; and that warders should be properly trained to deal with violence and to take proactive measures to deal with conflict. It also recommended that Affirmative Action should be more speedily implemented, and that problems between the Department and POPCRU (the leading trade union) should be resolved. It warned that any delay in dealing with these matters might lead to further breakdown in the management system at Leeuwkop and highlighted that implementation of the recommendations would assist with problems in other prisons as well (SAHRC, 1998).

Following this report, investigations were conducted at Worcester, Helderstroom Maximum, Pollsmoor and Voorberg, prisons as well. The Commission then embarked on a national project on prison conditions (SAHRC, 1998). It visited a cross section of prisons in each province and invited letters and submissions from prisoners and staff who posted their responses in locked ballot boxes. The thematically arranged *Report of the National Prisons Project of the SAHRC* dealt with all aspects of the prison system including the physical environment, the prison population and overcrowding; prisoner involvement in development and educational programmes; juvenile, women and awaiting trial prisoners; gangs and personnel management. The comprehensive report highlighted a number of shortcomings in the system and pointed to the inhumane conditions in prison. A series of recommendations were made dealing with issues raised in the report. The report was presented to the Department and Minister of Correctional Services. Chairperson of the Commission, Jody Kollapen says there was a lack of follow up on the report. In hindsight, he also believed that the Commission should have presented the report to the Parliamentary Portfolio Committee on Correctional Services (Kollapen interview).

The Constitution requires that each year the Human Rights Commission must ensure that the relevant organs of state provide the Commission with information on measures they have taken to realise socio-economic rights as set out in the Constitution (S 184(3)). It does this through the compilation of an annual Economic and Social Rights Report. This report is based on information that the state departments complete on a protocol or questionnaire provided by the Commission on the various socio-economic rights. In respect of prisons, the Department of Correctional Services reports on measures taken to realise the rights set out in the Constitution. It deals particularly with the right to adequate accommodation, nutrition, access to reading material, medical treatment, and education. It also reports on key policy and legislative developments over the period, as well as the budget and expenditure. The report provides an overview of prisoners' rights as determined by international human rights standards and norms, Constitutional requirements and its interpretation by the courts, and legislative requirements. The Department's comments are included in the reports. The reports highlight gaps in the Department's policy and shortcomings in its practice. Although the reports have increasingly become more

sophisticated in their critique and analysis of the Department's report, it still relied mainly on the information provided by the Department without corroborating this against other sources of information. This has led to inaccuracies or a failure to recognise where the Department does not give full disclosure, or to a superficial analysis of the information. For instance, in the reports for 1999/2000 and the 2000 – 2002 periods the Department stated, and the Commission accepted, that the Department was implementing the provisions of Act 111 of 1998. In fact, most of the Act is yet to be assented to and is not being implemented. The document also failed to follow up on particular issues. For instance, the DCS reported on its HIV/Aids policy. However, in the case of *Van Biljion and others v Minister of Correctional Services and others* (1997 (4) SA 441 (C)), the Cape Provincial Division rejected the argument that prisoners were not entitled to better medical treatment than would be provided by provincial hospitals, as it found that prisoners enjoy more extensive positive rights than other people. It placed the onus on the State to disprove the availability of funds for special treatment for HIV positive prisoners. In reality, the medical treatment and medication available to prisoners is not dealt with in the Department's Aids/HIV policy, and nor does the SAHRC follow this issue up.

Despite these shortcomings, the report does acknowledge some improvements in the both the reporting by the Department and in the realisation of rights. Each year the SAHRC makes recommendations and reports on the extent to which they have been followed up. The SAHRC recognises the limitation that overcrowding places on their realisation of rights, makes several recommendations to reduce overcrowding and to improve conditions and access to services for prisoners. The latest report commended the DCS for establishing Mother and Child Units in prison, and for separating different categories of prisoners, but was more critical about other aspects of the Department's report (SAHRC, 2000/2002).

