



INVESTIGATING PRISON CORRUPTION IN SOUTH AFRICA

By

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The aim of the CSPRI is to improve the human rights of prisoners through research-based lobbying and advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes. CSPRI supports these objectives by undertaking independent critical research; raising awareness among decision makers and the public; by disseminating information and through capacity-building.

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The Government had this morning formed an anticorruption squad to look into the conduct of the anticorruption commission, which has been overseeing the anticorruption task-force, which was earlier set [up] to investigate the affairs of a Government ad hoc committee appointed earlier this year to look into the issue of high-level corruption among corrupt Government Officers.¹

1.1 Introduction

Who investigates corruption, what is investigated and who makes these decisions are important considerations in the fight against corruption. The above quote illustrates how anti-corruption efforts can go awry and result in a morass of investigative mandates. This paper reviews the role and function of investigations as one of the approaches to addressing corruption in the South African prison system.

Corruption in the prison system is markedly different from corruption in other sectors of the public service for a number of reasons. Three distinguishing characteristics are important in this regard. The first is the sub-culture of prisons that distinguishes it from other sectors of the public service. The very close relationships that often develop between warders and prisoners are rather unique. No other sector of the public service renders such a long and intense service to its customers. Secondly, when the security function in prison is corrupted, in essence, the state's control is commodified and re-sold to the highest bidder. Thirdly, the established

¹ The Daily Nation, 28 October 1997, Kenya.

association that prisons have with crime, and the external world of crime, places additional pressure on governance and anti-corruption measures.²

The prison environment also creates inherent risks with regard to corruption:

Firstly, the all-encompassing nature of imprisonment regulates every aspect of prisoners' daily lives: from having the most basic necessities to having access to luxury items, or even illegal items and activities. This unavoidably creates a situation where some goods are scarce, and demand and reward exists for their supply. Secondly, the state as the controller, establishes a highly unequal power relationship between the prison bureaucracy (represented by the warder) and the prison population. Thirdly, the closed nature of prisons and their general marginalisation from the public eye and political discourse do not assist in making prisons more transparent. Against this backdrop, poor management, weak leadership or organised crime can have a devastating impact on the overall operation of a prison system and, ultimately, on the human rights of prisoners.³

As noted above, the closed nature of prisons and general lack of public interest in prisons do not assist in improving transparency. Perhaps only the most sensational events and scandals reach the media. The general attitude seems to be that what happens inside prisons affects the people inside prison and not the public. Therefore, the risk of officials operating with little restraint or accountability in a prison system (or areas of such a system) increases considerably. Nötzel refers to these as “calm biopes” – “areas in which, with organisation and control, corruption structures develop, grow and prosper over the years”.⁴ Good governance measures and anti-corruption strategies intend to prevent such “calm biopes” from developing in organisations and to prevent officials from controlling organisations or parts of organisations that they might otherwise attempt to exploit for private gain.

² Muntingh L (forthcoming) *Corruption in the prison context*, p. 5

³ Ibid. p. 3

⁴ Nötzel M “Investigation Strategies and Tactics in the prosecution of corruption offences: experiences from Germany” in C Fijnaut and L Huberts (eds) (2002) *Corruption, Integrity and Law Enforcement*, Kluwer Law International, The Hague. p. 51

In the past three decades, an enormous amount of international research and political energy have been invested in promoting good governance and combating corruption. However, prison systems have received relatively little attention in this regard. The extant literature, international and domestic, is scant and in many cases limited to newspaper reports of scandals and a few government reports. The lack of documented research on prison corruption is in itself reflective of the disinterest among researchers and governance advocates, and the difficulties in conducting research in prisons. It also reflects that the discourse on governance and corruption has not thoroughly penetrated the discourse on corrections. While corruption in the prison context must always be seen as a human rights problem, it has to be acknowledged that often human rights violations are the result of poor governance and are therefore part of a systemic problem.

This paper is an attempt to bring these discourses closer to each other by reflecting on approaches to investigating corruption in the prison context. Investigating corruption is, as will be shown below, one component of anti-corruption strategies.

Investigations can be done in different ways, can be based on different assumptions and be driven by different motivations. These assumptions and motivations are reflected in their respective mandates and terms of reference. Some investigations are fact-finding missions with fairly broad and open mandates, while others may be very specific with the intention of bringing about prosecutions and recovering state assets. There are also a number of institutions that have permanent Constitutional mandates to investigate corruption, such as the Public Protector (PP) and the Public Service Commission (PSC), whose roles and functions in investigating prison corruption also need to be reviewed.

As will be shown, there are a number of institutions with a mandate to investigate corruption. However, when reviewing these mandates and the different approaches that can be adopted in investigating prison corruption, the central question is: *What is the impact being sought when investigating corruption in prisons?* Finding facts in order to understand the problem is a legitimate pursuit as is identifying and prosecuting

individual perpetrators. However, apart from finding the facts and even identifying perpetrators and prosecuting them, the question of intended impact runs deeper. It pertains to the principles of an anti-corruption strategy and its underlying assumptions, such as the importance attached to investigations as a component of the strategy and the contribution of investigations to achieving the strategic objectives, which should ultimately be adherence to the principles of good governance.

Addressing prison corruption ineffectually or failing to do so not only holds severe risks (for taxpayers and victims), but also undermines the very integrity of the penal system by eroding the intended just and morally justifiable punishment of the offender. The prison serves a particular moral function in society and should therefore execute its task to the highest possible standard, untainted by dishonesty or even impressions of impropriety if there is to be any hope that the prisoner will perceive his punishment as justly administered.

1.2 Methodology

This paper is based primarily on a review of the available literature related to the investigation of corruption, with specific reference to the prison context. A number of interviews were also conducted to obtain a more recent description of policy application and operational issues.

This study is limited by two significant factors. The first is that at the time of writing, the Jali Commission's report, which would undoubtedly have enhanced this paper, had not been released. The second limitation on the research is that key staff members in the Department of Correctional Services (DCS) were not interviewed. Permission for interviews was sought through the prescribed channels but not granted.

Despite these limitations, the paper seeks to provide a basic discussion and offer a basis for further research to be undertaken.

2. Investigations – a component of South Africa’s anti-corruption strategy

2.1 The strategy components

A national anti-corruption strategy must aim to address corruption holistically and not be narrow in its focus and application. The strategy needs to concentrate, at least, on prevention, law enforcement, public awareness, and institution building.⁵

Investigating corruption resorts under the broader category of law enforcement.

While the results and sometimes even the process of investigations may be a very visible aspect of combating corruption, they represent one component of the broader strategy for fighting corruption. Corruption is one threat to governance on a national level and at this level governance may be seen within the framework of the National Integrity System (NIS), which is a descriptive and analytical tool created by Transparency International to assess the broader structures and systems in a country that contribute to governance. The NIS investigates and describes the functioning of institutions that would enable the state to deliver on its mandate in a manner that is accountable and transparent and is defined as:

*“the sum total of the laws, institutions and practises in a country that maintain accountability and integrity of public, private and civil society organisations. The NIS is concerned with combating corruption as part of the larger struggle against misconduct and misappropriation, and with creating an efficient and effective government working in the public interest, supported by a vital, transparent civil society and private sector”.*⁶

⁵ Pope J (1999) “Elements of a successful anti-corruption strategy” in R Stapenhurst and SJ Kpundeh *Curbing corruption – toward a model for building national integrity*, Economic Development Institute of The World Bank, Washington.

⁶ Transparency International: Anti-Corruption Handbook, <http://www.transparency.org/ach/introduction.html> Accessed 19/9/2005

The NIS consists of eleven key institutions namely the legislature, executive, judiciary, supreme audit institution, ombudsman, watchdog agencies, public services, media, civil society, private sector and international actors.⁷

National anti-corruption strategies must be comprehensive in their nature and not focus on one aspect only, because in most cases corruption is not an individual problem but an organisational one. Successful approaches to fighting corruption are not aimed at removing the proverbial rotten apple from the barrel but at tackling the barrel itself.⁸ Therefore, the aim should be to fix the system that created the conditions for corrupt acts to be committed.

Investigations, as a part of an anti-corruption strategy, also come with a warning attached. Over-reliance on law reform and law enforcement are uncertain ways of changing behaviour and over-reliance on investigations and law enforcement may lead to repression, the abuse of enforcement power and, ultimately, to corruption.⁹ It is also suggested that over-emphasising law enforcement and control functions can create a self-fulfilling prophecy in that “having been placed continuously under suspicion, treated like quasi-criminals or probationers, public employees will behave accordingly”.¹⁰ As much as “being tough on crime” and “zero tolerance” are popular rhetoric amongst politicians, law enforcement requires a carefully considered and sufficiently resourced approach that is sensitive to the fact that it is one component of what should be a comprehensive strategy.

Investigations, as a strategy component, therefore need to be appropriately proportional to the other spheres of the strategy, namely prevention, public awareness and institution building.¹¹ The appropriateness of this proportional

⁷ Ibid.

⁸ Van der Beken T “A Multi-disciplinary approach for detection and investigation of corruption” C Fijnaut and L Huberts (eds) (2002) *Corruption, Integrity and Law Enforcement*, Kluwer Law International, The Hague. p. 273.

⁹ Pope (note 5), p. 101

¹⁰ Fijnaut C and Huberts L “Corruption, integrity and law enforcement” in C Fijnaut and L Huberts (eds) (2002) *Corruption, Integrity and Law Enforcement*, Kluwer Law International, The Hague. p. 14.

