A review of the Judicial Inspectorate of Prisons of South Africa

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1 INTRODUCTION

Independent prison inspectorates and the oversight of prisons by laymen are designed to contribute to improving prison conditions and protecting the human rights of prisoners. The South African model, the Judicial Inspectorate of Prisons (hereafter: the Inspectorate), is no exception and forms part of an array of independent institutions set up to bolster and support democracy and human rights. This report examines and assesses the work carried out by the Inspectorate since its inception in 1998. The conclusion of this report is that the Inspectorate is making a significant contribution to improving the human rights of prisoners in South Africa, but there are several areas of its work that need to be improved and modified in order to maximise its effectiveness.

2 METHODOLOGY

This report is based on interviews conducted with staff of the Inspectorate, including a small number of Independent Prison Visitors (hereafter: IPVs) and Regional Co-ordinators, members of civil society, institutions set up to support constitutional democracy under Chapter 9 of the Constitution,[1] senior staff of the Department of Correctional Services (hereafter: DCS), members of Parliament, as well as the first Inspecting Judge and persons involved in the drafting of the Correctional Services Act.[2] This report is also based on an analysis of documents developed and used by the Inspectorate, including reports and records of complaints. It also draws on some academic sources.

3 BACKGROUND TO THE ESTABLISHMENT OF THE INSPECTORATE

The idea of having an independent body to oversee prison conditions in South Africa was formally proposed after the DCS issued its white paper on prison reform in 1994. Three members of the National Advisory Council on Correctional Services (NACOCS),[3] Judge Mark Kumleben, Advocate

1 The Constitution of the Republic of South Africa Act 108 of 1996.

2 Act 111 of 1998. In some cases, respondents completed questionnaires and, in others, they were interviewed orally. The list of people interviewed is not disclosed here for reasons of confidentiality.

3 Established by s 7 of Act 122 of 1991.

Neil Rossouw and Professor Dirk van Zyl Smit were appointed to advise the government on the drafting of new correctional services legislation. Judge Kumleben was briefed to research and investigate the idea of including in the new legislation provision for an independent prison inspectorate, which entailed a study tour to the United Kingdom to research the feasibility of adopting the English model in South Africa. The English model proved influential and the final recommendations on an independent prisons inspectorate included many of its features, but with some important differences. The most notable of these was the appointment of a judge to head the inspectorate. All those involved in the drafting of the new Act noted that, although it was not common for prisons inspectorates in other countries to be headed by judges, this model was chosen for South Africa after much debate because of the independence, stature and credibility a judge would bring to the Office.

In terms of section 85(1) of the Correctional Services Act (hereafter: the Act), the Inspectorate is 'an independent office under the control of the inspecting judge'.[4] Its objective is to 'facilitate the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prisons and on conditions in prisons'.[5] Judge JJ Trengove took office as the first Inspecting Judge in June 1998 until his resignation in 2000.

4 THE LEGISLATIVE FRAMEWORK

4.1 Background

The establishment of the Inspectorate[6] must be seen against the backdrop of the South African constitutional order as well as the aims and objects of the Act as a whole. The Act attempts to regulate the correctional system in order to give effect to the Bill of Rights – particularly as it affects prisoners[7] – and international law and principles on correctional matters.[8] It must

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

5 S 85(2). Before the amendment of this section by s 31 of the Correctional Services Amendment Act 32 of 2001, the Inspectorate was also required to report on corrupt and dishonest practices in prisons.

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

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

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

also be seen as giving effect to the principles of accountability, responsiveness and open governance that are embraced by the Constitution.[9]

Under the Act, the purpose of the correctional system is to ensure a just, peaceful and safe society by the detention of all prisoners in safe custody whilst ensuring their human dignity.[10] The Act also has a general focus on promoting the 'social responsibility and human development of prisoners'.[11] An important component in encouraging the success of this system is the existence and proper functioning of an independent oversight body to ensure that the purposes of the legislation are fulfilled and that conditions in prisons are in line with our constitutional framework and democratic practices. As one of the key 'independent mechanisms to investigate and scrutinise the activities of the Department of Correctional Services',[12] the Inspectorate plays a crucial role in maintaining the objectives of the Act and safeguarding the constitutional requirements of the correctional system.

4.2 Inspecting Judge and staff

The head of the Inspectorate, the Inspecting Judge, must be appointed by the President and must be a judge or retired judge of the High Court.[13] Under section 87, the Inspecting Judge has the power – after consultation with the Commissioner of Correctional Services (hereafter: the Commissioner) – to appoint, from time to time, persons with legal, medical or penological expertise as Assistants. Assistants may be appointed for a specified period or for a specific task and, while they remain under the overall authority and control of the Inspecting Judge, they have the same powers, functions and duties as the Inspecting Judge.[14] Since the inception of the Inspectorate, the Inspecting Judge has made use of this power on one occasion only.[15]

In terms of section 89(1) of the Act, the Inspecting Judge must determine the staff complement of the Inspectorate in consultation with the Commissioner. The Inspecting Judge must then appoint inspectors and other staff within this complement.[16]

4.3 General powers, functions and duties

Under section 90(1), the overarching function of the Inspecting Judge is to inspect or arrange for the 'inspection of prisons in order to report on the

