

Policy and practice in South African prisons: An update

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ABSTRACT

In June 2003, the Civil Society Prison Reform Initiative (CSPRI) released a policy review concerning major developments in penal policy in South Africa since the advent of constitutionalism in 1994. This paper was widely disseminated, and drew quite heated reaction from some quarters at the time. By and large the policies discussed pertained to previous corrections administrations and the fact that a new commissioner had been appointed in August 2001. This article gives an overview of the issues to which attention had been drawn in the earlier policy review and provides an update to some key changes that have occurred subsequently.

1 INTRODUCTION

The Department of Correctional Services inherited by the government in 1994 was characterised by a deep-rooted militaristic tradition, a burgeoning and vociferous trade union membership,¹ a closed management style inherited from draconian legislative enforcement measures in the 1960s to 1980s, and a racially unrepresentative staff corps. Shortly after the first democratic elections in 1994, the Department tabled a White Paper on Corrections, which was rather rapidly adopted. As a conceptual strategy for policy development, this document's shortcomings have been widely noted,² most recently and succinctly in the 2005 White Paper on Correctional Services, which has replaced it altogether as a policy instrument.

Subsequent to the acceptance of the 1994 White Paper, the policy environment in the period 1994–2002 was determined, first and foremost, by the fact that, early on, a stand-off developed between the African National Congress (ANC) chairperson of the Portfolio Committee and the Inkatha Freedom Party (IFP) Minister. This was one factor which contributed

1 The Public Service Labour Relations Act was introduced in 1993 and made applicable to correctional officials in 1994, just before the 1994 elections, as a result of mounting pressure to grant public service employers protection from unfair labour practices (Department of Correctional Services *White Paper on Corrections* (2005) 2.6.3 (hereafter: *White Paper*).

2 See, for example, Penal Reform Lobby Group 'An alternative white paper on correctional services', unpublished, 1995 (copy on file with the author).

to the breakdown in collaborative efforts at transformation. The multi-sectoral Transformation Forum, which had been convened after a conference hosted by the then deputy President to address and debate the nature of civil society involvement in correctional reform (a broad grouping which included both organised labour and civil society structures), withered and disappeared in the absence of ministerial commitment accompanied by reluctant Departmental participation.³ In the period that followed, policy-making was eclectic, personality-driven, and deeply influenced by the minister's affinity with US-style corrections practices. A string of senior staff changes took place under both the first and second (IFP) Ministers after 1994, Ministers Mzimela and Skosana. One of the first departures⁴ was the now infamous Commissioner Sithole, who had made public pronouncements about the desirability of putting prisoners down mine-shafts. He left under a cloud of alleged corruption. A series of acting commissioners followed and the permanent appointment of the present Commissioner was made only in August 2001. There can be no doubt that instability at management level over a prolonged period has contributed significantly to some of the challenges facing correctional policy and practice today.

In the policy review undertaken in 2003, eight themes were identified as being central in policy development until the end of 2002. These were not scientifically determined⁵ but appeared to suggest major trends that have concerned the public mind or shaped transformative processes. Some of those topics will be briefly reviewed and an updated analysis of their significance presented. Thereafter, further themes which have emerged as being crucial to the correctional sphere since the 2003 study will be highlighted. In conclusion, an endeavour to chart a future vision for critical policy issues will be made.

This article has, however, been prepared in the absence of the final public report of the Jali Commission of Inquiry into Corruption, Crime, Maladministration, Violence or Intimidation in the Department of Correctional Services established in August 2001.⁶ This Commission of Inquiry was originally intended to have completed its work within a year but such was the magnitude of the discovery of ongoing malpractices that it is only now (in 2005) completing its work. The Jali Commission expects to deliver its final report during the second half of 2005,⁷ and it is predictable that

3 Giffard C 'Out of step? The transformation process in the South African Department of Correctional Services' unpublished MSocSci thesis, University of Leicester, 1997; Sloth-Nielsen J 'Overview of policy developments in South African Correctional Services 1994-2002' (July 2003) 1 *CSPRI Research Paper* series (hereafter: Policy Review).

4 In late 1998.

5 The 2003 review explicitly declined to engage with the issue of prison overcrowding, on the basis that the review was intended to inform the process towards the drafting of a new White Paper on Corrections, which would, in any event, had to take place within an overall system reaching critically overcrowded proportions. The issue of overcrowding is, however, raised below in the context of sentencing.