¹¹ Pope (note 5) p. 99

relationship depends on the circumstances and the overall strategic objectives, but, more importantly, on the priorities that have been set for the short, medium and long term. It also has to be accepted that these priorities may change over time. To illustrate this, Grindle asks what good governance and anti-corruption measures would yield the maximum pay-off of reducing poverty and promoting development.¹² In extremely poor countries, it may serve little purpose to investigate cases of corruption as perpetrators will be caught, but little will change for the poor. In middle-income countries, such as Chile and South Africa, there is the capacity to embark on fairly sophisticated governance reforms and law enforcement measures and where the yardstick of direct impact on poverty and development is not the overriding concern. Different constituencies will identify different priorities, and the challenge lies in reaching a workable consensus on what will deliver the most constructive results in the shortest possible period in the most efficient manner. The potential for tension in this process is evident and setting priorities remains an inherently political task and one in which trade-offs have to be made between different constituencies.¹³

2.2 The South African Public Service Anti-Corruption Strategy

At a strategic level, priorities will be located between the four pillars of the anti-corruption strategy, namely prevention, public awareness, investigations and institution building. The Public Service Anti-corruption Strategy, released by the DPSA in 2002, has nine “strategic considerations”, namely:

- review and consolidations of the legislative framework;
- increased institutional capacity;
- improved access and protection of whistle-blowers and witnesses;
- prohibition of corrupt individuals and businesses;
- improved management policies and practices;

¹² Grindle MS (2004) “Good enough governance – poverty reduction and reform in developing countries” *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 17, No. 4, p. 537

¹³ Grindle (note 12) p. 539

- managing professional ethics;
- partnerships with stakeholders;
- social analysis, research and advocacy, and
- awareness-raising and education.¹⁴

The principles underpinning this strategy reflect the desire to find the right balance between prevention, public awareness, investigation and institution building. The strategy is informed by the following principles:

- The need for a holistic and integrated approach to fighting corruption, with a balanced mixture of prevention, investigation, prosecution and public participation as the platform for the strategy.
- Constitutional requirements regarding the criminal justice system and public administration.
- The requirement for tailor-made Public Service strategies that operate independently but that complement national strategies, particularly with regard to detection, investigation, prosecution and adjudication of acts of corruption, as well as the recovery of the proceeds of corruption.
- Acts of corruption are regarded as criminal acts that can be dealt with either in the administrative or criminal justice system or both if need be.
- Domestic, regional and international good practice and conventions.
- All aspects of the strategy must be:
 - supported by comprehensive education, training and awareness
 - co-ordinated within Government
 - subjected to continuous risk assessment
 - expressed in terms of measurable and time-bound implementation targets.¹⁵

The Public Service Anti-Corruption Strategy pays particular attention to the contribution made by investigations in the first three strategic considerations:

¹⁴ Department of Public Service and Administration (2002) *Public Service Anti-Corruption Strategy*, http://www.dpsa.gov.za//macc/Public%20service%20anti_corruption_strategy.pdf , p. 12-21

¹⁵ Department of Public Service and Administration (note 14) p. 11.

consolidation of the legislative framework, increased institutional capacity, and protection of whistleblowers. Under each strategic consideration a number of investigation-specific objectives are articulated, which are presented below:¹⁶

Consolidation of the legislative framework

- Establish a workable legal definition of corruption.
- Extend the scope of legislation to all officials in public bodies, corruptors and their agents.
- Reinstate the common law offence of bribery.
- Create presumption of *prima facie* proof to facilitate prosecution of an offence under the revised legislation.
- Establish extra-territorial application and jurisdiction, and compliance with international conventions to which South Africa is a signatory.
- Improve the civil and recovery elements of the legislative framework, in particular tax legislation that prohibits rebates related to bribes, the applicability of Sections 297 and 300 of the Criminal Procedure Act, recovery of losses in terms of the Public Finance Management Act, prevention of organised crime, recovery from pension provisions, freezing of assets and return of assets to institutions that have incurred losses.
- Enable the State and individuals to claim for damages.
- Establish responsibility for maintaining the witness protection system.
- Make legislation easy to understand and apply.

In 2004, the Corruption Act¹⁷ was repealed and replaced by the Prevention and Combating of Corrupt Activities Act¹⁸, which provides for an overarching legislative framework.¹⁹ The new legislation deals with the relevant objectives listed above and

¹⁶ Department of Public Service and Administration (note 14) p. 12-15

¹⁷ Act 94 of 1992

¹⁸ Act 12 of 2004

¹⁹ The purposes of the Act are: To provide for the strengthening of measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities; to provide for investigative measures in respect of corruption and related corrupt activities; to provide for the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts;

specifically addresses investigations in respect of property relating to corrupt activities and the powers of the National Director of Public Prosecutions when investigating such cases.²⁰ It does not create new or different investigative structures, which is an issue that will be discussed further in Section 5 below.

Increased institutional capacity

This consideration is directed at existing institutions, namely courts, national corruption-fighting institutions and departmental institutions.

- The efficiency and effectiveness of the *courts* need to be improved and particular attention should be given to improving the specialised capacity of court officials to address corruption cases, rather than creating additional specialised courts.
- Improving the functioning of *existing institutions* that have anti-corruption functions, namely: The National Prosecuting Authority (specifically the Directorate of Special Operations and Asset Forfeiture Unit), the Public Protector, the Auditor- General, the Public Service Commission, the Special Investigation Unit (SIU), the South African Police Service (the Commercial Branch and the SAPS Anti-corruption Unit), the National Intelligence Agency, the Independent Complaints Directorate, the South African Revenue Service, committees of legislatures and occasional commissions established in terms of the Commissions Act.
- Several departments have created specific *departmental capacity* to address corruption. Since there is great diversity in the various departments' capacities, it is necessary to bring about uniformity by establishing minimum standards, so as to enable departments to, among other things:
 - Conduct risk assessments.
 - Investigate allegations of corruption and detected risks at a preliminary level.

to place a duty on certain persons holding a position of authority to report certain corrupt transactions; to provide for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities; and to provide for matters connected therewith.

²⁰ Ss 22-23

- assist the process of conducting further investigation, detection and prosecution, in terms of prevailing legislation and procedures.
- Receive and manage allegations of corruption through whistle-blowing or other mechanisms.

Protection of whistle blowers

Successful investigations depend on reliable witnesses and evidence, but in making disclosures whistle-blowers may place themselves at great risk, therefore ensuring that they enjoy effective protection is a key element:

- Establishing guidelines for the implementation of the Protected Disclosures Act
- Establish institutions to implement departmental whistle-blowing implementation policies, including policies for supporting persons maliciously and falsely implicated
- Obtaining support from the civil society sector to assist, support and protect whistleblowers
- Promoting a culture of whistle-blowing amongst employees
- Taking steps to improve the conditions for and functioning of the system of witness protection
- Reviewing the effectiveness, risks and existing problems of current hotlines in order to improve the system.

Whilst the Public Sector Anti-Corruption Strategy provides the overall strategic framework for combating corruption as adopted by cabinet, there was also a need to assist government departments to develop a minimum capacity to address and investigate corruption within their respective spheres of influence. In response, the Department of Public Service and Administration developed a practical resource guide titled the “*Anti-Corruption Capacity Requirements*”.²¹ The guide provides a useful

²¹ Department of Public Service and Administration (2006) *Anti-Corruption Capacity Requirements: Guidelines for implementing the Minimum anti-corruption capacity requirements in departments and organisational components in the public service*, http://www.dpsa.gov.za//macc/Anti%20Corruption%20Capacity_Booklet.pdf

resource to departments, supported by examples, of how to develop and implement a departmental anti-corruption strategy. It identifies the four key components of an anti-corruption strategy as preventing, detecting, investigating and resolving corruption. This differs slightly from the components referred to above as it does not identify institutional development as an integral part of the anti-corruption strategy. It also separates investigation from detection, which may be a useful distinction at operational level.

In summary, at macro-level, the NIS provides the overall structural and functional framework for combating corruption, and the National Anti-corruption Strategy gives direction to using these capacities as supported by the legislative framework. These are given expression in a number of independent and semi-independent structures, (which will be described in more detail in Section 5), which have specific mandates to investigate corruption. Departmental anti-corruption strategies, supported by minimum capacity requirements, must establish internal capacity to combat corruption by means of departmental investigative units, among others. The priorities for investigation and the priority of investigation itself as a strategic consideration is a political issue that inevitably involves trade-offs. Developments since 2002 indicate that investigations play a lesser but not insignificant role in government's approach to combating corruption. Indicative of this is the conclusion by the Public Service Commission not to establish a single anti-corruption unit but rather to rationalise existing institutions and facilitate co-operation between them.²²

3. DCS anti-corruption strategy

The preceding discussion covered the overall context with regard to investigations. In this section, a description of the DCS anti-corruption strategy is presented with a view to further contextualising the role of investigations in combating prison corruption. The DCS has a particular historical relationship with the problem. As

²² Van Vuuren H (2005) *National Integrity Systems – transparency International Country Study Report – South Africa*, Final Draft, Transparency International, p. 71

early as 2 September 1996, the Parliamentary Portfolio Committee on Correctional Services (PPCCS) and its counterpart on Health signed a joint resolution requesting “*an immediate independent national investigation into corruption*”. The Committees were extremely concerned about allegations emanating from the Victor Verster (now Drakenstein), Pollsmoor, and Johannesburg Prisons and asked the relevant Area and Regional Commissioners as well as the National Commissioner to appear before them to explain what was being done about the situation.²³ The 1998 Report of the Auditor General on the DCS financial statements also raised serious questions about issues that did not necessarily indicate corrupt practices, but that undoubtedly contributed to an environment that would facilitate such practices.²⁴ A further report by the Auditor General investigating alleged irregularities among senior officials in the DCS was released in 1999.²⁵ Late in 1999, the Minister of Public Service and Administration, in consultation with the Minister of Correctional Services, instructed that a management audit of the DCS be carried out, the findings of which were presented to the PPCCS on 14 March 2000.²⁶ The findings were so damning that it was reported that “*members from all parties shared concern that the State had lost control of Correctional Services*”.²⁷ The establishment of the Jali Commission of Inquiry²⁸ into prison corruption and maladministration finally gave a clear indication that government would no longer ignore the continued allegations and findings that something was fundamentally wrong in the DCS.

In November 2002, the DCS briefed the PPCCS on its anti-corruption strategy and presented a three-pronged strategy:

²³ African National Congress, “Joint Resolution on Corruption in Correction Services” Statement issued by the ANC, 2 September 1996

²⁴ Report of the Auditor General on the financial statements of Vote 10 for the year ended 31 March 1998 and Performance Management Audit on the management of Prisons (RP 181/1998).

²⁵ Report of the Auditor-General on Findings Arising from a Special Investigation into Alleged Irregularities Among Senior Officials of the Department of Correctional Services, Published by Authority RP 123/1999.

²⁶ Parliamentary Monitoring Group Minutes of the Parliamentary Portfolio Committee on Correctional Services, 14 March 2000.

²⁷ Ibid

²⁸ The Commission was duly constituted by the order of the President in terms of Proclamation No. 135/2001 dated 27th September 2001, which set out the regulations governing the Commission as well as the Commission’s Terms of Reference.

- Prevention
 - By addressing management weaknesses
 - Through the identification and management of opportunities for corruption and risks
 - Through the development and promotion of a code of conduct

- Investigation
 - Investigation by the Jali Commission
 - Investigations by the SIU
 - Intelligence support as well as support from the SAPS and Directorate Special Operations in the National Prosecuting Authority

- Sanction
 - Disciplinary hearings
 - Use of internal and external sanctions²⁹

Given the history of the department in respect of corruption, the emphasis on law enforcement is not altogether surprising. At the time, it was important to demonstrate, at least on paper, that a tough approach would be followed. It should be kept in mind too that the National Anti-Corruption Strategy only became available that year³⁰ and that the DCS was probably occupied with the Jali Commission's investigations for most of 2002. An audit of the DCS anti-corruption capacity³¹ was completed only towards the end of 2003, which provides further reason for the anti-corruption strategy's emphasis on investigation and law enforcement at the time.