9 See, for example, s 1(d) and ch 10 of the Constitution.
10 S 2.
11 S 2. See, also, generally ch III and IV of the Act.
12 See the preamble to the Act. For an overview of other oversight mechanisms, see Dissel A 'A review of civilian oversight over correctional services in the last decade' *CSPRI Research Paper* Series 4 (November 2003).
13 S 86(1).
14 S 87 (2) and (3).
15 This occurred when Dr Cohen, a dental surgeon in the Western Cape, volunteered to conduct a survey on dental care in the Western Cape prisons. Interview with Mr Gideon Morris, 25 August 2003.
16 S 89(2).

treatment of prisoners in prisons and any corrupt or dishonest practices in prisons'.[17] The Inspecting Judge is required to submit to the Minister of Correctional Services a report on each inspection.[18] He or she must also submit an annual report to the President and the Minister of Correctional Services who must table the report in Parliament.[19]

The Inspectorate receives prisoners' complaints via the National Council for Correctional Services, the Minister of Correctional Services, the Commissioner or a Visitors' Committee (hereafter: VC). In cases of urgency, a complaint can come directly to the Inspectorate from an IPV. The Inspecting Judge may also deal with any complaint of his or her own volition.[20] In addition, a judge or a magistrate visiting a prison within his or her area of jurisdiction in terms of section 99(1) may interview any prisoner and bring a matter to the attention of the Inspecting Judge.[21] In practice, the VCs refer most of the complaints that the Inspectorate deals with.

Hearings and enquiries may be held for the purposes of conducting investigations.[22] The Inspecting Judge also has the power to make rules that are considered necessary or expedient for the effective functioning of the Inspectorate.[23] An important function of the Office of the Inspecting Judge is the appointment of IPVs, who visit prisons and receive, record and monitor complaints directly from prisoners.[24] IPVs are required to submit a quarterly report to the Inspecting Judge, which report must include information on the duration and number of prison visits carried out and the number and nature of complaints dealt with or referred to the VC.[25] IPVs must be given access to a prison and to any documents or records, and the Head of Prison must assist IPVs in the execution of their powers, functions and duties.[26] Should the Head of Prison refuse a request from an IPV relating to IPV's functions, the dispute must be referred to the Inspecting Judge who may make a final ruling on the dispute.[27]

17 It is noteworthy that s 90(1) was not amended in line with s 85(2) to remove the issue of 'corrupt and dishonest practices' in prison. Read together with s 85(2), therefore, s 90(1) must be understood to include corruption and dishonesty when they affect the treatment of prisoners in prisons and on conditions in prison.

18 S 90(3).

19 S 90(4).

20 S 90(2).

21 S 99(2).

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

23 S 90(9).

24 S 93(1).

25 S 93(7).

26 S 93(2) (3).

27 S 93(4). The question of whether this section provides the Inspecting Judge with the power to consider the merits of the complaint of a prisoner in the matter concerned or whether it allows him or her simply to adjudicate on whether the dispute falls within the functions and duties of the IPV has not been resolved. This question, which was put to Mr C Paxton, Director Legal Services, DCS, in a letter from Mr Gideon Morris of the

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A related function of the Inspecting Judge is the establishment of VCs in particular regions.[28] The VC consists of the IPVs in that region, the Regional Co-ordinator and community members and meets at least quarterly.[29] The functions of the VC are to consider and attempt to deal with unresolved complaints and to submit to the Inspecting Judge those complaints it cannot resolve. The VC also organises a schedule of visits to prisons and 'extends and promotes the community's interest and involvement in correctional matters'.[30]

4.4 Powers and functions relating to mandatory reports and prohibited publications

The Act also sets out a number of other specific functions and roles for the Inspecting Judge and his or her office. Section 15 provides that any death in prison must be reported to the Inspecting Judge 'who may carry out or instruct the Commissioner to conduct any enquiry'. Under section 25 of the Act, a penalty of solitary confinement imposed on a prisoner at a disciplinary hearing must be referred to the Inspecting Judge for review. The Inspecting Judge must consider the record of the disciplinary proceedings and a report from a nurse or doctor on the health status of the prisoner concerned and may confirm or set aside the decision or penalty and substitute an appropriate order in its place. The Inspecting Judge must review the record and make a decision within three days. A penalty of solitary confinement cannot be implemented unless confirmed by the Inspecting Judge.[31] In addition, any segregation of prisoners made under section 30 of the Act must be reported immediately by the Head of Prison to the Inspecting Judge.[32] A prisoner may refer his or her segregation to the Inspecting Judge, who must 'decide thereon' within 3 days of receipt of the referral.[33] Similarly, the Head of Prison must report the use of mechanical restraints (except handcuffs or leg-irons) to the Inspecting Judge.[34] A prisoner subjected to mechanical restraints may appeal against the decision to the Inspecting Judge, who must decide thereon within three days of receipt of the appeal.[35] Then, in relation to prohibited publications, the Inspecting Judge must, on referral by an affected person, confirm or set aside a decision of the Commissioner of Prisons refusing that person permission to publish details of an offence for which a prisoner or person subject to community corrections is serving a sentence.[36]

Inspectorate on 23 August 1999, relates to the broader issue of the powers of the Inspecting Judge under the Act.