6 Presidential Minute no 423 of 8 August 2001.

7 Personal Communication with Jali Commission staff on 9 May 2005.

amongst the recommendations might be significant proposals concerning policy, particularly insofar as they pertain to the investigation and elimination of corruption.

2 DEMILITARISATION

The 2003 policy review commenced with an overview of the process of demilitarisation⁸ that was implemented (virtually overnight) on 1 April 1996. With immediate effect, all insignia were removed, military-style parades ceased, rank was abandoned as a form of address, and a new civilian character espoused. Poor communication of the new policy, coupled with the crude manner of implementation, led to commentators' describing the process as a debacle.⁹ It was pointed out that demilitarisation was conceptualised in a narrow and mechanistic manner and that there was no proper contingency planning. The White Paper also cites resistance to this new direction amongst senior staff as a cause of the flawed process of demilitarisation. The White Paper notes, too, that the demilitarisation process coincided with a massive affirmative-action campaign aimed at transformation of the staff corps, which occurred without due consideration of the training and development needs of these affirmative-action appointees.¹⁰ Staff and inmates seized the opportunity the hiatus provided and ill-discipline became an endemic problem. 'The confused notion that demilitarisation meant a retreat from discipline and security further negatively impacted on the functioning of the Department'.¹¹ Staff disciplinary procedures had to be reworked, for example, and laxity in implementing disciplinary procedures for infringements continue to bedevil the correctional environment.¹²

The 2003 Policy Review notes that the issue of uniforms was never completely off the agenda. By 2000, the design of a new uniform appeared to have been agreed upon internally, and in April 2002 the roll-out of uniforms commenced. Some criticism of the continued military style and colour has persisted,¹³ and the reintroduction of insignia detailing rank was, as recently as a few months ago, a ground for resistance in the rank and file.¹⁴ It seems, though, that the reflection of a corporate identity

8 The 1994 White Paper had reluctantly acknowledged that the militarised character of the Department may need re-consideration.

9 See Giffard C (fn 3 above); see, further, Luyt W 'The transformation of corrections in the new South Africa' vol 14 (3) *Acta Criminologica* (2001) at 27.

10 White Paper par 2.7.9.

11 *Ibid.*

12 See Tapscott C 'A study of best practice in prison governance' *CSPRI Research Paper*, April 2005 (copy on file with the author).

13 Policy Review at 13.

14 The White Paper notes (at 8.12.2) that a misinterpretation of demilitarisation resulted at both the provincial and national offices in officials' no longer wearing uniform and insignia, while officials at correctional centre level continued to wear uniform but no insignia. It was at the correctional level that the re-introduction of insignia resulted in industrial action, allegedly based on some warders' fear that this would make them targets for gangsters (*Cape Times*, 23 February 2005). It was reported, too, that more than 100 warders from around the country had been dismissed or suspended for refusing to

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via the re-introduction of uniforms has been an important shift in the immediate past and that it was the culmination of a growing realisation of the need to portray a more coherent corporate identity, in that this was linked to staff discipline.¹⁵ This is more than evident in the approach taken in the White Paper, which puts it thus:

The DCS must be conceptualized as performing a socio-security function. As such the Department should be a civilian structure with a strong social sector dimension, with a focus on tight security, on personnel discipline, and on a civilian rank recognition as crucial factors in correctional management . . . It is important that the Department has a clear approach to uniform, insignia, command and control . . . The Department's approach in this regard must map out a comprehensive identification package that will affect both officials and offenders.¹⁶

In the short term, the Department will, it seems, use the existing uniform for officials. However, prospects for a longer-term revision may still exist, as the White Paper makes mention of a longer-term 'complete package' of corporate identification which would include identity cards for electronic access and security purposes, as well as colour-coding of these cards according to function.¹⁷ The White Paper asserts that the DCS remains committed to a culture devoid of militaristic practice, however.¹⁸

The Policy Review did not highlight the significant changes brought about by the introduction of the new prisoner garb in the last few years. Prisoner uniform now consist of bright orange overalls with the words 'Prisoner' branded on them numerous times (allegedly more than one hundred). Again, there appeared to have been little if any public engagement¹⁹ with this highly stigmatising design, and it is an issue which has now formed the basis of a legal challenge.