In June 2005, the DCS briefed the PPCCS³² on its anti-corruption strategy again. It was evident that the new strategy was better informed and aimed to find a balance, thus

²⁹ Parliamentary Monitoring Group Minutes of the Parliamentary Portfolio Committee on Correctional Services, November 2002.

³⁰ The National Anti-Corruption Strategy was released in January 2002.

³¹ Painter-Morland M et al (2003) *Final Consolidated Report – focused assessment of anti-corruption capacity within the Department of Correctional Services*, UNODC, Pretoria.

³² Parliamentary Monitoring Group Minutes of the Parliamentary Portfolio Committee on Correctional Services, 7 June 2005.

echoing the strategic considerations outlined in the National Anti-Corruption Strategy. The 2005 DCS strategy stated at the outset that “*corruption is inherent in all correctional systems*” and said that the problem was located primarily at the levels of area management and prison levels in the DCS hierarchy.³³ It explained that the approach to preventing corruption would be decentralised and would target area management and prison levels in the department. The strategy further reflects on the Administration of Justice Act, the duties of the Commissioner as head of the department, Protected Disclosures Act³⁴ and the Prevention and Combating of Corrupt Activities Act.³⁵

The overall strategy was presented as a wagon-wheel with “Anti-corruption awareness” as the hub and the spokes consisting of the following 15 anti-corruption areas of intervention:

- Risk management
- Internal auditing
- Physical and information security
- Fraud detection
- Corruption trend analysis
- Investigation of corruption
- Disciplinary code and procedure
- Systems, policy and procedure
- Internal controls
- Integrity testing
- Whistle-blowing policy
- Obligation to report corruption
- Code of conduct
- Ethics training

³³ The DCS is managed in terms of six regions - these represent provinces but with two exceptions: Limpopo, Mpumalanga and North West are treated as one region, and Free State and Northern Cape as another. The next level is Management Areas where there are 48 management areas in total. Areas are subdivided into individual prisons.

³⁴ Act 26 of 2000

³⁵ Note 18

- Communication strategy

The anti-corruption strategy is integrated into the DCS Strategic Plan with the key departmental objective being: “to ensure effective, legally sound policy compliance and corruption-free management of Correctional Services”.³⁶ For this purpose, the strategy implementation plan emphasises three aspects, namely trend analysis, effective and efficient investigations resulting in prosecutions and sanctioning, and effective and efficient delivery on, and updating of, the integrity and vetting plan.³⁷ It should also be borne in mind that other key departmental objectives also intend to feed into the Anti-Corruption Strategy outputs. The investigation of corruption in this strategy is flanked by two information-driven processes, namely trend analysis and vetting. It is nonetheless noticeable that the key departmental objective relating to corruption in the DCS reflects an emphasis on investigations.

It is beyond the scope of this paper to deal with the question of whether this emphasis is at the cost of the other areas of intervention. However, Painter-Morland cautioned that an over-emphasis on investigations (and enforcement-related activities such as vetting) may create the impression that broader issues of ethics are of less importance:

It creates the perception that ethics can be managed merely by ensuring that dishonest people do not enter the department, and it loses sight of the important role that current staff within the department, as well as the organisational culture within the department, play in the continuation of corrupt behaviour. Even if one could ensure that only honest people is recruited and appointed, the attitude and practices of long-term staff and the corrupting organisational environment could still create a “rotten barrel” that would corrupt the most ethical individuals.³⁸

From 2002 to 2005, the DCS anti-corruption strategy evolved into a more comprehensive approach in line with the *National Anti-Corruption Strategy* and the minimum capacity requirements developed by the DPSA. The strategy also accepted

³⁶ Department of Correctional Services (2006) *Strategic Plan for 2006/7 to 2010/11*, p. 30

³⁷ Ibid.

³⁸ Painter-Morland (ed) (note 31) p.27

that corruption was an “inherent problem” and incorporated the anti-corruption strategy into the departmental strategic plan, placing particular emphasis on information-driven processes.

4. Internal investigative capacity of the DCS

The National Anti-Corruption strategy requires the development of an internal capacity in all national departments. This is expanded on further in the *Minimum Anti-Corruption Capacity Requirements*. This section provides a description of the development of that capacity in the DCS.

4.1 Structural arrangements

The legislative mandate for the internal capacity to investigate theft, fraud and corruption is provided for in the Correctional Services Act in respect of the “internal service evaluation”. The internal service evaluation must be conducted at regular intervals to assess the effectiveness of internal control at national and provincial levels as well as at individual prisons. Sections 95(2)(f) and 95(2)(g) specifically provide for developing measures to combat theft, fraud and corruption and for investigating such practices, as well as dishonesty in general. An amendment to the Act in 2001³⁹ provided for the establishment of a unit in the DCS to deal with such matters. The unit is mandated to initiate disciplinary action resulting from any investigation relating to theft, fraud, corruption or dishonest practices. Members of the unit may also enter and search any departmental premises and seize any departmental records.⁴⁰ The *Minimum Anti-Corruption Capacity Requirements* instructed all government departments and other sectors of the public service to establish, amongst others, a capacity to:

- investigate allegations of corruption,
- institute and complete disciplinary actions for cases of corruption,

³⁹ Act 32 of 2001

⁴⁰ S 95(3A)

- detect corruption, and
- refer allegations of corruption to a relevant law enforcement agency or other appropriate agencies or bodies in terms of a formal arrangement.

The *Minimum Anti-corruption Capacity Requirements* document provides a useful description of the structure of the internal capacity of the DCS to investigate corruption, which is presented below.⁴¹ As noted above, the DCS has determined that its primary corruption risk areas are at the levels of management area and prison. In view of this, the focus is on a decentralised prevention strategy that emphasises that preventing corruption is the responsibility of all personnel. The department chose not to have a specific corruption prevention unit as this might have created the impression that corruption prevention was the responsibility of this unit only.

The *Risk Management Committee* does risk assessment. It comprises six Deputy Regional Commissioners, the 16 Deputy Commissioners, the Director: Inspectorate and the Director: Internal Audit, and is chaired by a Chief Deputy Commissioner. Corruption has been identified as one of the 16 risk areas which are monitored at this level. Risk assessment is done annually - in time to inform the department's strategic plan. As part of the strategic plan, it is the responsibility of management at all correctional facilities and all branches to implement the strategy.

While the prevention strategy is decentralised, the investigation and sanctioning functions are centralised. The investigative function resorts under the Deputy Commissioner Legal and Special Operations, which resides under the Chief Deputy Commissioner: Central Services. The Chief Directorate Legal and Special Operations has three directorates: Code Enforcement (CEU), Legal Services, and the Departmental Investigations Unit (DIU).⁴²

⁴¹ Dept of Public Service and Administration (note 21) , pp 15-18.

⁴² DCS website <http://www.dcs.gov.za/head/Headoffice.htm#>

The DIU was created specifically to deal with the detection and investigation of corruption, fraud and serious maladministration. Although overseen by Central Services and Legal and Special Operations, it has relative autonomy within the department regarding investigations.⁴³ The approach is that all managers should provide the DIU with full support in the course of its investigations. Within the DIU there are three sub-units namely the Investigation Unit, Analytical and Prevention Desk, and the Integrity Testing Desk.

The *Investigation Unit* is responsible for investigating allegations of corruption. It has a Director, 12 investigators, and two administrative support staff. The DIU is located in Pretoria, but its mandate is national. Apparently, this arrangement is beneficial as investigators are not close to the target of investigation, which reduces the chances of intimidation or undue influence.

An *Integrity Testing Desk* functions as a Vetting Field Unit in terms of the National Intelligence Agency's (NIA) policy on vetting, and is responsible for vetting staff in co-operation with the NIA. It is staffed by a director and six integrity investigators.

The unit also has an *Analytical and Prevention Desk* that is responsible for maintaining a database on incidents, doing trend analysis and reporting on this line function to the executive management committee. Information from this database is used to identify high-risk areas and prisons with high levels of reported incidents, in order to advise the relevant managers. It is argued that this flow of information back to implementation level places the responsibility of strategy implementation in the hands of the area and correctional centre managers. The sub-unit has a director and three analytical and prevention staff members.

After the DIU has completed an investigation, the file is given to the Prosecutions Unit of the CEU, which deals with disciplinary prosecutions. The CEU has two sub-units, *Prosecutions* and *Sanctions*. The *Prosecutions* sub-unit is responsible for initiating

⁴³ Dept of Public Service and Administration (note 21), p. 16

disciplinary investigations and prosecuting cases. It has a staff compliment of one deputy director and six initiators. The *Sanction* sub-unit is responsible for training chairpersons for disciplinary proceedings and has one deputy director. The CEU is also responsible for handing cases over to the SAPS or other external agencies, which should happen as soon as there is reason to believe that a criminal case may emanate from an investigation.

Two other units in the department are also important to the investigation of corruption. The first is the Human Resource Department, which is responsible for doing pre-employment screening and verifying the qualifications of recruited staff. The second is the Finance Unit that is part of the Risk Management Committee, which is responsible for allocating additional resources when external assistance is required, such as the SIU, forensic auditors, or expert witnesses.

In overview, it has to be concluded that the DCS has a small investigative capacity situated at its head office. Its impact has not been evaluated and it would therefore be premature to form an opinion in this regard at this stage. However, the size of the department (36 000 employees and 240 prisons accommodating 160 000 prisoners) and the historical context appear almost overwhelming. The number of dismissals and disciplinary actions taken against staff members, as reflected in the DCS Annual Report, suggests that this may indeed be the case.⁴⁴

The DCS had a corruption reporting hotline, but this was phased out and all corruption complaints are now lodged with the PSC Anti-Corruption Hotline. It has also been reported that the SIU co-operates closely with the DIU not only in respect of investigations but also to improve the latter's skills capacity.

5. External agencies with a mandate to investigate corruption in the correctional system

⁴⁴ In 2004/5 a total of 14 officials were dismissed as a result of misconduct, 115 received written warnings (of ranging severity), and 54 received verbal warnings. DCS Annual Report 2004/5 p. 139.

There is no single anti-corruption agency in South Africa and, as Van Vuuren points out, it was decided rather to mandate a number of agencies with the powers to address corruption – “a one-dragon-with-many-heads approach” – than to have a single agency.⁴⁵ These agencies are categorised as follows:

- Constitutional and oversight bodies that have a special mandate in respect of Chapter 9 of the Constitution, such as the Auditor General (AGSA), Public Protector (PP), Public Service Commission (PSC) and the Independent Complaints Directorate (ICD)
- Criminal justice agencies such as SAPS, Special Investigations Unit (SIU), National Prosecuting Authority, which includes the Directorate Special Operations (DSO) (Scorpions), Asset Forfeiture Unit (AFU)
- Other stakeholders such as the Department of Public Service and Administration, National Intelligence Agency, South African Revenue Service (SARS) and the cross-sectoral National Anti-Corruption Forum (NACF).⁴⁶

A short description of the powers and functions of the key external investigative agencies is presented below. Included in this is a description of other agencies that have a directly relevant mandate with regard to the investigation of corruption, such as the Anti-Corruption Co-ordinating Committee and the Department of Public Service and Administration (DPSA).