28 S 94(1). In 2003, there were 36 VCs. See Judicial Inspectorate of Prisons *Annual report* (2002) 14 (hereafter referred to as *Annual report* (2002)).

29 In practice most VCs meet monthly.

30 S 94(3).

31 S 25.

32 S 30(6).

33 S 30(7).

34 S 31(4).

35 S 31(5).

36 These are s 15, 25, 30 and 31.

An affected person may refer the matter to the Inspecting Judge within 10 days of being informed of the Commissioner's decision.[37]

4.5 The passage of complaints under the Act

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

If the IPV is unable to resolve the matter or deal with the complaint internally, he or she must refer the matter to the VC in that region. If the complaint remains unresolved after the VC has attempted to deal with it, or if there is no VC in that region, it must be referred to the Inspecting Judge.

5 FUNCTIONAL AND STRUCTURAL AGREEMENTS

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

5.1 The Inspecting Judge

The first Inspecting Judge, Judge Trengove, spent a great deal of his time in office setting up the Inspectorate, appointing staff, publicising its work and consulting with others involved in prison reform.

As the second Inspecting Judge, Judge Fagan is known best for his activism in the area of overcrowding. His view is that most of the problems relating to prison conditions, such as restricted living conditions, spread of diseases, and poor sanitation and hygiene, can be attributed to overcrowding.[38] He has lobbied and campaigned within governmental and

37 S 123(4). A decision by the Commissioner regarding access to a prison for the purpose of filming a documentary, *Focus with Freek*, was overturned by the Office under this provision.

38 See, for instance, Judicial Inspectorate of Prisons *Annual report* (2001) 3 (hereafter: *Annual report* (2001)).This view is shared by experts in prison reform. Van Zyl Smit observes that 'overcrowding is reaching a level where it is virtually impossible, even with

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non-governmental bodies, the legal profession and the media to highlight and reduce the large prison population. Judge Fagan also frequently makes both scheduled and unannounced visits to prisons.

Some of those who were interviewed for this study expressed concern that Judge Fagan had adopted an overly conciliatory and non-confrontational approach towards the DCS. The view was expressed that such an approach tended to undermine the stature and independence of the Inspectorate and that the Inspecting Judge should maintain some distance from the DCS so that the perception of independence would be maintained. Most of the people who were interviewed, however, described Judge Fagan as courageous, energetic and compassionate and saw his individual efforts on behalf of the Inspectorate as extremely effective. There is no doubt that Judge Fagan's tenure as Inspecting Judge has been very successful and that his work has been important in that it has raised the visibility of the Inspectorate and helped gain publicity not only for its work but also for the issue of prison reform in general.

5.2 IPV Unit

The IPV Unit is responsible for appointing, training, managing and supervising IPVs. IPVs are appointed on a two-year contract and allocated to prisons across the country with more than 100 prisoners. Nominations for IPVs are called for at public meetings after consultation with community organisations in the area concerned. Candidates must complete a customised nomination form that solicits specific information about them, including their language proficiency and history of community and NGO involvement. Volunteer workers enter this information into an electronic database which automatically allocates scores to the applicants according to weighted criteria. The sheer number of applications means that only the top-scoring candidates will be considered and invited for interviews in the regions. The interview panel makes recommendations for appointment to the Inspecting Judge and, unless there is evidence of a lack of fairness and due process, the appointments are confirmed. All IPVs must undergo a three-day training course before they commence their duties. At the end of 2003, there were 236 IPVs nationally.

The IPVs process a large number of complaints each year. In 2002, IPVs received 190 167 complaints from prisoners. Unresolved complaints are referred to the Legal Services Unit in the Office, but the vast majority of complaints are resolved without the need for referral to the Office. In 2002, only 217 unresolved complaints were referred to the Office.[39]

IPVs are supervised and supported in their regions by Regional Co-ordinators. Regional Co-ordinators are involved in the selection and ongoing training of IPVs and in conducting quarterly performance and financial audits on which they report to the Office. They attend meetings

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the best intentions, to implement regimes that meet minimum standards of human dignity' (Van Zyl Smit D 'South Africa' in Van Zyl Smit and Dunkel (eds) *Imprisonment today and tomorrow* (1999) 606).

39 *Annual Report* (fn 28 above) 14.

of the Visitors' Committee, expedite and assist in the resolution of complaints and facilitate public awareness of and involvement in prisons.[40] They also capture unresolved complaints on the electronic reporting system and follow up on all outstanding complaints. Normally, Regional Co-ordinators are based in the regions, but two are presently based in the national office in Cape Town. In 2002, Regional Co-ordinators conducted 87 in-service training sessions and 205 performance audits of IPVs.[41]

5.2.1 *Analysis, obstacles and problems*

The IPV Unit carries a heavy workload but management structures and systems designed to support and supervise the IPVs appear to be efficient and well organised. Policy documents and manuals regulating the appointment and work of the IPVs and VCs contain helpful and comprehensive information.[42]

Interviews reveal that there are some problems with the present system. An issue that persistently arose was the absence of regional offices and the need for a greater institutional presence in the provinces. At present, there is only one national office based in Cape Town. IPVs and Regional Co-ordinators expressed the view that their work was made very difficult by the absence of a supporting administrative infrastructure. The Office was inaccessible to those segments of the public with a legitimate and real interest in the welfare of prisoners, such as family members.