In keeping with its mandate, the Commission was involved in educational interventions in prisons. In 1998 the SAHRC participated on an advisory panel on the development and implementation of a human rights training project for prisoners and correctional officials. This was a collaborative effort on the part of NGOs, the Correctional Services and the Commission.[41] The Commission also participated in a train-the-trainer human rights project with the Department. The project was initiated by the United Nations High Commission for Human Rights. However, although both these projects started out with the Department's full backing and approval, the DCS did not give its staff full support to continue with the project once NGOs or the UNCHR had completed its initial training role, the training gradually grew to a halt in the different provinces.[42] Again, this could be partly due to lack of commitment on the part of DCS, as well as lack of follow-up by the SAHRC and other institutions involved. At the request of the Judicial Inspectorate, the SAHRC was involved in the training of Independent Prison Visitors. These are also *ad hoc* projects initiated elsewhere. Although the SAHRC more recently established a special human rights training centre, it does not include training of correctional officials within its curriculum.

The Commission did have a limited engagement with some particular issues pertaining to correctional services. In 1997 the Department introduced C-Max prisons to South Africa with the intention of creating a facility to deal with the 'worst of the worst' prisoners. The Commission was very concerned about the restrictive regime for prisoners and engaged the Department on the constitutionality of certain rules and regulations governing the prison. It also engaged in public debate over the issue. Its interventions were successful in softening some of the very harsh restrictions on prisoner movement, and persuaded the DCS to recognise the importance of administrative fairness in deciding who should be sent to C-Max and how long they should stay there. It visited the prison regularly and took up complaints of prisoners with the authorities. However, following the resignation

[41] This was a project initiated by the Centre for the Study of Violence and Reconciliation and Lawyers for Human Rights. A number of NGOs and the SAHRC participated in a reference group. See for instance the training manual by Oliver, L. and McQuoid-Mason (1998) "Human Rights for Correctional Services", CSVR and LHR.
[42] Personal recollection.

of Commissioner Sitole under whose guidance the project was established, C-Max became de-prioritised and the harsh regime was relaxed (Sloth-Nielson, 2003).

The Commission made specific submissions to the Portfolio Committee on Correctional Services in respect of the Correctional Services Act of 1998, as well as some input on prison privatisation. Kollapen recalls, "Our concern at that point was not to expressly oppose privatisation, but to raise concerns that the private prisons comply with human rights norms. I don't think that the debate about whether privatisation was desirable was sufficiently canvassed by everybody". The Commission did not have sufficient resources to engage authoritatively on the issue of costs of privatising.

One area where the Commission has been very active has been in the public arena and in stimulating public debate around penal issues. The response was particularly strong from Commissioner Kollapen and former Commissioner Rhoda Kadalie who made frequent comments in the media, wrote articles and made public presentations on the state of prisons. Through this they played an important role in strengthening the voice of other sectors of civil society, calling for improved conditions, and educating the public on the importance of respecting the human dignity of prisoners.

During the period when the Commission was more actively engaged with prison issues, it developed a very positive working relationship with the Department. The DCS set up a Human Rights Department which was meant to be the focal point of the Commission's engagement with the Department. Kollapen says that it was perhaps not the best arrangement, but there certainly was a desire on the part of DCS not to be in default of its obligations. The Commission had considerable authority and the DCS respected it and understood its role, and was anxious to comply with their recommendations. The Department was quick to respond to complaints lodged by the Commission, and where the Commission was dissatisfied with their response, to engage in dialogue around it. Kollapen adds, 'But not to the extent that they were simply willing to abdicate responsibility and say they would do whatever we wanted. They had their rules and so on, but it was useful. We tried to understand one another'.