5.1 Judicial Inspectorate of Prisons

The Judicial Inspectorate of Prisons (JIP) has a particular oversight function in respect of the prison system and is tasked with the inspection of prisons in order that “the Inspecting Judge may report on the treatment of prisoners and on conditions in prisons”.⁴⁷ The Inspecting Judge has a further mandate to establish a system of

⁴⁵ Van Vuuren (note 22) p. 71.

⁴⁶ Ibid.

⁴⁷ Correctional Services Act (Act 111 of 1998) S 85(2) The powers, functions and duties of the Inspecting Judge is further described in S 90 of the Act.

Independent Prison Visitors (IPVs)⁴⁸ whose duty it is to visit prisons, interview prisoners, record complaints lodged by prisoners, and attempt the resolution of complaints in consultation with the Head of Prison.⁴⁹ Since its establishment, the JIP has established an extensive system of IPVs at nearly every prison and records in excess of half a million complaints lodged by prisoners annually.⁵⁰

The original version of the Correctional Services Act, as adopted by Parliament in 1998, also mandated the Judicial Inspectorate to investigate corrupt and dishonest practices. An amendment to the Act in 2001 removed the words “corrupt and dishonest practices” as part of the Judicial Inspectorate’s investigative mandate from section 85(2).⁵¹ However, in respect of the powers of the Inspecting Judge, the power to investigate any corrupt and dishonest practices was retained and not affected by the 2001 amendments to the Act.⁵² Therefore, the Inspecting Judge, but not the JIP, retained the power to investigate corruption. When this occurred, the argument put forward was that the JIP does not have the requisite capacity and skills to investigate corruption and that a focus on corruption and dishonest practices may indeed alienate departmental officials from the Inspectorate (and more particularly the IPVs), who needed the co-operation of officials at ground level to resolve prisoners’ complaints.

The *de facto* situation is that the JIP does not investigate theft, fraud or corruption. Should allegations of corrupt and dishonest practices come to the attention of the JIP, these are referred to the relevant agencies, which could be an agency external to the DCS, or the department’s own internal investigative unit, depending on the nature of the allegation.⁵³

⁴⁸ Correctional Services Act (Act 111 of 1998) S 92(1)

⁴⁹ Correctional Services Act (Act 111 of 1998) S 93(1) The remainder of S 93 provides more detail in this regard and it is not necessary to explain the procedure here.

⁵⁰ Annual Report of the Judicial Inspectorate of Prisons, 2005/6.

⁵¹ Correctional Services Amendment Act (Act 32 of 2001) S 31

⁵² Correctional Services Act (Act 111 of 1998) S 90(1)

⁵³ Interview with the Director of the Office of the Inspecting Judge, 10 August 2006.

5.2 Jali Commission

The *Commission of Inquiry into alleged incidents of corruption, maladministration, violence or intimidation in the Department of Correctional Services* (Jali Commission) was duly constituted by the order of the President in terms of Proclamation No. 135/2001 dated 27 September 2001, which sets out the regulations governing the Commission as well as the Commission's Terms of Reference. These stated that it was the task of the Commission to:

- Inquire into and report on alleged incidents, of corruption relating to
 - the procurement of goods and services for the Department of Correctional Services
 - the recruitment and appointment, promotion and dismissal of employees for the DCS;
 - the treatment of prisoners;
 - dishonest practices and illicit relationships between employees and prisoners leading to unlawful activities;
 - alleged incidents of non-adherence to departmental policy and deviation from national norms and standards;
 - alleged incidents of violence or intimidation against employees of the department, which affect the proper functioning of the department;
- the extent of implementation of recommendations of past investigations relating to the department;
- recommend steps that could be taken to prevent the future occurrence of such incidents
- recommend steps that could be taken against any employee who in terms of the findings of the Commission was implicated in impropriety against the employer.

While the terms of reference applied to the DCS in general, the following management areas were singled out for the Commission's attention:

Pietermaritzburg, Durban Westville, Ncome, Johannesburg, Pollsmoor, Pretoria, St. Alban's and Leeuwkop. The amended terms of reference, dated June 2002, extended

this list to include Bloemfontein management area. It was originally planned that the Commission would complete its work within 12 months at a cost of R12 million,⁵⁴ but the Jali Commission eventually took four years and four months to complete its work at a total cost of R27.5 million.⁵⁵

A significant characteristic of the terms of reference is that the investigations were directed at area management level and no mention is made of investigations at regional (provincial) level or that of head office. The exclusion of the two top tiers of the department from the gaze of the Commission should not be regarded as incidental, especially since the previous permanently-appointed Commissioner, Sithole, resigned from his position amidst allegations of theft, fraud and corruption.

The two-page terms of reference are also fairly scant on the reporting of the Commission and do not give a due date for reporting, the confidentiality of the report, or provisions for interim reporting. In the course of its work, the Jali Commission submitted 11 interim reports to the DCS without making these available to the public or Parliament. Presumably, the DCS based many of its strategic decisions concerning combating corruption on the interim findings of the Commission, but these were not open to public or parliamentary scrutiny.

5.3 NPA: Directorate Special Operations

The Directorate Special Operations (DSO), one of four directorates under the National Director of Public Prosecutions, and more commonly known as the Scorpions, was established in terms of the National Prosecution Authority Amendment Act.⁵⁶ In

⁵⁴ Sekhonyane M *Showings its Teeth – The Jali Commission on prison corruption*, SA Crime Quarterly No. 2, Nov 2002, p. 28.

⁵⁵ Parliamentary Monitoring Group Minutes of the Parliamentary Portfolio Committee on Correctional Services, 20 June 2006.

⁵⁶ Act 61 of 2001

short, its purposes are to investigate organised and other serious crimes with the aim of prosecuting offenders.⁵⁷ The strategy of the DSO is summarised as:

- identifying and addressing serious, complex and organised crime phenomena, that call for pro-active counter-attack
- becoming the primary source of crime information (as per its mandate), with a stable, pre-emptive capacity to analyse serious organised crime trends and determine targets
- applying a multi-disciplinary approach to investigations to ensure quality impact in its focus areas
- disrupting organised crime and corruption networks through arrests, searches and convictions, and forfeiture
- attacking the value chain of organised crime, through modern technology and communication surveillance
- applying racketeering and money-laundering legislation
- proliferating the perception of victory over crime, that is essential to enhance public confidence.⁵⁸

Cases to be investigated by the Scorpions must meet four criteria as the first sifting process. Such cases must fall in one the following four categories:

- organised crime
- organised corruption
- serious and complex financial crime
- racketeering and money laundering.⁵⁹

⁵⁷ Act 61 of 2000, S 1 In order to ensure that the prosecuting authority fulfils its constitutional mandate to institute criminal proceedings on behalf of the state and to carry out the necessary functions incidental thereto, to make provision for—

- the establishment of an Investigating Directorate, with a limited investigative capacity, to prioritise and to investigate particularly serious criminal or unlawful conduct committed in an organised fashion, or certain offences or unlawful conduct, with the object of prosecuting such offences or unlawful conduct in the most efficient and effective manner; and
- the necessary infrastructure and resources to perform these functions.

⁵⁸ Van Vuuren (note 22) p. 76.

⁵⁹ Ibid.

A further process involves using 14 criteria to refine case selection further which Redpath describes in detail and the inclusion of which is not essential to this paper.⁶⁰ It is noticeable that these criteria do not reflect specifically on corruption, but rather on organised crime syndicates, regardless of whether their crimes involve corruption. The monetary impact of the crime(s) is also of significance and while serious economic offences should involve losses to the value of at least R5 million, corruption cases have a significantly lower threshold at R500 000.⁶¹ Despite recent controversy, the Scorpions are an extremely powerful agency for combating corruption and the integration of investigation and prosecution has brought some significant successes since 2000. Available information does not indicate that there have been recent investigations in the prison system.

5.4 NPA: Asset Forfeiture Unit

The Asset Forfeiture Unit (AFU) was established within the NPA to enable the seizure of assets and proceeds of crime. The unit does not have a specific anti-corruption mandate, but it does have the power to investigate, freeze and seize assets that may be connected to criminal activity.⁶² Since it is a creation of the Prevention of Organised Crime Act⁶³, it follows that organised crime and corruption will be the focus of its investigations in as far as these are in line with the strategic objectives of the AFU. The focus of these objectives relates to developing case law, building capacity to ensure effective asset forfeiture, affecting priority crimes, ensuring a national presence, and developing productive relationships with key stakeholders.⁶⁴ The AFU helped the SIU recover significant losses identified by means of the investigation into medical aid fraud in the DCS.⁶⁵

⁶⁰ Redpath J *The Scorpions - Analysing the Directorate of Special Operations*, ISS Monograph No 96, March 2004, p. 47.

⁶¹ *Ibid.*

⁶² Van Vuuren (note 22) p. 80.

⁶³ Act 121 of 1998

⁶⁴ Van Vuuren (note 22) p. 81

⁶⁵ Parliamentary Monitoring Group Minutes of the Parliamentary Portfolio Committee on Correctional Services 7 June 2005

5.5 Special Investigations Unit

The Special Investigations Unit (SIU) is the only state agency that is specifically dedicated to combating corruption.⁶⁶ The SIU was created in terms of the Special Investigations Units and Tribunals Act⁶⁷ and headed by Judge Heath until he had to resign in June 2001 after the Constitutional Court ruled that a judge could not head the SIU.⁶⁸ The new SIU was established by proclamation by the President in July 2001.⁶⁹ The SIU is an independent structure that is accountable to Parliament. Investigations are conducted at the request of the President to whom investigation outcomes are reported. In short, the mandate of the SIU is to investigate fraud, corruption and maladministration, and to institute civil litigation to recover losses suffered by the state, or to prevent further losses.⁷⁰ The President may refer a matter to the SIU for investigation if it relates to any of the following:

- serious maladministration in connection with the affairs of any state institution;
- improper or unlawful conduct by employees of any state institution;
- unlawful appropriation or expenditure of public money or property;
- any unlawful, irregular or unapproved acquisitive act, transaction, measure or practice that has a bearing on state property;
- intentional or negligent loss of public money or damage to public property;
- corruption in connection with the affairs of any state institution;
- unlawful or improper conduct by any person who has caused or may cause serious harm to the interest of the public or any category thereof.⁷¹

The SIU is also mandated to take civil legal action to recover losses, cancel contracts if procedures were not followed, and stop transactions and actions that are not properly authorised. In order to expedite this process of civil litigation, the SIU litigates in a Special Tribunal that focuses only on these matters. While the emphasis falls on civil

⁶⁶ Van Vuuren (note 22) p. 72.