A second, related problem was the perception that the Inspectorate consisted of two branches working in isolation from one another. The perception was that the IPV system operated largely within the prison system and in direct contact with the prisoners and prison personnel. On the other hand, the Inspecting Judge and staff at the Office were seen to fulfil a very different function that was independent of the IPV process. Part of the reason for the perception that IPVs are separate from the Inspectorate may be the absence of regional offices in areas beyond the Western Cape.

Another problem identified in relation to IPVs is their two-year tenure. It was suggested that IPVs' tenure should be extended to three years, so as to strike a balance between the need to guard against institutionalisation, on the one hand, and the need to address the high turnover of IPVs, on the other.

Responses concerning the effectiveness of IPVs varied considerably. Most people were of the opinion that the very presence of IPVs in prisons positively affected prisoners' rights and afforded an additional avenue for dealing with prisoners' complaints. However, the view was also expressed that, despite the presence of IPVs, conditions in South African prisons had not changed substantially. Another concern was that IPVs do not possess

40 *Ibid* 12.

41 *Ibid* 11.

42 See, for example, the *IPV manual* and the *User manual for IPVs for submission of electronic reports*. In addition, policy documents such as the *Appointment of IPVs and the establishment of visitors' committees* (Form JI 6/2) and *Suggestions and guidelines for interviewing prospective IPVs* contain helpful guidelines and principles to direct the work of the IPV Unit.

sufficient understanding of the context and systemic issues pertaining to prison reform for them to be able to intervene and report effectively. Many also voiced the need for greater understanding, on the part of IPVs, of their role in reporting on conditions in prisons, thereby establishing a much-needed ongoing reporting mechanism.

Some raised the concern that IPVs rely on their relationship with the prison authorities for an effective discharge of their mandate and that prisoners perceive the IPVs' relationship with prison authorities as lacking independence. The solution envisaged was that the Office should strive to support IPVs visibly, by allowing them to draw on the stature of the Inspectorate for persuasive authority. This, in turn, would rely on the ability of the Inspectorate to guard its independence jealously.

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

5.3 Legal Services Unit

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

5.3.1 *General complaints*

The general complaints division deals with complaints that have not been resolved by the IPV, Regional Co-ordinator or the VC. In addition, this division receives some complaints directly from prisoners, primarily in the form of referrals to the Office by non-governmental organisations, including NICRO, the South African Prisoners Organisation for Human Rights, the South African Human Rights Commission, the Public Protector and prisoners' family members.[43]

According to staff of the Inspectorate, the vast majority of cases referred to the Office are dealt with by mediation.[44] In a small number of

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

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

cases where the matter cannot be resolved in this way, 'rulings' on the complaint are made either in favour of prisoners or the DCS.[45] Most staff at the Office reported that 'rulings' on general complaints, which are sent to the Head of Prison under cover of a letter signed by the Inspecting Judge, are generally complied with.

5.3.2 *Mandatory reports*

Mandatory reports cover matters which, in terms of the Act, must be reported to the Inspecting Judge by the prison authorities. Deaths in prison, instances of segregation and the use of mechanical restraints must be reported, and penalties of solitary confinement must be confirmed by the Inspecting Judge. A major difficulty for the work of this sub-unit is that none of these provisions had yet been put into effect at the time that this study was undertaken. However, the Inspectorate has instituted an electronic reporting system for Heads of Prison to report deaths under section 15 of the Act. One of the reasons for the introduction of the electronic reporting system, which is accessible via the Inspectorate's web page, is the increasing number of deaths in prison.

In the event of a death in prison, the DCS conducts an internal investigation to determine the cause of death and issues a report. In addition, however, the Inspectorate, through the IPV in the prison, conducts an independent assessment of the DCS report.[46] Information on the death is sent via the electronic reporting system to the Case Officer, who makes an initial determination and a recommendation to the Case Manager for mandatory reports. The IPV in the region may be asked to collect more information. At the time of the interview with the Case Manager for Mandatory Reports, the Inspectorate had made no findings on unnatural deaths.[47]

However, the Inspectorate is also concerned about determining reasons, trends and statistics in relation to the high number of natural deaths in prisons and finding ways to prevent this phenomenon.[48] Related to the issue of natural deaths is the release of prisoners on medical parole under section 79 of the Act, which provides that, if a prisoner is diagnosed as

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

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

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

48 In 2002, there were 1 389 natural deaths in prison (*Annual report* (2002) 21. The number of deaths in prison increased dramatically from 737 in 1997 to 1 087 in 2000 and 1 169 in 2001. See *Annual report* (2001) 19. The Office reports that most of the deaths are due to HIV/AIDS-related illnesses (*Annual report* (2001) 19).