In late 2004, an application was brought in the Johannesburg High Court by a trio of prisoners alleging that the uniform was an infringement of their constitutional right to dignity.²⁰ The outcome of this application is not yet known. A small clue that the prisoner uniform might over time be altered is to be found in the White Paper, insofar as it is suggested that, in the longer term, colour-coding of prisoner uniforms will be used to reveal to which stage in the correctional cycle they have progressed.²¹

wear the insignia. Evidently, the decision to reintroduce rank insignia was taken by Cabinet in 2003.

15 Responding to the suspension of three warders from Voorberg prison for forcibly removing insignia from two of their colleagues who had failed to heed demands not to wear the insignia, the Minister of Correctional Services characterised their action as being 'ill disciplined' (*Cape Times*, 23 February 2005).

16 White Paper at 8.13.2 and 8.13.3.

17 White Paper at 8.13.4.

18 White Paper at 8.13.1. It has been remarked, though, that the military-style colours chosen coupled with visible rank does create some dissonance with international instruments which do not support a militaristic orientation for prison governance.

19 E.g. via the Parliamentary Portfolio Committee on Correctional Services.

20 They aver that publicly they are called 'Oros' men (after a well-known brand of orange juice) and that they wear the overalls inside out as a token of resistance. See www.sundaytimes.com <accessed 15 December 2004>.

21 White Paper at 8.13.4.

It can be concluded that, insofar as the demilitarisation and subsequent re-establishment of a corporate identity is concerned, events in DCS have probably come as full a circle as they will for the next while. However, other characteristics of the previous military-style regime, such as parades and salutes, have not resurfaced.

3 NEW MODES OF PRISON GOVERNANCE

The second broad theme that the Policy Review identified were issues subsumed under the rubric 'New modes of prison governance'. They were the introduction of unit management as the preferred philosophy governing the delivery of services to prisoners and the question of privatisation of prisons. As more recent developments after 2003 in relation to each of these have occurred in a diverse way, the two issues will be addressed separately here.

3.1 Privatisation

The commissioning of privately constructed and managed prisons was, as the Policy Review explains, influenced by the practice of the United States and the preference of the then Minister (Mzimela) for correctional policies from those quarters.²² The privatisation strategy was part of an overall expansion in the prison-building programme, a key aim being to alleviate overcrowding through more rapid construction of new facilities. The purported benefit to the government was further that, under the Asset Procurement and Partnership System chosen as the vehicle for outsourcing, the private sector would finance the costs of design and erection of the buildings in the short term, with the government paying back both capital and management costs over a substantial period of time.

Initially, it was announced that contracts for seven such prisons would be awarded. However, ultimately only two contracts were signed, and the prisons erected in accordance with these contracts became operational in 2001 and 2002 respectively. The Policy Review notes that the process of embarking on the privatisation route occurred extremely hastily, with the first tenders being awarded before enabling legislation was even tabled in Parliament.²³ Second, it became a source of some acrimony that Departmental officials who were initially involved in the project design and drafting of contracts left the Department soon after the conclusion of negotiations to take up senior positions in the award-winning companies. Third, the choice of maximum-security prisons as the two pilot projects gave rise to some criticism, as the contracts provided for extensive vocational training, education, rehabilitative and therapeutic services to

22 Another example of the influence of corrections policy from the USA was evident in the introduction of C Max prison.

23 Policy Review at 20; see, too, Berg J 'Private prisons: The international debate and its relation to South Africa' (2000) vol 14 (3) *Acta Criminologica* at 4 and Berg J 'Accountability in private corrections: Monitoring the performance of private prisons in South Africa' (2001) 4 *South African Journal on Criminal Justice* at 327.

inmates. It was argued that, instead of providing this array of interventions to long-term prisoners, the opportunity should rather have been used to break the cycle of crime for first offenders.²⁴

However, the international controversy surrounding privatisation of prisons notwithstanding,²⁵ the major issue, in the South African context, that emerged virtually immediately the ink was dry was the question of costs. Although the short-term benefit mentioned above entails that the private sector finances construction costs up front, the flip-side of the coin is that the lease payments include not only a day-to-day fee per prisoner but also repayment for capital expenditure over the long term (25 years) to ensure that, by the expiry of the contract term, the government has repaid (with interest) those costs. As Luyt commented in 2001 already, 'what should have been a less expensive alternative to accommodation erection, turned out to be so expensive that the development of two more joint venture prisons has been discontinued'.²⁶ The Minister of Correctional Services noted in 2002 that the Department was experiencing significant affordability constraints in meeting its contractual obligations. Press reports continue to assert union claims that the repayments to the private contractors consume 50 percent of the DCS budget (although this is factually not true).²⁷