Impact

It is difficult to measure the impact of the SAHRC's interventions. The Commission probably played a very important role in exposing prisons conditions in the early years before the Judicial Inspectorate was established and brought awareness to the issues. The development of new Correctional Services legislation (which the SAHRC made inputs on) ensured the recognition of basic human rights for prisoners and there has been a definite attempt to incorporate human rights norms into the approach of its work. The Act also deals with security procedures and personnel management, and the Commission definitely played a role in this shift. However, more recent reports by the Judicial Inspectorate (Office of the Inspecting Judge, 2003) and the Law Society of South Africa (Law Society, 2001, 2002) indicated that, if anything, prison conditions have worsened – largely due to overcrowding. The report states, 'Despite nine years into our democracy it would seem that the culture of human rights has not taken root in some our institutions [for example in prisons] where culture change is needed most' (2002: 3). The hearings of the Jali Commission of Inquiry seem to indicate that gangsterism and warder corruption remain as much a problem as ever (Sekhonyane, 2002). So far, the Commission has lacked the teeth to ensure the implementation of human rights standards more generally in prisons. In Commissioner Kollapen's view, the Commission did not do enough to monitor the implementation of its recommendations made in reports or other interactions with the DCS, or of the new legislation and policies that were adopted. It should, he said, have moved from broad recommendations on policy to monitoring the implementation and practice. The Commission has done some work in this regard, but it acknowledges that it has been sporadic. One of the shortcomings lies with the structure of the Commission which does not have departments or individuals focused

on specific areas or human rights. Although it may have been more effective, it wouldn't have been feasible for the Commission to have a dedicated unit focusing on correctional issues. The Commission tried to cover as many human rights issues as possible and perhaps lost depth of engagement in some of them. The Commission was also strongly influenced by the individual interests of the Commissioners, and in this respect it was fortunate that several Commissioners were keenly interested in prisons.

The Commission is accountable to the Portfolio Committee on Justice and Constitutional Development and is obliged to report to them at least once a year. However, the report covers all the work of the Commission, and the short time period is inadequate to do justice to the range and extent of all its work, let alone providing sufficient time to deal with penal issues. Consequently, there has been limited interaction with Parliament and the Portfolio Committees and no collaboration on taking issues forward. The Commission does not report to the Portfolio Committee on Correctional Services, and has only very rarely appeared before them (for instance when they made presentations on the Correctional Services Act).

The Commission envisages once again focusing on correctional services, but on specific areas given its limited resources. According to Kollapen, three areas are of priority now: ensuring the implementation of Correctional Services Act 111 of 1998 and compliance with the legislation; tackling the problem of overcrowding in prisons; and finally, looking at conditions and treatment of children in prison. The Commission has identified a project looking at the problem of children in custody in two provinces where it will also focus on investigation of measures which support the release of children from prison or alternative sentencing.

The Commission has successfully worked with civil society and NGOs in many aspects of its work, and believes that it is still important to work collaboratively on these issues. Due to the Commission's limited resources it is unable to embark on a range of programmes dealing with penal issues, but could rather collaborate and support civil society initiatives.

Recommendations

The SAHRC intends to continue with its prison focus, but in a more limited but directed way. The prisons work of the Commission thus far has mainly been driven by the individual interests of particular Commissioners and staff members. While this has been advantageous so far, it is important that the capacity and engagement of these issues is formally structured into the strategic objectives of the organisation. The SAHRC should also be careful in selecting the issues it tackles. Since there are a range of organisations involved in the prisons arena, it should be careful to select issues that are not already being canvassed more effectively elsewhere. On the other hand, the SAHRC is recognised as an authoritative and influential body and its support to the initiatives of other civilian oversight bodies and organisations is important and should continue.

There is a need to strengthen the Commission's capacity to monitor its recommendations to the DCS and the implementation of policy. The annual Social and Economic Rights report does this to some extent, but the recommendations are quite general and its monitoring not sufficiently thorough. The monitoring should focus less on the development of policy, as it has done until now, but more on its implementation, and the actual practice in prisons. The SAHRC is currently looking at building its capacity to monitor its recommendations generally. This will also require that it rely on first hand reports on conditions from prisoners and other organisations involved in this sector.

Despite the formal recognition of the rights of prisoners, there is wide-spread acknowledgement that the realisation of these rights is severely compromised by overcrowding. The SAHRC needs to be more challenging

of the issues faced by overcrowding and more insistent that government take steps to alleviate the problem. Thus far it has made suggestions to improving the coordination of the criminal justice sector and an increase of non-custodial sentences and pre-trial measures. However, to the extent that these suggestions have been accepted, they have been slow to take root and despite these efforts, prison numbers have escalated.