being in the final phase of any terminal illness, he or she may be considered for placement under correctional supervision or medical parole, 'to die a consolatory and dignified' death. Although the Inspectorate technically has no legal mandate to intervene in decisions made under section 79 of the Act, the link between deaths in prison and release on medical parole has resulted in the Inspectorate's becoming involved in monitoring and developing policy guidelines regarding medical releases.[49]

5.3.3 *Analysis, obstacles and problems*

Some problems and obstacles were evident. First, it takes too long to resolve a complaint that cannot be mediated. A complaint, particularly if it is referred to the Office, typically takes about three months to resolve. This often means that the complaint is stale by the time a decision has been made. Consideration should be given to developing guidelines for the circumstances under which an IPV may refer a matter directly to the Inspectorate under section 90(2) of the Act. The Inspectorate needs to address the issue of the life-cycle of cases, as quick and effective responses to prisoner complaints would not only increase legitimacy and confidence but also be in line with the spirit and objectives of the Act.

Except for one occasion, the Inspectorate has not made use of the power to appoint Special Assistants since 2000. The reasons for this are not clear, but the use of Special Assistants is an important means of including civil society in the work of the Inspectorate. The salaries and conditions of service of Special Assistants must be determined after consultation with the Commissioner and in consultation with the Director-General of the Department of Public Service and Administration. The difficulties this requirement has led to were illustrated by Judge Trengove in his inaugural annual report of March 2000.

Some of those interviewed were questioned about what it meant to 'resolve' complaints. It was not clear how cases were resolved, what criteria were used to assess the conduct of the DCS, and how the exercise of power, particularly in relation to larger issues of prison management, was assessed. While many cases could be resolved by the application of existing rules or policy, some would involve an evaluation of the exercise of discretionary power and it was not clear what criteria or standards would be used to assess and deal with this category of complaints. In addition, even the routine application of rules or policies may not necessarily mean 'resolving' a complaint in a way that improves prison conditions, since the rules and policies may themselves reflect a culture that is not conducive to furthering the human rights of prisoners. For these reasons, it is not always the case that 'resolving' a case affects positively prisoners' rights or leads to improved prison conditions. A set of minimum standards of fair treatment needs to be developed and made more transparent, so that the link between improved prison conditions and the resolution of individual complaints can be assessed, both by the Inspectorate and outside

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

bodies. In this regard, civil society could play an important role in helping to identify and develop minimum standards against which the conduct of the DCS and conditions in prisons could be measured.

5.4 Inspections Unit

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

Inspections, on the other hand, are conducted when there is evidence of a trend or problem area that needs further examination. All inspections are followed by reports, which contain findings and recommendations and are sent to the Minister and Commissioner as well as the relevant provincial commissioner and the Head of Prison. In the normal course of events, the response of the DCS to recommendations made by the Unit in the report is not monitored, although it is envisaged that IPVs will monitor the implementation of recommendations in individual prisons.

An important part of the work of the Inspections Unit is the conducting of inspections and the analysis of data to develop individual profiles on every prison in South Africa. The Unit has begun compiling the profiles which will eventually be accessible on the Internet via the Inspectorate's web page.[50]

5.4.1 *Analysis, obstacles and problems*

The work of the Inspections Unit is crucial to the achievement of the overall objective of the Inspectorate in identifying trends and problem areas for longer-term intervention. Its work could also help shape the strategic direction of the Inspectorate and other organisations involved in prison reform, since the trends and problems identified by the Inspections Unit could influence what issues are given priority in terms of intervention.

Well-considered plans, priorities and a vision for the Inspections Unit are in place and the importance of identifying broader issues and problems by scrutinising individual complaints is recognised. However, the identification of trends and the addressing of problem areas are not being carried out as effectively as they could be despite the systems that are in place to facilitate this process.

A related problem is the content of reports, which are sometimes lacking in analysis or neglect to identify more deep-seated systemic problems in prisons. This, too, is an area where continued liaison with and input

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

from civil society and academics involved in correctional services would assist greatly, as they could work together with the Inspectorate to determine areas needing special attention. One way of assessing trends and writing reports more effectively is to develop a full and thorough set of minimum standards by which to rate prisons.

A further problem is that reports are not widely disseminated.[51] Inspection reports routinely should be sent to all civil society organisations involved in prisons and key findings should be publicised in the local press and made known to local civil society organisations. All reports should be made available on the Inspectorate's web page.[52] In this way, the work of the Inspectorate may become better known, awareness of issues affecting prisons will be highlighted and partnerships with civil society might be promoted to mutual benefit.[53] In addition, non-compliance with recommendations should also be communicated to other oversight bodies such as the Parliamentary Portfolio Committee on Correctional Services and civil society organisations involved in prison reform.

There is no routine follow-up by the Inspectorate on recommendations made in inspection reports. Prison authorities should be asked to provide feedback within a certain period of time on what steps they have taken to implement recommendations made in reports, following which further observations may be made by the Inspectorate.[54] Issues of urgency, such as ensuring the separation of youth and adult offenders, should be followed up more immediately by senior staff in the Office or, in appropriate cases, by the Inspecting Judge, to encourage compliance. The Inspectorate should also, where possible and practical, provide guidance and support to the DCS to assist in implementing recommended changes.