By the end of 2002, a task-team report drafted by officials from both the Department and State Treasury had been presented to the Portfolio Committee on Correctional Services, indicating serious difficulties with the financial arrangements. Because costs were based on the input specifications (size of cells, number of inmates per cell, number of hours that prisoners had to be productively engaged in activities and skills development outside their cells, a higher standard of medical services etc), the cost per prisoner was significantly higher than in the state-run facilities. The Policy Review mentioned further that the Treasury had indicated that a higher-than-normal return on equity was being enjoyed by the private contractors (then estimated at 29 percent and 25 percent respectively), leading the task team to conclude that the contents of the contracts should be renegotiated. In a further report to the Portfolio Committee on Correctional Services in March 2003, the task team said that no feasibility studies had been undertaken before the contracts were drafted to determine affordability limits, optimal value for money and optimal risk transfer.

The release of the 2003 Policy Review was accompanied by some press attention to the privatisation question and the mystery surrounding the history of the unfavourable contracts. The Special Investigating Unit (SIU)

24 Luyt (fn 9 above) at 31. This is a view with which the present managers of the private prisons agree, according to personal communication.

25 See, for example, the Prison Privatisation Report International electronic newsletters, available at www.psiru.org, which frequently highlight news reports concerning abuses in privatised prisons abroad.

26 See Luyt (fn 9 above) at 31.

27 *Cape Times*, 21 January 2005, citing a Popcru spokesperson.

expressed some interest in investigating the situation;²⁸ however, the private contractors responded to the adverse press reports by alleging that the task-team figures were exaggerated and that the cost per prisoner was in fact the same as, or less than, comparisons with state facilities, once the capital repayment element of the overall sum per prisoner was excluded.

During 2004, a Transactions Adviser was appointed by the Department at the insistence of the Treasury to investigate the question of renegotiation of the contract to create terms more favourable to the government (for example, by addressing the 2-prisoners-per-cell limitation set by the contracts). The fate of this project is, however, not yet in the public domain.²⁹

Four further relevant issues in the privatisation context must be adduced, however. First, there has been significant 'good press' in a range of popular media for the private prisons in recent times, including such diverse journals as the *Financial Mail*³⁰ and the *Big Issue*,³¹ the journal sold on street corners by homeless vendors. The public message that has entered popular discourse is that private prisons are efficient, cost-effective³² and humane and, moreover, able to meet impressive empowerment targets. In the context of the frequent media reports of adverse prison conditions, corruption and the like still besetting the corrections sphere, the public has already started to question whether the privatisation option was not prematurely abandoned.³³

Next, the question must arise as to how the White Paper deals with the way in which PPP (public-private partnership) correctional centres will be taken forward. The White Paper describes in reasonable detail the policy framework on public-private partnership correctional facilities with reference to the prevailing legislative and policy environment.³⁴ It is, however, rather coy about future 'whole facility' procurement possibilities, noting only that National Treasury rules on PPP's must be followed in any such process³⁵ and that 'it is early days to assess the rehabilitative impact of the PPP correctional centres'.³⁶ This would appear to indicate continuing

28 It is unknown whether the investigation was in fact pursued and, if so, what conclusions were reached. The SIU is busy with a range of investigations into prison-related matters after a series of promulgations in this regard, as follow up in support of the work of the Jali Commission of Inquiry and to ensure effective prosecution and conviction, as well as civil forfeiture where necessary. See, in this regard, White Paper at 2.9.6 and the SIU briefing to the Portfolio Committee on Correctional Services on 7 June 2005 available at www.pmg.org.za/docs/2005/050607jali.htm.

29 See, for further information, the consideration of Correctional Services qualified audit report by SCOPA at www.pmg.org.za/viewminutes/ptp?id=4874.

30 *Financial Mail* cover story 'Making crime pay' 29 April 2005.

31 See *The Big Issue* March 2005 vol 92 (9).

32 Based, as mentioned above, on the dispute about the way in which the cost per prisoner per day should be calculated. See *Financial Mail* (fn 29 above) at p19-20.