The Public Protector South Africa

The Public Protector is established by Section 182 of the Constitution. Its mandate is:

- to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice
- to report on that conduct, and
- to take appropriate remedial action.

The Public Protector may investigate improper prejudice suffered by a complainant as a result of:

- abuse of power
- unfair, capricious, discourteous or other improper conduct
- undue delay
- the violation of a human rights
- any decision taken by the authorities
- maladministration
- dishonesty or improper dealings with respect to public money, or
- improper enrichment

The Public Protector may investigate government at any level, any person performing a public function or official duty - which includes the correctional services in its ambit. Complaints may be submitted by anyone affected by an administrative decision or action, including prisoners and prison officials. The Public Protector reports annually to the National Assembly.

Despite its wide mandate, the Public Protector has had relatively little engagement with correctional services and has undertaken no special investigation into prisons. This is surprising given the extent of allegations of corruption and abuse of power in corrections. It does however receive and respond to complaints from prisoners and staff of the following type. During the 2002/2003 year, the Public Protector received 15 674 new complaints and finalised 21 705 – some of the complaints had been brought forward from previous years (Public Protector, 2003). Unfortunately the number of prison related complaints received and attended to is not reported on. According to respondents, prison related complaints include the following types of cases:

1. Complaints regarding treatment by officials and abuse of power. This included complaints about reports of assault in prison being made with the SAPS and not being followed up. It also included complaints about corruption (although not very many complaints of this nature were received[43]).
2. Complaints about administrative decision making; such as parole decisions, transfer requests or complaints about transfers.
3. Complaints by departmental officials concerning administrative decisions and pension issues.
4. Complaints from prisoners about inaccurate recording of information about their trials and sentences which may affect their security classification or decisions about their release.

[43] This does not indicate that there is little corruption in the prisons as the Jali Commission hearings have revealed.

The complaints were referred to investigators dealing with the correctional services. Several of the complaints, for example those dealing with conditions in custody and treatment of prisoners, were referred to the Judicial Inspectorate. In respect of the others, the investigators requested comment from the Correctional Services, usually by written correspondence. Correspondence was usually directed to the Area Manager or the Provincial Commissioner, and sometimes, depending on the seriousness of the complaint, directly with the Commissioner. An investigator reported that there was generally a good relationship between the Public Protector and the Department, but added that the Department often took a long time to respond to requests for information, and they could be required to wait up to two months for a response. This could be problematic, as in the case reported in the Public Protector's Annual report. A DCS official retired from the service and was advised that his pension benefits would be paid out within three months. When he had still not received the payments after the expiration of the three month period, he contacted the Public Protector. Inquiries to the DCS revealed that there had been a delay in submitting the complainant's documents and that they had now received them. They were advised that payment would take 60 days to process. The complainant eventually received his payment six months after the date of his resignation (Public Protector, 2003:36). Although the Public Protector intervened timeously in this case, it did not expedite the resolution of the complaint.

The Public Protector was effective in the sense that it did attend to complaints received, and that they were resolved in some way, although not always to the obvious benefit of the complainant. The Public Protector makes a negative or positive finding following its investigation. Although, according to the respondent, often the complaints were not substantive and a negative finding was made. The results of the investigation were communicated both to the prisoner/official, and to the Department. Although effective at an individual level, the Public Protector has not tackled the systematic problems that exist within the Department, such as corruption, abuse of power or maladministration. Instead, the Special Investigations Unit (SIU) has been authorised to investigate maladministration, improper and unlawful conduct by officials, unlawful expenditure of money and property, and corruption in the DCS and by its officials which took place between January 1996 and August 2002. The SIU is a civil investigations unit which aims to recover money or property acquired through unlawful gain. Complaints are forwarded directly to the SIU, rather than being channeled through the Office of the Public Protector.[44] However, since the SIU is time-bound and specific, the Public Protector still has an important role to play in this regard.