⁶⁷ Act 74 of 1996

⁶⁸ *South African Association of Personal Injury Lawyers v Heath and Others*, CCT 27/00

⁶⁹ SIU Annual Report 2004/5, p. 2.

⁷⁰ Ibid.

⁷¹ Ibid.

litigation, it has the powers to arrest and prosecute. In the event that criminal activity is uncovered, the SIU will hand over a court-ready docket to the NPA (DSO). The SIU may also investigate private sector matters that may cause significant harm to public interests.

Following the revelations of widespread corruption in the DCS during the public hearings of the Jali Commission, the DCS approached the SIU for assistance and investigations started in 2002.⁷² Since then, the scope of investigations into the DCS have been broadened and formed the basis for an apparently very productive partnership between the DCS and the SIU. After an initial agreement that the project would last for three years, the SIU agreed to extend it beyond 2006. In terms of the agreement, the DCS contributes R6 million to the SIU annually for it to conduct investigations and employ a dedicated team of 25 staff members on the project. Since the signing of the original agreement, this capacity has grown to a team of 40 staff members.⁷³

The scope of investigations covers all nine provinces and focuses on:

- allegations by correctional centre inmates
- procurement of medication at DCS pharmacies
- fraudulent claims against the medical aid fund
- abuse of the First Auto Fleet card system
- procurement contracts.

After the Jali Commission reported widespread allegations of medical aid fraud, fraud committed against the medical aid fund became a primary focus of the SIU's investigations.⁷⁴ Briefing Parliament in June 2005, the SIU reported that its investigations had uncovered three forms of fraud:⁷⁵

⁷² SIU (note 69) p. 7.

⁷³ SIU *Fact sheet on the National Investigation into corruption, fraud and maladministration at various Correctional Centres*, <http://www.siu.org.za/index.asp?include=about/dcs.html>

⁷⁴ Ibid

⁷⁵ Parliamentary Monitoring Group Minutes, Parliamentary Portfolio Committee on Correctional Services meeting on 7 June 2005.

- A medical practitioner and a colluding official would co-operate to charge an innocent member's medical aid account. The colluding official would obtain relevant information, such as the PERSAL number that was required for the claim, which the medical practitioner would submit to the fund. Once the fund paid out, the benefit was shared between the official and the medical practitioner.
- A medical practitioner and a colluding official would submit excessive claims (up to 200 in one day) on the official's medical aid account. When the fund paid out, they would share the benefits.
- Non-medical goods (e.g. groceries) were supplied through colluding pharmacies and the claims submitted to the medical aid as if these were medical goods.

The SIU will be continuing with its investigations and estimates that cumulative savings of close on R1 billion have already been achieved through the restructuring of the fund, funds recovered, and reduction in fraudulent claims. A total of 74 medical practitioners have been charged and R23 million been recovered in addition to R3 million worth of assets that have been confiscated.⁷⁶ In addition to the medical practitioners being investigated and prosecuted, cases involving 244 DCS officials have been referred to the SAPS. A further 398 DCS officials have been referred for disciplinary action.⁷⁷ As a result of prison visits and interviews with staff and prisoners⁷⁸, in the 2004/05 financial year the SIU investigated other cases of fraud and corruption relating to the submission of fraudulent travel claims, rendering assistance with escapes, theft of kitchen stock, and theft of scrap metal from the DCS workshops.

⁷⁶ The following three cases give insight into the mechanics of the corrupt acts:

- Dr M (Gauteng) claimed between R5 000.00 and R30 000.00 for an injection that costs R124. He also saw patients very seldom.
- Dr K (North West) claimed R200 000.00 on an innocent member's account. He also admitted to submitting excessive claims to the value of R500 000.00.
- Dr B (Gauteng) admitted to the SIU that he submitted false and/or excessive claims to the value of R7.6 million to the medical aid

⁷⁷ SIU (note 69)

⁷⁸ The 2004/05 Annual Report of the SIU (p. 8) reflects that that 161 prisons were visited, 103 496 prisoners interviewed, 16 927 DCS staff members interviewed, 8091 complaints followed up, 244 cases referred for criminal prosecution and 398 disciplinary actions against officials instituted.

There is no doubt that DCS and the SIU's co-operation has been very productive and resulted in enormous savings. The systematic and focused approach followed in respect of grand corruption cases ensured that results were of a concomitant magnitude in respect of the monetary value of recoveries and future savings. Despite the investigations being wide-ranging and intensive, which is reflected in the number of prisoners and staff members interviewed and the number of complaints followed up (see footnote 69), the number of criminal convictions has been comparatively low. Of 157 criminal referrals between 2002 and 2005, there have been only five convictions, with 96 investigations still pending and another 19 cases on trial.⁷⁹

Regardless of these figures, the SIU has been instrumental in uncovering fraud and corruption in the DCS. In 2002, the circumstances at the time necessitated that an independent body with highly skilled and dedicated staff undertake the investigations. It was evident then that neither the Department's own investigative unit nor that of the SAPS would be able to investigate properly the allegations emanating from the Jali Commission. During the Jali Commission's hearings, evidence was heard that efforts by the DCS management to have fraud and corruption investigated by means of its internal unit were frustrated and achieved very little and that at times even the police were denied access to prisons by those who were intent on protecting corrupt practices.⁸⁰

By September 2006, it was not clear if the extended agreement between the DCS and the SIU would continue to focus on the same areas of investigation or whether there would be a shift to different issues.

⁷⁹ SIU (note 73) p. 10.

⁸⁰ Muntingh (note 1) p.41.

5.6 Public Service Commission

The Public Service Commission (PSC) is a Chapter 9 institution that was established in terms of S 196 of the Constitution. The PSC's mandate is wide-ranging and covers all aspects of ensuring that South Africa has an effective, efficient, transparent and accountable Public Service.⁸¹ It does not have a specific mandate to investigate corruption, but it is empowered to initiate investigations in response to complaints or out of its own accord. Findings from such investigations must be reported to the relevant authority. The PSC furthermore is empowered to investigate the adherence to applicable procedures in the Public Service. It also has wide powers in respect of investigating any personnel matters concerning recruitment, appointment, transfer, discharge or any other matter relating to the careers of public officials.

The PSC now hosts the national anti-corruption hotline; the DCS hotline number has been phased out. All complaints are now assessed centrally and referred to the appropriate agency, be that an external agency or the department concerned itself. It is reported that the majority of cases involving the national departments of

⁸¹ S 196 (4) The powers and functions of the Commission are -

- (a) to promote the constitutionally prescribed values and principles governing public administration in the public service;
- (b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices, of the public service;
- (c) to propose measures to ensure effective and efficient performance within the public service;
- (d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers promotions and dismissals comply with the constitutionally prescribed values and principles;
- (e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the constitutionally prescribed values and principles are complied with; and either of its own accord or on receipt of any complaint -
 - (i) investigate and evaluate the application of personnel and public administration practices, and report to the relevant executive authority and legislature;
 - (ii) investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;
 - (iii) monitor and investigate adherence to applicable procedures in the public service; and
 - (iv) advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.

government relate to prison corruption and identity document fraud.⁸² A further important out-put of the PSC is the ‘State of the Public Service Report’, the most recent edition of which was released in 2006.

It is not the objective of the PSC to be a corruption investigation structure, but it plays a number of critical roles, with specific reference to overseeing the DPSA, developing general human resources management policy, and monitoring trends in the public service. In the prelude to the appointment of the Jali Commission, the PSC played an important role together with DPSA in conducting a management audit of the DCS emanating from consistent concerns raised by the AGSA.⁸³ Its function in relation to corruption therefore probably emphasises prevention and capacity-building. The PSC is now also a central receiving point for all complaints to the hotline regarding public officials; whether related to corruption or any other matter. It therefore has an important role in channelling complaints to the appropriate authorities.

5.7 Department of Public Service and Administration

The DPSA does not have a specific mandate to investigate corruption, but is responsible for the overall service conditions of all public officials. In the aftermath of the resignation of Commissioner Sithole in 1999, the Minister of Public Service and Administration ordered a management audit of the DCS. When the final report was presented to Parliament in March 2000, it was evident that there was widespread corruption in the department and specifically in respect of human resource management.⁸⁴ It can be argued that the DPSA report laid the foundation for subsequent steps taken by government to get the DCS-house in order, such as the appointment of new leadership, establishment of the Jali Commission and the involvement of the SIU.

⁸² Public Service Commission *State of the Public Service Report 2006 - Assessing the Capacity of the State to Deliver* (2006) p. 20.

⁸³ Interview with DPSA representative 20 July 2006.

⁸⁴ Dept of Public Service and Administration (2000) *Final Report to be presented to the Portfolio Committees on Correctional Services and Public Service and Administration*, Parliamentary Monitoring Group Minute of Correctional Services Portfolio Committee meeting of 14 March 2000.

The DPSA also oversees the implementation of the National Anti-Corruption Strategy that was approved by Cabinet in 2002.⁸⁵ The strategy requires, among others things, that departments develop internal capacity to address corruption, including the investigation of corruption. To facilitate this, the DPSA focused on providing departments with support and guidance on developing this internal capacity, as described in the Minimum Anti-corruption Capacity requirements released in 2006.⁸⁶ This document cites numerous good practice examples from the DCS aimed at building the necessary internal capacity to address corruption.

5.8 Auditor General

The Auditor General of South Africa (AGSA) is a Chapter 9 institution established in terms of S 181 of the Constitution with its functions set out in S 188. The AGSA must audit and report to the National Assembly on the accounts, financial statements and financial management of:

- all national and provincial state departments and administrations;
- all municipalities, and
- any other institution or accounting entity required by national or provincial legislation to be audited by the AGSA.

AGSA performs a number of different audits and supporting activities in respect of its mandate, including regularity auditing, performance auditing, computer auditing, environmental auditing and forensic auditing.⁸⁷

AGSA reports annually on the DCS in respect of the annual auditing process and comments on the budget vote. In addition to these functions, AGSA has prepared a number of focused reports on the DCS relating to alleged irregularities among senior officials (1999)⁸⁸, the performance audit (1998)⁸⁹, progress in implementing the White

⁸⁵ Van Vuuren (note 22) p. 52.

⁸⁶ Dept of Public Service and Administration (note 21).

⁸⁷ Van Vuuren (note 22) p. 45.

⁸⁸ RP 123/1999

Commission recommendations (1999)⁹⁰, and the use of sick-leave benefits (2003).⁹¹ The three reports produced before 2000 were part of the motivation for the management audit ordered by the Minister of Public Service and Administration in 1999.⁹²

Over the years, AGSA has expressed concern over the DCS's financial management and accounting, and has given the department qualified audit reports for the past four consecutive years.⁹³ While this does not allege or imply corruption or any illegal activity, it creates risk areas that need to be managed more effectively.