33 Personal interview with the *Port Elizabeth Weekend Post*, May 2005.

34 White Paper at 12.4.

35 These guidelines were developed only after the contracts in this sphere had been negotiated.

36 White Paper at 12.4.2.

ambivalence as to what the actual costs are (excluding capital repayments), what the affordability level should be, and whether the cake is worth the candle (as it were), supposing that rehabilitation were indeed more achievable in the private-prison setting.

Third, privatisation of 36 prison kitchens in a variety of large prisons across the country occurred in September 2004.³⁷ This is a pilot project and will be evaluated before being formalised. Prisoners are still involved in the preparation of food but private sector companies are responsible for ordering, stock control and general management of the kitchens. Initial anecdotal reports³⁸ indicate that that better quality, more varied and tastier food is finding its way to prisoners. However, equally it has been mentioned that privatisation has put paid to the 'flying chicken' syndrome, which saw large quantities of food being siphoned off and sold for private (corrupt) gain. Proper stock-control procedures, bypassing the state tendering system for procurement of food, and enhanced management and loss-control procedures may bode well for the mutual profitability to both the DCS and the private sector for this form of privatisation.

Fourth, a parallel development noted in the 2003 Policy Review, namely the outsourcing of juvenile pre-trial detention facilities by provincial Departments of Social Development to private operators, has continued to occur, with additional facilities in at least two provinces having been contracted by the relevant state department and the management and operation of the facility thereafter outsourced.³⁹ A third province is considering the same model. However, as far as can be ascertained, the management contracts are of far shorter duration – one to three years – than those in the prison sector and none has yet involved facility-construction finance and repayment, as the buildings have been erected by the commissioning department. Informally, it has been reported that many of the contractors identified in the previous paragraphs are keen to expand in the detention sphere, juvenile or otherwise.

Since the apparent stand-off that developed after the adverse task-team report in 2002 between DCS policy-makers and the PPP prison operators, Tapscott has completed his survey of best practice in prison governance.⁴⁰ Having included the two privately managed prisons in the seven facilities in this review, he was able to compare more nuanced factors (i.e. issues other than cost and the obvious discrepancies related to standards of physical accommodation and care) that differentiate state-run and PPP

37 It must be noted that, according to unofficial minutes of the Parliamentary Portfolio Committee on Corrections, this was another major development in which they were not consulted prior to implementation. This was also the case during the initial privatisation process, where Parliament was left in the dark until November 2002 see Policy Review at p22.

38 Personal communications with NGO staff who work in prisons and with some prison staff during the period September to December 2004.

39 One evaluation, comparing a privatised facility to state-run institutions, concluded that the privatised facility was more cost-effective and, moreover, provided better protection of children's rights. See, for a summary of this evaluation, 'PAWC commission's review of facilities' (December 2004) vol 6(4) *Article 40*.

40 Tapscott C (fn 12 above).

prisons. His conclusions relating to the PPP prisons' vastly superior human-resources management systems, in particular, have been heralded with considerable interest.⁴¹ This may mean that a thaw is in the offing and that the debate may move beyond the sterile terms of the 1998 contracts to a more sustained engagement with the management practices, procedures and tools that allow privatisation to present a better image than state facilities.

In summary, the PPP option has not yet been abandoned but nor has it been embraced as the model for the future. The DCS will have learnt that the contractual process is incontrovertible, and it can be predicted that future PPP exercises will be dealt with a great deal more caution.

3.2 Unit Management

Unit Management was first officially introduced in the DCS lexicon in the 1999–2000 Annual Report of the Department.⁴² In the Mvelaphanda Strategic Plan 2002–2005 adopted in October 2002 by the DCS, it was noted that rehabilitation needed to be at the centre of the Department's activities and that the missing ingredient in the transformation of the South African correctional system required for this to be achieved was unit management. A target was then set of introducing unit management in 80% of the prisons by the end of March 2005.⁴³

Unit management is a philosophy grounded in managing prisoners in smaller clusters with greater interaction between correctional officers and prisoners, intended to enhance direct supervision, proper case management, superior risk management, and ultimately an improved prognosis for the eventual rehabilitation of prisoners.⁴⁴ Clearly, too, espousing unit management as the basis for operations entails architectural transformation as well, as unit management can by definition not be achieved when large numbers of prisoners are grouped in communal cells with minimal interaction with correctional officials who are forced to rely largely on external security to maintain control. The sealed-off corridor comprising several cells containing 60 or 70 inmates, such as is found in most prisons in South Africa, provides an entirely antithetical environment for unit management.