The Commission for Gender Equality

Section 187 of the Constitution provides that the Commission for Gender Equality (CGE) must promote respect for gender equality, as well as the protection, development and attainment of gender equality. It is empowered to do this through monitoring, investigation, research, education, lobbying, reporting and advising on issues concerning gender equality. At one of its first meetings the CGE resolved to prioritise the most disadvantaged women.

The Gender Commission has had very little engagement with correctional services, and where it has done so, its focus has been on an issue concerning a small group of sentenced female prisoners. The CGE's chief involvement in addressing issues relevant to women prisoners has been through the Justice for Women Campaign, initiated in 2001. The Campaign has three areas of focus: the reform of legal defences to murder and

[44] The Special Investigations Unit was brought into effect by virtue of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996). Proclamation No. 23730 issued on 8 August 2002 provides that allegations against the Department of Correctional Services should be investigated and justicable civil disputes emanating from the investigation should be adjudicated upon. A schedule to the Act determines the nature of allegations that the SIU should investigate.

the reform of sentencing guidelines/provisions applied to women who kill abusive partners; the establishment of some form of review mechanism to allow for the early release of women serving lengthy sentences for killing abusive partners; and the provision of support services to such women. The CGE has participated in planning strategies around the Campaign (together with several NGOs) and has been present at high-level discussions around the campaign with government representatives. The campaign has also been profiled during some of the Commission's public events as well. The campaign is ongoing with no results as yet, although it is generating some support from key stakeholders.[45]

Female prisoners constitute a small proportion of prisoners (about 2%), but due to their particular needs, and because their numbers are small they are held in prisons often far from their families where they are without the range of services available to male prisoners. Several NGOs have tackled conditions for women in prison and have raised the issue of mothers with babies in prison, an issue recently taken up by the Department of Correctional Services. However, the GCE has played no role in these broader issues, nor has it responded to individual issues raised by prisoners, perhaps because these are referred to the Judicial Inspectorate.

The mandate of the CGE obviously extends beyond mere enquiry into conditions and treatment of women, but could also extend to a full range of gender discriminatory practices affecting male and female prisoners. Possible areas of intervention could include treatment of homosexual, transsexual and other trans-gendered people. It could also do work on sexual violence and coercion in prison, an issue which is endemic in both male and female prisons, and is under-researched and often neglected. Sexual violence impacts on the daily lives of inmates, and could have serious implications for inmates once they are released from prison as well as for the communities they are released into. Understanding the gendered nature of violence in the prison could be a useful tool in helping to understand and prevent its occurrence.

National Youth Commission

In addition to the Chapter Nine institutions, the State President inaugurated the National Youth Commission (NYC) on 16 June 1996. The aim of the Commission was to develop a comprehensive strategy to address the challenges facing youth in South Africa. It recognises that youth must promote national reconciliation and unity and build a new patriotism, foster peace and build justice and a human rights culture. Not an oversight body as such, the Commission aims to redress the imbalances of the past and to create a national youth policy aimed at empowering the youth and allowing them to realise their full potential.

The NYC is located in the Office of the Presidency and falls under the responsibility of the Minister of the Presidency. It consists of five full-time Commissioners appointed by the President for a term of three years each.

In terms of the National Youth Commission Act (Act 19 of 1996) the main aim of the NYC is to coordinate and develop an integrated national youth policy. The NYC is empowered to develop principles and guidelines and make recommendations to Government regarding the implementation of the youth policy, as well as to monitor its implementation. It is tasked with implementing measures to redress past imbalances among specially disadvantaged youth. It is also supposed to promote a uniform approach by all organs of state, and to make recommendations regarding any matter affecting youth (S 3).

[45] Personal communication with Lisa Vetten of the Centre for the Study of Violence and Reconciliation, one of the Campaign partners.

The Commission has wide recommendatory and monitoring powers and functions. In terms of its monitoring role, the Commission must monitor and review policies and practices of:

- organs of state at any level
- statutory bodies or functionaries
- public bodies and authorities; and
- any other persons, bodies or institutions

with regard to youth matters, and may make any recommendations that the Commission deems necessary (S 8 (1)(a)(x)).