5.5 Administration services

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

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51 Sarkin notes that the 'Office of the Inspecting Judge is one of the most unknown human rights protection institutions in South Africa at present' and that reports should be made widely available and published in a variety of languages and be written in plain language see Sarkin J 'An evaluation of the role of the Independent Complaints Directorate for the Police, the Inspecting Judge for Prisons, the Legal Aid Board, the Human Rights Commission, the Commission on Gender Equality, the Auditor-General, the Public Protector and the Truth and Reconciliation Commission in developing a human rights culture in South Africa' 2000 (15) *SA Public Law* 397).

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

53 An example of how the work of civil society could be bolstered by making inspection reports publicly available is the use of an inspection report that recommended the separation of gang and non-gang members in litigation initiated by the Legal Resources Centre, a public-interest law firm. In this case, the mother of a youth is sueing the DCS for negligence after gang members in prison killed her son.

54 This process is followed by the Committee on the Prevention of Torture in Europe.

5.6 The electronic reporting system

A major success of the Inspectorate has been the establishment of an online electronic reporting and communication system that is used by staff of the Inspectorate, including the IPVs and Heads of Prison, to report and communicate with the Office. A major advantage of the system is that it keeps full and proper records of the number and types of complaints received from prisoners, which also makes the identification of trends and problem areas easier.

An electronic bulletin board, which facilitates communication between the Office and those working in the regions, is also part of the system. The system is linked to the DCS database. This allows all staff to get information on each prisoner, including the nature of his or her offence and the number of previous convictions. In addition, data captured by the DCS, including statistics on the prison population, is also available.

The electronic reporting system was evaluated in 2003 by bridges.org, an international non-governmental organisation based in Cape Town, which focuses on encouraging the effective use of information communication technology (ICT) in developing countries.[55] The evaluation formed part of the organisation's Case Study Series on ICT-Enabled Development. The study rated the system very highly under each of its seven 'best practice guidelines' for successful initiatives and highlighted the advantages of the system for implementing the mandate of the Inspectorate.

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

6 INDEPENDENCE

The legitimacy of and confidence in the work of the Inspectorate depends largely on the extent to which it is perceived as independent. Section 85(1) of the Act guarantees the independence of the Inspectorate. A persistent concern raised by those interviewed was whether and the extent to which the Inspectorate was truly independent of the DCS. The concern arose from both the administrative and financial link between the Inspectorate and the DCS and the fact that some of the Inspectorate's staff were drawn from the ranks of DCS officials. Some interviewees expressed concern about the degree of independence of the IPVs, whom some prisoners saw as being too close to prison officials.

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

Under section 91 of the Act, the DCS is responsible for all the expenses of the Inspectorate. In other words, funding for the work of the Office comes from the DCS. In addition, the staff complement of the Inspectorate must be determined by the Inspecting Judge in consultation with the Commissioner.[56] Appointing Special Assistants and determining their salaries and conditions of service takes place after consultation with the Commissioner.

The incumbent judge does not see the link as a problem. He is of the opinion that the independence of the judge as the head of the Inspectorate contributed significantly to making it independent.[57] While it was felt that these links with the DCS did not necessarily compromise the functional independence of the Inspectorate, concern regarding its financial and administrative independence is widespread. Concerns regarding perceptions of independence were also raised. Some staff were of the view that appointments from within the DCS also contributed to the problem.

In *New National Party of South Africa v Government of the Republic of South Africa*,[58] the Constitutional Court pointed out the need for both financial and administrative independence to ensure the independence of the Independent Electoral Commission. Similar arguments may be made in relation to the Inspectorate, whose independence is stipulated in legislation and is essential if it is to perform its functions effectively. Financial independence implies the ability to access funds reasonably required for the performance of certain statutory functions.[59] Both the guarantee and source of funding are crucial. If funding is sourced from the same organ that is the object of oversight, the independence of the oversight body and the perception thereof may be compromised.

Administrative independence 'implies control over matters directly connected with the functions that such institutions must perform'. In relation to the Inspectorate, this means, at least in part, control over the processing of applications for the appointment of staff and Special Assistants. Ideally, the budget of the Inspectorate should not be linked to the DCS but should come directly from Parliament. However, should this route prove difficult to implement,[60] consideration should be given to amending the Act to provide safeguards for the financial security of the Inspectorate. This could involve an amendment to section 91 of the Act to include a clause requiring the DCS to provide funding that would ensure, in the opinion of the Inspecting Judge, the full and effective operation of the Inspectorate.

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56 S 89(1).

57 Interview with Judge Fagan, 27 August 2003.

58 1996 (6) BCLR 489 (CC).

59 Corder H, Jagwant S and Soltau F *Report on parliamentary oversight and accountability* (June 1999) 56 available at http://www.prng.org.za/bills/oversight&account.htm.

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

Mechanisms ensuring administrative independence also need to be put in place. In particular, all appointments should be processed by the Office itself in order to avoid delays. Consideration should be given to placing certain core administrative responsibilities within the Office itself, with a concomitant increase in resources to cope with them. Unless efforts are made to ensure administrative separation, there is the danger that an independent body is perceived as merely a directorate of the parent department both by the department itself and staff in the office and by the user public.