5.9 Public Protector

The Public Protector (PP) is a Chapter 9 institution established in terms of S 181 of the Constitution. The PP has a wide very wide mandate 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
- report on that conduct, and
- take appropriate remedial action.⁹⁴

The Constitution places only two restrictions on the PP, namely that it cannot investigate court decisions and, in the case of exceptional circumstances, may choose not to release a report resulting from investigations.⁹⁵ The Public Protector Act⁹⁶

⁸⁹ RP 181/1998

⁹⁰ RP 173/1999

⁹¹ Report un-numbered [http://www.agsa.co.za/Reports/Our%20Reports/AG%20reports-National/Specialised%20audits/Performance/2005/Performance%20audit%20on%20management%20of%20sick%20leave%20benefits%20at%20certain%20national%20and%20provincial%20departments%20\(2005\).pdf](http://www.agsa.co.za/Reports/Our%20Reports/AG%20reports-National/Specialised%20audits/Performance/2005/Performance%20audit%20on%20management%20of%20sick%20leave%20benefits%20at%20certain%20national%20and%20provincial%20departments%20(2005).pdf)

⁹² Note 83

⁹³ Public Service Commission (note 82) p. 42.

⁹⁴ Constitution (Act 108 of 1996) S 182(1)

⁹⁵ Ibid Ss 182(3) and 182(5)

⁹⁶ Act 23 of 1994 (as amended)

describes the functions and powers of this institution in more detail and defines the scope of investigations as:

- maladministration at any level of government,
- abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function,
- improper or dishonest acts, omissions or offences referred to in the Combating of Corrupt Activities Act,
- improper or unlawful enrichment, or receipt of improper advantage or promise thereof by a person performing a public function
- acts or omission by a public official which results in the unlawful or improper prejudice of another person.⁹⁷

Pienaar has observed that the role of the PP should be interpreted more along the lines of a referee; it is independent and does not act for either the state or the complainant. It is important to note that the PP does not have executive powers and cannot enforce its decisions - it has to rely on its persuasive powers by means of recommendations.⁹⁸ The PP also has the power to refer to the relevant authorities any matter that has come to its attention, be it of a criminal or non-criminal nature, and thus serves the function of a “clearing house”.⁹⁹

Based on this mandate, it has to be accepted that the PP’s powers to investigate specific cases of fraud and corruption are limited, as such matters have to be referred to the relevant authorities. On a broader level, the PP has an important function in relation to corruption as its mandate covers “the large grey area between criminal and acceptable behaviour”.¹⁰⁰ In this grey area of non-criminal transgressions, the PP can act as an early warning system concerning the erosion of standards.

⁹⁷ Public Protector Act (23 of 1994) S (6)(4)(a)

⁹⁸ Pienaar G *The Role of the Public Protector in fighting corruption*, African Security Review, Vol 9 No 2, 2000, p. 4

⁹⁹ Ibid p. 6

¹⁰⁰ Ibid p. 9.

The PP's engagement with prison corruption has been limited to date and the PP has not yet produced a formal investigation report on any matter related to prisons. Judging from the PP's annual reports, it appears that individual cases relating to administrative issues are being dealt with. Dissel has also remarked that the PP has had very limited involvement in prison-related issues and referred matters to institutions such as the JIP and the SIU.¹⁰¹

6. Motivations for investigations

6.1 Priority areas for investigations

Priority areas for anti-corruption efforts are identified based on the risk-profile of a department.¹⁰² For example, the risk profile of a department that mainly procures services will be significantly different from a department that procures large quantities of goods and capital items. The DCS procurement pattern falls in the latter category because of the prisoners placed in its care. This is an obvious risk area. Food, medicine and capital items are known to have been the source of corrupt transactions in this department. When the SIU was called in to assist the DCS in 2002, the investigations focused to a large extent on procurement.¹⁰³ Investigations in the DCS also focused on human resources, with there having been systematic investigations with regard to appointments by means of a vetting process.

Priorities are also determined based on the financial impact of corrupt activities. In the case of the Medcor investigation conducted by the SIU, referred to earlier, the financial impact was an important motive. The investigation revealed that the medical aid fund was defrauded of millions of rand.¹⁰⁴ A further motivation for this investigation must have been the potential for recovering funds and assets lost due to

¹⁰¹ Dissel A *A Review of civilian oversight over Correctional Services in the last decade*, Civil Society Prison Reform Initiative, Research Paper No. 4, 2003, p. 42.

¹⁰² Interview with DPSA Representative 20 July 2006

¹⁰³ SIU (note 73)

¹⁰⁴ Ibid.

fraud and corruption. Because of this investigation, the SIU recovered funds and assets worth in excess of R24 million between 2002 and 2005.

To date, investigations in DCS have focused primarily on corrupt acts between the department as the employer and its employees, and between the department and external suppliers. While both the SIU and the Jali Commission have used prisoners' allegations as leads in investigating larger corruption cases, investigations have not focused on corrupt acts between employees of the department and prisoners, especially prisoners organised in gangs. It should also be acknowledged that this relationship covers a very wide range of acts, ranging from extorting small bribes from individual prisoners to organised contraband-smuggling networks or assisted escapes involving more significant amounts of money.¹⁰⁵ Given the long history of prison gangs in South Africa¹⁰⁶ and the collusion between gangs and corrupt officials, this lack of attention to prison gangs from an anti-corruption perspective is somewhat perplexing.

The strategic choice not to focus investigations on prison gangs appears to be motivated essentially by three arguments.¹⁰⁷ The first is that prison gangs are part of the sub-culture of prisons and highly resistant to change, therefore investigations would be ineffective in addressing the problem of gangs. Secondly, even if investigations were conducted with relative success and resulted in the removal of the gang leadership, these individuals would quickly be replaced by successors emerging from the gang hierarchies. Thirdly, the prison context will always provide a supply and demand situation and while the demand cannot be changed, the supply (of contraband for example) can be changed by improving the integrity of the DCS's staff.

¹⁰⁵ A former prison warder testified before the Jali Commission how he ran an escape racket and drug smuggling ring together with a prisoner and earned nearly R60 000.00 between 1998 and 2000. He also told the Commission of an earlier syndicate that allegedly involved the payment of R200 000.00 for an assisted escape. He received R30 000.00 to help two prisoners to escape. Nobody was charged after the escape. He was caught after assisting two prisoners in escaping, for which he received over R14 000.00. (This Day 1 April 2004)

¹⁰⁶ Steinberg J *Nongoloza's children – Western Cape prisons gangs during and after apartheid*, CSV, Johannesburg.

¹⁰⁷ Interviews conducted with representatives from DPSA, SIU and PSC on 20 and 21 July 2006.

While the DCS could have focused on investigating a very wide range of issues, especially those emanating from the Jali Commission, it appears that the areas prioritised for investigation are those that are regarded as high-risk areas inherent to the department's core functions (e.g. procurement and asset management). The second priority was high-cost fraud and corruption such as that involving the medical-aid fund, and the third focus area was, and remains, the staff of the department through a vetting process. This approach seems to tie in with the department's broader strategy of improving and strengthening the integrity of its staff and not relying on law enforcement as the primary means of addressing corruption.

6.2 Threshold for investigations

The Minister of Public Service and Administration ordered a management audit of the DCS in 1999 because of persistent reports that there was something fundamentally wrong in the DCS. The findings of this investigation, released in 2000, provided strong motivation for the establishment of the Jali Commission. It was evident that the nature of the problem in the DCS was much greater than a mere "management problem" and that there was large-scale fraud and corruption. This required a different approach.

As information about the extent of corruption in the DCS became available, government escalated the status of and focus of the investigative approach. What started as an initial public service management investigation, was followed by a judicial fact-finding mission, which in turn resulted in a focused forensic and criminal investigation.

While the Jali Commission was underway, the DCS asked the SIU in 2002 to assist with investigations into alleged fraud and corruption in the medical-aid fund, vehicle-fleet management and procurement contracts. Essentially two approaches

were followed. Firstly, and similar to the Jali Commission, the SIU commenced by interviewing more than 103 000 prisoners between 2002 and 2005.¹⁰⁸ This dragnet approach produced a large volume of allegations of fraud and corruption. According to the SIU, sifting through such allegations makes it possible to note trends and identify leads to be followed up. It is also true that it produces a large volume of irrelevant and unrelated information. It is evidently an expensive and time-consuming process, but nonetheless regarded as an important information-gathering tool for obtaining a comprehensive view of the problem. It also has the potential to open up new areas of investigation that were not identified initially, or to correctly frame a particular investigation.¹⁰⁹

The second approach followed by the SIU was that of more focused investigations into the medical aid fund, procurement contracts (e.g. pharmaceuticals) and vehicle-fleet management. Identifying what risk areas to subject to more focused investigations is the task of the DCS, although this is done in consultation with the SIU. The SIU can only respond to a department's request for it to get involved and cannot launch investigations of its own accord. Because SIU investigations are authorised by proclamation, determining the exact scope, outcomes, terms or reference and legality of the intended investigation is a lengthy process.¹¹⁰

Investigations also fulfil an important symbolic function as they are reactive and usually produce demonstrable results within a limited time. Launching investigations and releasing findings demonstrates that government is acting on corruption in a very clear way that has more public appeal than the equally important objectives of preventing corruption and building capacity. Successful investigations build public confidence and are an important tool for managing public perceptions of government's efforts to address corruption. In this sense, agencies also have a reputational risk that must be managed.¹¹¹ Some agencies may have a very low

¹⁰⁸ SIU (note 69) p.8.

¹⁰⁹ Interview with SIU representative 21 July 2006

¹¹⁰ Ibid.

¹¹¹ Ibid.

threshold in this regard while others may be more “tolerant”. For example, an allegation of a minor dishonesty transgression against an SIU official can be extremely damaging to that agency while the same allegation against a DCS official may not hold the same reputational risk and may require a different response. In managing reputation risk, investigations become an important tool.

6.3 Distribution of cases between agencies

Given the number of agencies with a mandate to investigate corruption, it can rightly be asked how cases are distributed amongst these agencies. The need for greater co-ordination between agencies was identified as a problem in 2001¹¹² and in 2002 government established the Anti-Corruption Coordinating Committee (ACC) that meets monthly and includes representatives from key government stakeholders and specifically affected departments.¹¹³ The purpose of the ACC is, however, not to deal with operational matters, but rather to develop policy positions and share information. The strategy of the ACC is that by developing policy co-ordination can be improved, duplication avoided, mandates clarified and information shared to ensure that government’s anti-corruption strategy is implemented.¹¹⁴ The ACC does not fulfil an oversight or even operational co-ordination function as will be elaborated on below.