The Commission may evaluate new or proposed legislation, recommend the adoption of new legislation, and monitor and review compliance with international instruments affecting youth. It may conduct any investigation it deems necessary (S 8(1)(b)(i)).

The Youth Commission has focused on youth offending in an indirect and very limited way. The *State of the Youth Report* (NYC, 2002) identified the problem of youthful offending and highlights the statistics on youth crime. It looks at the high rate of young perpetrators in comparison with the adult population, but points out that this reflects international trends. The Report adds, "But high levels of poverty and the disruption of families, and the weaknesses of initiatives around rehabilitation aggravate the problem" (Ibid: 97). In relation to crime, the Report makes the obvious and superficial recommendation that it is necessary to tackle the problem of youth criminality, and improve prevention by limiting access to alcohol and expanding alternative sentencing (op cit: 102). However, specific recommendations are not made as to how to do this.

The Report does not make any recommendations regarding the treatment of youth in prison, which is unfortunate as the youth represent the majority of people in prison. According to statistics released by the Judicial Inspectorate, youth who are twenty nine years and younger constitute 60% of the prison population. They are also a group which is still suffering from historical disadvantage, and are severely prejudiced in prison as well as when they are released back into the community. The NYC has limited engagement with youth in correctional services, however. Its one initiative was a pilot project in three prisons – Durban, Thoyandou and Hawequa in partnership with the DCS and several private sector organisations. The programme reached 180 inmates and focused on three areas of training:

- entrepreneurship programmes
- life skills, and
- computer skills

The programme also assisted 60 successful trainees to access loans and to set up a small business on release. The project is now complete and the NYC aims to hand over the programme to the DCS, once the DCS has completed an evaluation of the programme. The DCS has expressed an interest and willingness to continue with the project and to extend it nationally (NYC, 2002).

In addition to this, as part of its mandate to celebrate and commemorate Youth Day, the NYC holds special events in youth facilities in prisons. However, this is not part of a particular strategy and the number of prisons targeted is small. The Commission does not respond to individual complaints, nor has it become involved in policy or practice impacting in youth on prisons.

Clearly there is large scope for the NYC to become involved in the issues of youth criminality and young prisoners more particularly. There are already a range of organisations dealing with the conditions and treatment of young people in prison, as well as the development of programmes for young prisoners. The best approach may well be for the Commission to link up with existing projects. Nevertheless, it would need to develop a

comprehensive strategy in consultation with the many other stakeholders and civil society organisations currently working with youth in prisons.

Conclusions and recommendations

The last ten years have presented the Department of Correctional Services with many challenges in re-orientating itself so that it is structured and operates within the requirements of a Constitutional democracy. This has required a fundamental shift in human resource policy and practice and the alignment of the legal and policy framework in compliance with human rights imperatives. Although a range of policy and legislative changes have been introduced over the period, they have not been fully implemented. In addition, the challenges presented by trying to render humane treatment to prisoners as well as striving towards achieving successful reintegration of released offenders, have to be seen in the context of the unacceptably high levels of overcrowding.

Because of the extent of changes required in this period, it has been critical to have external oversight over what and how the correctional services has been going about fulfilling its mandate. This has been important in order to establish confidence in and legitimacy over the Correctional Services, to establish some form of accountability and to ensure that information is generally available and accessible in the public domain. As highlighted in this paper there are a range of bodies which have a mandate or interest to pursue oversight over correctional services. The Portfolio Committee on Correctional Services has a role in terms of overall accountability and oversight over policy development and implementation, as well as in relation to budgets and expenditure. Although their interest is not solely with prisons and prisoners, the Chapter Nine institutions have specific oversight concerns: with the promotion and protection of human rights; keeping a check on maladministration and corruption; promotion of gender equality; and the promotion of the interests of youth. The role of these mechanisms is both to contribute towards the shaping and direction of policy, and to monitor its implementation in practice. Although the power of these mechanisms is restricted to recommendations, they have the ability to demand information, to question strategies and performance, and to publicly expose non-performance or maladministration.