7 LEGISLATIVE AMENDMENT ON CORRUPTION

In its 2000 *Annual report*, the Inspectorate indicated that it wished to be relieved of the mandate to investigate and report on corrupt or dishonest practices in prisons. The reasons given were: (i) that the good relationship between IPVs and prison officials would be compromised and the Inspectorate's work would be hampered; (ii) the DCS already has an Anti-Corruption Unit which investigates corrupt and dishonest practices in prisons; (iii) allegations of corrupt and dishonest practices in prisons are, in any event, taken up with the appropriate correctional officials or the South African Police Service or the Office of the Public Protector; and (iv) the presence of IPVs in prisons has an inhibiting effect on corruption and dishonesty.[61] In 2001, the Act was amended to remove corruption from the ambit of the Inspectorate's work under section 85. However, reference to corruption and dishonest practices has been retained in section 90(1) of the Act, which covers the powers, functions and duties of the Inspecting Judge.

As events in the Jali Commission of Enquiry indicate, corruption is endemic in South African prisons. Despite legislative amendments, the Inspectorate will no doubt have to continue to deal directly with this issue in the execution of its legislative mandate. Only instances of corruption that have no direct impact on the conditions in prisons are removed from the Inspectorate's mandate. Section 90(1) of the Act makes it clear that corruption and dishonesty, where they affect conditions in prisons, remain part of the Inspectorate's mandate.

8 LIAISON AND CO-OPERATION

An overwhelming number of members of civil society organisations who were interviewed were of the opinion that the Inspectorate liaised, co-operated and worked effectively with NGOs, particularly those operating in the Western Cape. Many of those who were interviewed felt that the Inspectorate had provided them with invaluable statistical information and had facilitated easier access to prisons. The Inspectorate was visible amongst NGOs and other organisations working in the field of prison reform. However, outside the Western Cape, this was less so.

61 *Annual report* (2000) 18–19.

The Inspectorate also appears to have co-operative working relationships with institutions established under Chapter 9 of the Constitution. Because both the office of the Public Protector and the South African Human Rights Commission (SAHRC) also investigate prisoner complaints and conditions in prison as part of their mandate, procedures for streamlining and referring complaints are being developed. Both the SAHRC and the Parliamentary Portfolio Committee on Correctional Services (hereafter: the Committee) also receive prisoner complaints.

Formal liaison and co-operation between the Inspectorate and members of the Committee take place through briefings of the Committee. While it is clear that the Committee in general is supportive of the work of the Inspectorate, the Inspecting Judge was sharply criticised by members of the Committee for statements about the rate of HIV-infection amongst prisoners.[62] However, it appears that the Committee draws significantly on the work of the Inspectorate, especially in relation to overcrowding, to determine priorities and strategies. A strong partnership between the Inspectorate and the Committee is essential. The Inspectorate's work complements the Committee's own oversight function: together with the Committee it acts as a watchdog over the DCS. The Inspectorate can support and aid the Committee in its oversight function by providing it with information that may not be derived from the DCS.[63] In turn, the Committee can support and aid the work of the Inspectorate by publicising in Parliament conditions in prisons and the content of reports and by using parliamentary structures to ensure that the Inspectorate's recommendations are implemented.

Positive accounts were received regarding communication between the DCS and the Inspectorate. The direct communication between the Inspecting Judge and the office of the Chief Deputy Commissioner was described as 'invaluable' in establishing a working relationship between the management of the DCS and that of the Inspectorate. The Inspectorate also appears to have a co-operative relationship with the Department of Justice, with which it has worked closely on the issue of overcrowding.[64] However, a point of tension between the Inspectorate and the DCS that deserves mention relates to statements made by the Inspectorate on the rate of HIV-infection amongst prisoners. The Inspectorate also has initiated and participated in several projects with other civil society organisations.

There have been other initiatives involving civil society and community organisations more recently. The plan to appoint Special Assistants is a

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

63 See H Corder *et al* (fn 59 above) where the same argument is made in relation to Ch 9 institutions and Parliament.

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

significant development and the Inspectorate should consider appointing persons to assist in specialised aspects of inspections and investigations under section 90(8) of the Act.

The Inspectorate is also engaged in several initiatives as part of its strategy to combat overcrowding. For example, it has attempted to facilitate the use of plea-bargaining by working with the Legal Aid Board, law societies and the Department of Justice to process these cases more quickly and efficiently. The role of the Inspectorate is to provide information to prisoners on plea-bargaining and identify awaiting-trial prisoners who are willing to enter into a plea-bargain.

The Inspecting Judge and representatives of the National Council on Correctional Services convened a meeting with all Regional Court Presidents and Chief Magistrates in South Africa with the aim of finding ways to reduce the number of awaiting-trial prisoners.[65] As a result, the Lower Court Management Committee put in place a Sub-Committee on Awaiting-Trial Prisoners which has as its main objective the reduction of the number of awaiting-trial prisoners. A list of 28 suggestions for reducing the number of awaiting-trial prisoners, prepared by the Inspectorate, was sent via the Sub-Committee to all courts in South Africa. The Inspectorate has been asked to provide the Sub-Committee with monthly statistics of all awaiting-trial prisoners in South Africa, so that it can, 'within 48 hours, review the reasons for the further detention of the detainee'.[66]

The Inspectorate has also assisted other organisations with research into prisons. Senior members of the DCS emphasised the need for an internal clearance process before the Inspectorate performs or commissions research studies. While there are good grounds for the suggestion that research initiatives be discussed with the DCS, any structures put in place to regulate research, or decisions taken, cannot compromise the independent functioning of the Inspectorate.