At operational level, the Prevention and Combating of Corrupt Activities Act provides some basic guidance to ensure that suspected corruption is at least reported to the police. The Act requires that persons in positions of authority who know or suspect that a corrupt act (as set out in the Act) has been committed or that theft, fraud, extortion, forgery or uttering a forged document involving an amount of R100

¹¹² Office of the Public Service Commission *A Review of South Africa’s Anti-Corruption Agencies*, Pretoria, 2001, Chapter 16.

¹¹³ This Committee consists of 14 departments and agencies within Government, including the Special Investigating Unit, National Prosecuting Authority, Public Protector’s Office, Auditor-General, National Intelligence Agency, Public Service Commission, the Department of Public Service and Administration, the Department Provincial and Local Government, as well as 8 Provincial Governments represented by the Premier’s Offices (Free State not represented), Department of Justice and Constitutional Affairs, Department of Home Affairs, National Treasury, and SAPS.

¹¹⁴ Note 83

000 or more has occurred, must report this to the police.¹¹⁵ This does, however, leave a significant quantum of allegations of corruption up to the discretion of public officials in respect of an appropriate course of action.

An important component of managing cases is the requirement laid down by the *Anti-corruption capacity requirements* is that all departments must establish an information system that, among others, keeps a record of all allegations made, enables the tracking of cases, and provides minimum information to designated national departments (DPSA, PSC and National Treasury).¹¹⁶ This information system should facilitate the allocation and management of cases and ensure that cases are investigated and completed. An earlier audit by the DPSA of anti-corruption capacity in the public service revealed that there were substantial backlogs in the handling of disciplinary cases and that a proper information system should assist in addressing this problem.¹¹⁷

Allegations of corruption can originate from and be brought to the attention of a department by a number of sources. One such source is the PSC Anti-corruption Hotline. According to a PSC representative, all complaints reported via the hotline are analysed. Routine matters are referred to the relevant department.¹¹⁸ Sensitive or complicated cases are referred to the National Prosecuting Authority (NPA) or the National Intelligence Agency (NIA). In August 2006, the PSC was reviewing the use of the hotline and a report in this regard is due for release towards the end of 2006.¹¹⁹

In respect of the DCS, a further source of allegations of corruption is the JIP which, primarily through the IPVs, records a large number of complaints from prisoners annually. According to the JIP, if there is reason to believe that a complaint may relate to corrupt activities it is reported to the DCS if it is within the mandate of the department to investigate. The JIP has also improved its complaints recording system

¹¹⁵ Act 12 of 2004, S 34

¹¹⁶ DPSA (note 21) p. 7

¹¹⁷ DPSA (note 14) p. 4.

¹¹⁸ Interview with PSC representative, 21 July 2006.

¹¹⁹ Ibid.

to ensure that all complaints lodged with IPVs are also recorded in the official “Complaints and Request Record” (the G365 register). This ensures that that the G365 provides a full record that is accessible to the departmental internal auditing process. This also forms the source document for discussions with the Head of Prison and the Area Manager.¹²⁰

As noted earlier, the PSC Hotline acts as a clearing house and receives a large number of complaints that it refers to the relevant departments. The procedure at present is that within 40 working days the PSC requires feed-back on all complaints forwarded to a department. If feed-back has not been received, the department concerned will be alerted to this fact and requested to provide it. The feed-back received is also analysed and if the PSC is not satisfied with the explanation given it may request additional information. If the investigation into a complaint has been discontinued prematurely in the view of the PSC, it will request that the department concerned provide a detailed motivation for its decision. It may also compel a department to re-open a case and resume an investigation.¹²¹

The distribution of cases between agencies raises a further question in respect of oversight as to what cases are investigated. It has to be assumed that cases referred to the DCS DIU for internal investigation must be subjected to some form of selection, but at present there does not appear to be an independent oversight mechanism in this regard. Such an oversight function is also not envisaged in the *Anti-corruption capacity requirements*. As it stands now, save for those complaints that are referred from the PSC Hotline, it appears that it is effectively up to the Commissioner to determine which cases are identified for investigation, without any reporting taking place as to the motivation for determining the selection of cases to be pursued. Independent oversight of this selection process is justifiable, given the need for transparent and accountable decision-making. This approach is accepted by the New South Wales Independent Commission Against Corruption (ICAC) and the

¹²⁰ Interview with JIP Director, 10 August 2006.

¹²¹ Telephonic interview with PSC representative, 18 August 2006.

Commission reports to the Operations Review Committee (ORC) in this regard monthly. The ORC consists of government and community representatives whose task it is to advise the Commissioner whether ICAC should investigate particular complaints.¹²² An important part of its function is to review all cases or complaints received by the ICAC to ensure that all deserving matters are investigated and not discontinued without good reason.

The question of oversight is also not restricted to internal investigations. The involvement of other investigative agencies, such as the SIU, would also require independent oversight, especially since more serious cases are referred to these external agencies. In the case of investigations referred to the SIU, the terms of reference for the investigations are, as noted above, determined by the DCS and SIU and submitted to the President for final approval. There does not appear to be independent oversight over this process. Parliament's involvement in this regard appears to be restricted to receiving progress reports upon request.¹²³

7. Reporting on findings

Apart from holding offenders accountable, investigations into corruption should contribute to the broader prevention process in a number of ways. Investigations should, in the first instance, contribute to knowledge-building by improving our understanding of how a particular crime was committed, how it was detected, and what effect it had. This should also provide an indication of possible systemic weaknesses. Secondly, investigations should provide valuable information to inform the risk assessment of the department, not only in terms of the type of risk, but also the extent of the risk. Thirdly, the results of investigations, successful or not, should be made available to stakeholders from government or civil society. It should not be the intention to sensationalise or further humiliate a department that has suffered this

¹²² Poulton G Independence in investigations and prevention – the role of the New South Wales government's Independent Commission against Corruption" in C Fijnaut and L Huberts (eds) (2002) *Corruption, Integrity and Law Enforcement*, Kluwer Law International, The Hague, p. 207.

¹²³ See for example PMG minutes of briefing by SIU to the Parliamentary Portfolio Committee on Correctional Services, 7 June 2005.

fate during the four-year-long investigation of the Jali Commission, but rather to improve insight into the problem and to demonstrate that effective action can and will be taken against corrupt officials.

The following provides an example of more effective reporting on investigations. The New South Wales ICAC regularly makes the results of its investigations public in the form of comprehensive reports. The reports are detailed, providing not only a description of the offence in question but also the history of the offence(s), giving particular insight into the chain of events preceding the offence and context in which it occurred. It is also noteworthy that the reports are available relatively soon after the investigation has begun, often resulting in interim reports being followed by more comprehensive reports at a later stage; both interim and final reports are made public. There appears to be no selection in respect of the cases that are reported, with reports ranging from serious cases involving the smuggling of contraband and assault of prisoners, to the submission of false invoices and alteration of parole reports without any private gain resulting from these actions.¹²⁴ Extracts of questioning done during the investigations are used to great effect in the ICAC reports, thus furthering insight into the daily issues that public officials may face. The following extract is from an investigation into the smuggling of contraband into a remand facility:

Q: Can you tell us in your own words, how it came about that you agreed to assist this prisoner?

A: It started off like with jokes, "Can you bring this in, can you bring that in", and it was just — it's pretty — it happens a lot. A lot of inmates will do that, you know, like they'll make jokes. I think they just do it to try and suss out who they can approach. And then I initially just joked about it with him, but then I ended up forming a friendship with him and I agreed to assist him in bringing things in for him.¹²⁵

¹²⁴ See ICAC *Investigation into the Department of Corrective Services: Fourth report – Abuse of official Power and Authority*, November 1999 and ICAC *Report on the investigation into the introduction of contraband into the Metropolitan Remand and Reception Centre, Silverwater, September 2004*.

¹²⁵ ICAC *Report on the investigation into the introduction of contraband into the Metropolitan Remand and Reception Centre, Silverwater, September 2004*, p.11.

Understanding how an official becomes involved in a corrupt act, whether he or she is lured into or initiates it, is important for developing effective prevention strategies. Building staff integrity hinges on having an acute awareness of the risks that prison staff face daily. Understanding the process that leads to the eventual crime being committed requires a multi-disciplinary approach that is receptive to the qualitative aspects of “norm dilution” and should not only focus on the law enforcement angle.¹²⁶ Reporting also needs to be comprehensive and should not only focus on the sensational parts of the crime or the sanction imposed, but should reflect the full picture in qualitative detail. The ICAC reports also make recommendations on corruption prevention and are not only concerned strictly with the investigation at hand. The observations and recommendations developed in this regard are detailed and comprehensive to such a degree that monitoring their implementation would be easy.¹²⁷ Apart from holding offenders accountable, investigative reports are also the products of investigative research processes and constitute the factual basis for improving anti-corruption strategies. Investigations should therefore continue to inform the improvement of systemic weaknesses.

In South Africa, aside from making reports available in the public domain, the results of investigations ought to be reported to particular stakeholders. Of particular significance are the oversight institutions of Parliament, with specific reference to the PPCCS and the Standing Committee on Public Accounts (SCOPA). Since 2000, reporting to Parliament (through the PPCCS) in respect of the investigation of corruption has been *ad hoc* and focused on particular issues, such as the medical-aid fraud. It is also noticeable that the reporting was done by the institutions doing the investigations (i.e. the Jali Commission and the SIU) and not by the DCS itself. Given the particular history of the department and the findings of the Jali Commission, there is a strong argument to be made for specialised, regular and structured reporting to Parliament on progress made in addressing corruption.

¹²⁶ Van der Beken (note 8) p. 275 The Dutch phrase is “normvervaging” and is translated with “norm blurring” but “norm dilution” is probably a more accurate description.

¹²⁷ ICAC (note 125) pp.21-31.

Investigation findings also need to be communicated to the staff of the department to demonstrate that action has been taken and to provide staff with a deeper understanding of the risks presented by their work environment. As noted earlier, investigations have a strong symbolic value that should be capitalised on. Publishing the full results of investigations would also serve to stimulate the discourse on ethics and integrity among the staff corps.

In short, there are several reasons why the findings of investigations should be made available widely, not only because this is required in terms of reporting duties, but also to create awareness and develop understanding among the staff of the department.