In their individual ways, these mechanisms have each made some contribution to reform and transformation in correctional services and the acknowledgement of respect for the rights of prisoners. The impact of their role is difficult to measure due to the cumulative effect of other forces impacting on the correctional environment, such as the courts and the political arena. In addition, while the public face of the mechanisms allows for some scrutiny, one should also acknowledge the subtle influences that may occur behind closed doors. It is often the nature of these mechanisms however, that their work is reactive, *ad hoc*, and takes place in isolation from other oversight mechanisms. Each of these bodies is pursuing its work without necessarily sharing information, skills, resources or strategies, and without cooperation on key areas. Thus the impact that they could be making in this area is dissipated. In order to strengthen the capacity and effectiveness of systems of oversight, the following are some tentative recommendations.

1. In order to ensure effective accountability, each oversight mechanisms should identify for themselves the standards in their own sphere of interest against which the correctional services should be measured. They need to follow this by setting out objectives for themselves in terms of which they can identify strategic areas of intervention, and plan their activities in line with this. Their work plans should also make allowance for responding to issues as they arise in the most appropriate manner. Establishing their own objectives would also allow for self-critical evaluation of their own work and achievements.

2. The ability of an oversight body to hold an institution accountable is enhanced if it is in a position to fully scrutinize the information that is presented to it by the reporting body. This may require that the oversight body engages in research of its own, or holds an inquiry, or some other pro-active activity. Without an adequate budget to do so, the oversight body is necessarily constrained in its activities, and often by the extent to which it can fully engage with an issue. Each body should have an independent budget so as to facilitate this additional work.

3. Most of the bodies highlighted needed to strengthen their capacity and approach to monitoring the implementation of their recommendations and to follow up on concerns they had raised with correctional services or the Ministry. In the case of the Portfolio Committee, this capacity could be strengthened by ensuring proper documentation of discussions and outcomes of meetings with the DCS, and ensuring that these are checked regularly and followed up on. In terms of the other organisations, this may also require building particular capacity to monitor implementation, and building this into the organisation's annual work plans. While the last nine years have been concerned with establishing the policy framework for correctional services, the next period is one which requires greater focus on the implementation of this policy at every level, so as to make a positive impact in the lives of prisoners.

4. While these mechanisms may each be doing valuable work on their own, there is seldom a sharing of information and strategies between them. While each organisations needs to retain its independence, there is also potential for more cooperation. More communication between the bodies is important to avoid duplication of work, but also to strengthen their potential impact by collaborating on joint projects, or supporting initiatives of the other institution where necessary.

5. There is a need for greater interaction with civil society, particularly with those organisations and individuals who are doing work in the prisons. These organisations have the potential for greatly enhancing the information that is available to oversight bodies, as well as their capacity, through their research, analysis and intervention work they do in prisons. They also have the potential to assist in monitoring the implementation of policy.

Acknowledgments

I would like to thank CSPRI for trusting me with this interesting study. I would particularly like to thank Lukas Muntingh and Professor Julia Sloth-Nielson for their ongoing advice and assistance with this project and to Reshma Inderjeeth for her support. Thanks also go to Chris Giffard and Sasha Gear for agreeing to help with proof reading and comments on the paper, and to Antony Altbeker for his help with understanding the concept of accountability. Thanks also to Bilkees Vawda for her tireless administrative assistance.

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National Youth Commission Act 19 of 1996

Public Finance Management Act 1 of 1999

Website

Parliamentary Monitoring Group: http://www.pmg.org

Appendix: List of interviews

The names of people interviewed are not included to protect respondent confidentiality except where they gave their viewpoints in an official capacity.

National Advisory Council: former chairperson Judge Kumleben and current chairperson Judge Desai. In addition, 4 current and former members were interviewed.

Portfolio Committee on Correctional Services: interviews were held with 6 current and former members as well as with committee researchers.

South African Human Rights Commission: Jody Kollapen, Chairperson of the SAHRC

Public protector: Interviews were conducted with the media liaison officer and one of the investigators allocated to correctional services.

National Youth Commission: Daniël van Vuuren, Commissioner dealing with youth in prison

Commission for Gender Equality: Matare Mashao