The Inspectorate has also publicised its work amongst judges and has increased judicial involvement in prison inspections. Annual reports of the Inspectorate are sent to all superior court judges, encouraging them to conduct independent prison inspections under section 99(1) of the Act. Many judges have responded to this call.

9 EFFECTIVENESS AND IMPACT

There was broad agreement that an independent oversight body on prisons in South Africa was necessary and that the existence of the Inspectorate contributed significantly to addressing the lot of prisoners in South Africa. Virtually all persons interviewed, regardless of political or ideological affiliation, considered the Inspectorate to be playing an important role in the protection of prisoners' rights and in addressing prison

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

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

conditions. Very little, if any, hostility was evident towards the Inspectorate and the overwhelming majority of those who were interviewed felt that its work was valuable and should continue. This is also the conclusion of this study. The Inspectorate is an important institution supporting democracy and human rights in South Africa and its work should be acknowledged, supported and strengthened. As many pointed out, despite the problems in the system, the mere presence and visibility of IPVs are important and prisoners have an additional avenue through which to address their concerns.

The inspection and investigation process, despite many flaws, has the potential to provide much-needed information on and publicity for prison conditions, including information on systemic problems and trends. The electronic reporting system is a pioneering effort which is leading the way for other prison inspectorates around the world. The Inspectorate has raised awareness about overcrowding in prisons and has put the issue of prison reform in the public spotlight. It has facilitated easier access to prisons and provides important statistical and other information relating to prisons. For a relatively new organisation, it has managed to achieve a significant amount in a short period of time.

It is in the area of attempts to reduce overcrowding that the Inspectorate has been particularly effective. In 2000, the Inspectorate proposed that the government use its power under section 66 of the 1959 Act[67] to release certain categories of awaiting-trial prisoners. In September 2000, 8 451 awaiting-trial prisoners were released as a result of the Inspectorate's call.

Legislative amendments relating to the powers of the police to grant bail at a police station were also largely due to efforts of the Inspectorate. In addition, in 2001, again due largely to pressure from the Inspectorate, the Criminal Procedure Act was amended to allow a Head of Prison, who is satisfied that the population of the prison 'is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused', to apply to court for the release of prisoners under specific conditions.[68] Other steps taken by the Inspectorate to reduce prison numbers include lending support for earlier release on parole, higher maximum amounts for admission of guilt fines, the introduction of plea-bargaining procedures[69] and the possibility of a general amnesty for certain categories of prisoner.[70] The Inspectorate also

67 Correctional Services Act 8 of 1959.

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

69 S 276B of the Criminal Procedure Act 51 of 1977, as amended by s 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997.

70 This proposal, made in the 2002 *Annual report*, was not without controversy. The Democratic Alliance, for example, expressed the view that granting a general amnesty would undermine confidence in the criminal justice system and send the wrong message

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routinely calls for shorter sentences and provides suggestions to judicial officers on alternatives to prison sentencing.[71]

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

There are, however, several areas that can be improved. A large number of those interviewed believed that the Inspectorate's success was partly due to the profile and the individual efforts of the Inspecting Judge, and that the profile and structure of the Office needs to be developed and strengthened. Another common response to the question of the impact of the work of the Inspectorate was that prison conditions in South Africa had not improved. Many people who were interviewed were of the opinion that, while there is no doubt that overcrowding contributes to the problem of intolerable conditions, other systemic problems relating to prison conditions also need to be addressed. The proceedings of the Jali Commission of Enquiry and the reports of other organisations tend to confirm the view that conditions in prisons have not improved significantly and remain a matter of serious concern.[72]

The view was also expressed that the Inspectorate needs to be more proactive in order to maximise its impact, by, for example, initiating inspections on a larger scale and making many more unannounced visits. It is important for the Inspectorate to begin analysing the impact of its own work in relation to prison conditions. There are presently very few mechanisms in place for the Inspectorate to assess the success of its efforts.[73] Such impact analysis needs to go beyond the production of statistics and should contain a full and frank assessment of the actual change in prison conditions, measured against minimum standards, as a result of its interventions. Experts in impact analysis and members of civil society could assist in the design of the study. Ongoing substantive impact analysis would not only lead to self-critical assessment of the Inspectorate's own work and more effective long-term planning, but would also allow civil society to assess more accurately the full picture relating to prison reform.

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to criminals (see 'Amnesty and crowded jails' *Cape Argus* (28 May 2003) 9). However, 17 000 prisoners were released following an amnesty announced on 27 April 2005.

71 See, for example, *Annual report* (2001) 12 -14. These suggestions are being used in the training of magistrates (see *HIV/AIDS Sentencing Manual* prepared for Justice College by the Law, Race and Gender Unit in the Faculty of Law, University of Cape Town (2004)).

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

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

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