8. Overview, findings and recommendations

8.1 Overview

The history of investigation into corruption in DCS went through a number of phases. The immediate post-1994 era saw a period of inaction despite persistent allegations and reports that corruption was a significant problem in the department. Under the leadership of Commissioner Sithole, corruption was permitted to flourish and powerful groups emerged in the department that made the investigation of corruption virtually impossible. With the departure of Sithole, the situation improved and the PSC and DPSA conducted an investigation into the nature of the problem in the form of a management audit in an effort to address systemic weaknesses. It should be borne in mind that prior to this investigation, the AGSA produced a number of special reports concerning problematic issues in the department. It was against this background, and following events in KwaZulu-Natal that resulted in a senior DCS official murdering a colleague, that the Jali Commission was established. The terms of reference of the Commission focused on management issues (such as procurement and staff appointments), but also included the conditions under which

prisoners were kept and their experiences of corruption in the prison system. Perhaps motivated at least in part by these developments, the Correctional Services Act was amended to alter the mandate of the JIP and exclude it in 2001 from investigating corruption and dishonest practices. Soon after the Jali Commission started its work, in 2002, the DCS brought the SIU on board to assist in investigating allegations of corruption that were emerging from the work of the Commission. In the course of the following years, the SIU proceeded with its work parallel to that of the Jali Commission, with the former producing significant results in respect of addressing large-scale corruption. The emphasis was placed firmly on corruption cases where the state was losing large amounts of money and with these investigations being completed in a rather clandestine manner.

The Jali Commission, on the other hand, held public hearings that captured the media's attention. As if this was not enough, the release of the so-called Grootvlei video sent shockwaves through the country and resulted in the Commission's mandate being expanded to include the Bloemfontein management area under which Grootvlei prison resides. Conducting investigations into prison corruption in full view of the media may have had the necessary symbolic value, but it undoubtedly had a demoralising effect on honest DCS employees who also had to hear about one scandal after another unravelling. While the Commission focused only on six management areas out of 52, there is little reason not to believe that the department was indeed being tarred with the same brush.¹²⁸ At the end of 2005, the Jali Commission completed its work, but by August 2006, the Commission's report had not yet been released.

Although exact dates are not clear, in 2003 and probably closer to 2004, the DCS also commenced with internal changes and, based on the *National Anti-corruption Strategy* and the *Minimum Anti-corruption Capacity Requirement* (that followed later), revised its own anti-corruption strategy and restructured and improved the capacity of the DIU.

¹²⁸ Improving the public image of the department became specific strategic objective in the wake of the Jali Commission. See DCS Annual Report 2004/5 p. 33.

This signalled an important shift in the sense that the DCS was taking increasing ownership of addressing corruption, acknowledging that external agencies (i.e. Jali Commission and the SIU) would have specific and time-limited roles to play. In the relatively short period from 2000 onwards, in combating corruption the emphasis has been on investigating large-scale corruption that has resulted in significant material losses to the state.

However, an over-reliance on legal remedies and, similarly, an over-reliance on enforcement have been shown to be ineffective in addressing corruption.¹²⁹ Even very comprehensive investigations can only cover very limited ground, and often at great expense. The Jali Commission took four and a half years, cost R27.5 million, its investigation focused only on six out of 52 management area and resulted in 43 dismissals and 18 written warnings.¹³⁰ In addressing corruption investigations are necessary but their targeted use is a tactical issue. For investigations to be useful and successful, they ought to be conducted by independent mechanisms that have adequate powers of investigation and prosecution.¹³¹ Investigative structures must be adequately staffed and resourced in relation to the task at hand and the form of corruption under scrutiny. Investigative structures should be able to provide adequate protection to whistle-blowers and have accessible complaint mechanisms, as failure to provide adequate protection to witnesses will undermine the integrity of an investigation.

It should also be borne in mind that the Jali Commission was a commission of inquiry that, similar to the JIP, did not have the powers to prosecute and sanction. Whatever they might find, structures such as these can only make recommendations to the DCS to take certain actions. As an employer, the DCS remains responsible for code-enforcement. If the capacity to fulfil this function is limited or hamstrung, it will dilute any impact that a commission of inquiry or the JIP may have. This paper noted earlier that the capacity of DCS in this regard may indeed be limited.

¹²⁹ Pope (note 5), p.98

¹³⁰ PMG Minutes of Portfolio Committee on Correctional Services meeting of 20 June 2006.

¹³¹ Pope (note 5) p. 101.

The DCS has attempted to maintain a dual strategy by centralising enforcement and devolving prevention and institution-building in its anti-corruption strategy. Although more specialised investigations are done by other agencies, such as the SIU, these investigations are co-ordinated at head-office level. To some extent, this dispersed approach is reflective of government's total anti-corruption strategy of structuring anti-corruption capacity with different and bordering (if not overlapping mandates) in diverse forms. The logic behind this is that the anti-corruption responsibility rests with the entire departmental structure and should not be centralised in one structure. However, the centralisation of the investigative and code-enforcement functions does create the risk that managers may avoid this task and refer allegations and suspicions to the internal investigative unit, resulting in the management function being fragmented. A further and consequent risk is that addressing corruption and, more particularly, the law enforcement aspect of the anti-corruption strategy, becomes distant and removed from daily prison management and more specifically from the warders who are most at risk of engaging in (petty) corruption. Drawing the comparison with the DCS's efforts to reduce escapes, the department's efforts in this regard were very visible and involved every warder to ensure that security was improved, even to the extent of revising the disciplinary code, suspending the Head of Prison in the event of an escape and issuing prisoners with the now common orange uniforms. Anti-corruption efforts to date have apparently not engaged warders to the same extent.¹³²

A further important feature of investigations into prison corruption to date has been that they have focused on so-called grand corruption cases where the state had lost money, for example the investigations into medical-aid fraud, procurement and vehicle-fleet management. By and large, investigations have not focused on the fairly common institutionalised forms of petty corruption that affect the daily lives of prisoners. When prisoners have to pay warders R10.00 to get a blanket or 50c to make a phone call, the state does not stand to lose money in the first instance, and secondly,

¹³² Interview with the Director: Office of the Inspecting Judge, 10 August 2006.

such forms of corruption are often trivialised and not regarded as a priority given the amounts involved. However, the collective monetary value of petty corruption in the prison context should not be underestimated. The damage done by this form of corruption does not lie so much in the monetary value but rather in the insidious manner in which it undermines the integrity of the penal institution. As noted earlier, prisons play a special moral function in society and petty corruption effectively leads the imprisoned offender to the conclusion that warders are also criminals, and that they have no real basis for claiming to hold the moral high-ground.¹³³

The tendency not to address corruption at the level of prisoners in the same systematic manner and give it the same profile as corrupt acts committed by officials against the DCS is regarded as a shortcoming in the current approach. Although the work done by the Jali Commission and the SIU extensively used prisoners to source information, one is left with the impression that this information was used to investigate cases of corruption affecting the state and not the daily lives of prisoners. Whilst corruption may be referred to as a human rights issue in rhetoric, far more work needs to be done to demonstrate this; investigations can be used effectively to provide the necessary profile.

8.2 Findings

The Public Service Anti-corruption Strategy provides a sufficient framework for government departments to address corruption and the *Anti-corruption Capacity Requirements* provide further guidance in this regard. The DCS's own anti-corruption strategy is also comprehensive in scope and the revised strategy is a vast improvement on the 2002 version. It is also acknowledged that under new leadership the DCS has developed a stronger and more focused approach to dealing with corruption; which was sorely lacking prior to 2000. The importance of political leadership in this regard was significant.

¹³³ The study by Painter-Morland (note 31, pp. 39-44) found that it was a common perception amongst prisoners that the staff do not act ethically, do not adhere to codes of conduct, extort prisoners for privileges, and accept bribes and gifts.

The current capacity of DCS to deliver results in respect of investigations is, however, called into question. The investigative function, which is situated at head office, is small given the size of the department and the number of prisoners in its care. The particular risk profile of the department (i.e. it has to procure large quantities of goods and capital items) also creates the need for a larger investigative capacity. There is also an argument to be made for devolving the investigative capacity of the DCS to regional level to ensure that an investigative presence is felt at all levels and, more importantly, that investigators and regional and area managers can co-operate closely and so that the enforcement function is not regarded as distant.

The DCS has formed a productive partnership with the SIU and there is no doubt that a continuation of this relationship will continue to yield positive results in respect of grand corruption cases. The results of the Jali Commission, on the other hand, remain to be seen. It is also unclear how the department used the findings of the 11 interim reports. As an investigative mechanism, the Jali Commission proved to be limited in scope, expensive and time-consuming. It was, nonetheless, necessary that the DCS go through that phase, which placed prison corruption, for a while at least, on the public agenda.

Based on the available information, it has to be concluded that investigations have focused on cases where the state has lost assets and funds, and that these can be broadly categorised as grand corruption. There has not been much focus on investigating cases of so-called petty corruption that affect the rights of prisoners daily and in a material way. This may have diluted the link between corruption and human rights. An additional consequence is that it may have placed law enforcement at a distant level that seems removed from the daily life of prisoners. Investigating this category of cases would greatly assist in building trust between prisoners and the department, as investigations have significant symbolic value.

It was reported in the preceding discussion that the PSC provides a measure of oversight over the complaints that it forwards to departments. However, there remain a significant number of complaints that are not subject to independent oversight, especially those that are referred internally or come from sources other than the PSC, such as the JIP. At the moment, the JIP does not have sufficient capacity to monitor investigations into complaints about corruption referred to the DCS and this is regarded as a shortcoming. There is also a need for the DCS to report more specifically in respect of corruption investigations to Parliament.

Following from the above there is a great need for the DCS (and other agencies investigating corruption in that department) to improve the regularity, scope and detail of reporting. Much of the value to be gained from investigating corruption lies in recording and reporting on cases and sharing this information with government and non-government stakeholders to improve insight into and understanding of prison corruption.

8.3 Possible improvements

Mindful of the risks involved in an over-reliance on investigations and law enforcement to address corruption, it is still possible to identify a number of areas for possible improvement, which are discussed below:

- It is necessary to ensure sufficient internal capacity (skills and quantity in human resources supported by information technology and systems) to conduct effective investigations. It is furthermore required that this capacity be sufficiently devolved to prevent a situation where investigation and code enforcement is detached from operational management.
- Following from the above, it is necessary to actively investigate prisoner-initiated complaints to give tangible expression to the link between prisoner rights and corruption.
- It is recommended that independent oversight be established over investigation selection. This oversight should not only be limited to

internal investigations, but should include external investigations. As the PSC only oversees cases originating from it, there is the risk that not all allegations are indeed placed under review.

- To improve knowledge and transparency it is recommended that reports emanating from investigations be made public and that these reports cover sufficient detail as discussed in Section 7.
- The Portfolio Committee on Correctional Services should receive regular reports on investigations conducted by the department or conducted by external agencies for the department.
- While the mandate of the JIP has been altered to exclude the investigation of corruption, the Inspectorate still has a duty to monitor investigations and verify that prisoners' complaints are indeed followed-up. There is therefore a need to improve the capacity of the JIP to monitor such investigations.
- Lastly, the DCS ought to conduct research with regard to corruption, the investigation thereof and general governance issues.

[End]