41 For instance, at a DCS research seminar held on 31 March 2005.

42 Policy Review at 4.4 and sources cited there.

43 See White Paper par 2.8.7. Whether this target has been achieved is not possible to tell. Is the fact that training has been rolled out for x% of the staff the criterion? Or whether they actually understand and apply the principles effectively? And how is this to be measured?

44 The White Paper refers to the six essential elements of unit management as: lateral communication with team work and common understandings; direct, interactive supervision of inmates; assessment and needs-driven programmes in structured day and correctional plan; multi-skilled staff in enabling a resourced environment; a restorative, developmental and human-rights approach to inmates; and delegated authority with clear lines of responsibility. The sub-values identified are co-responsibility; ownership; integrity and ubuntu (White Paper par 5.3.4 and 5.3.5).

Within a very rapid period of time, unit management became entrenched as the paradigm for the future, notwithstanding misgivings about the adequacy of training, the sustainability of unit management in warehouse-style older prisons, and the capacity of many members of staff to use effectively the approach to achieve the desired individual transformation.

Indeed, the White Paper patently has unit management as a cornerstone of its overall 'map' of the future. Chapter 5 contains the following articulation of the centrality of unit management to future correctional philosophy:

The approach of dividing offenders into smaller, more manageable units with direct supervision, called unit management, is the desired method of correctional centre management and an effective method to facilitate restorative rehabilitation. The principle of multi-disciplinary case management is equally applicable to the field of community corrections. It must be the basis of all structuring and resourcing at the correctional centre level of the correctional system, as the concept of unit management is regarded as one of the key services delivery vehicles to transform the delivery of correctional services in South Africa.⁴⁵

At this point, the rehabilitative ideal promised by unit management (along with the necessary individual assessment, sentence plans and programmes) appears to have swept aside the former narrow conception of imprisonment as having safe custody as its primary objective. This is reinforced by a variety of policy statements in the White Paper, not the least of which is the injunction that 'all correctional managers must understand the importance of achieving and maintaining the balance between security, control and justice. It is incorrect to suggest that treating inmates with humanity and fairness will lead to a reduction in security and control'.⁴⁶

The implications at a policy level of persisting with the introduction of unit management, even within existing overcrowded prisons not designed for this mode of prison management, relate chiefly to the investment in providing greater skills to staff that will have to occur for any measure of success to be recorded. Giving staff greater capacity is highlighted again in the conclusion below.

4 NEW MODELS OF PRISON DESIGN

The Policy Review provided an overview of the shifts and swings in thinking about prison design and priorities that characterised the period 1994–2001.

First, C Max, an ultimate security prison, was developed within Pretoria Central Prison, in the old accommodation for death row prisoners. Not only were the physical conditions of restraint arduous (e.g. exercise was

⁴⁵ Par 5.3.1.

⁴⁶ White Paper at 5.4.4, which falls under subsection 5.4 entitled 'person-centred correctional management through safe and secure custody in a humane environment'.

permitted only in wire baskets and inmates would spend 23 hours a day inside their cells), but psychologically the regimen was dramatic as well. The intention was to create more C Max facilities, but this programme was de-prioritised in 2001.

Next, the focus turned to super-maximum prisons, one of which was built at Kokstad. The Policy Review summarised the commissioning of Kokstad as 'a pointless expenditure' and noted that, for a long while, the DCS struggled to find sufficient qualifying prisoners to fill it. As at 30 November 2004, this prison was still only 45 percent full.

Thereafter, the focus turned to so-called 'New Generation' prisons which would allegedly save costs due to a range of factors (standardisation of design, using modular expansion to accommodate varying numbers of prisoners, reduced operating and maintenance costs through lower technology costs, the elimination of expensive 'non-beddable' spaces such as corridors and stairwells and so forth). The Policy Review noted that the initial estimates were that these prisons would cost one third of the then building costs per prisoner to erect. However, officially these are now going to cost a lot more than originally predicted. As the CSPRI briefing to the Portfolio Committee on Correctional Services concerning the budget vote in 2005 records:

In its newsletter in October 2004 CSPRI raised the matter of prison construction and that the per bed cost of the four new prisons have [sic] increased from the original R50 000 per bed (presented to this committee in September 2002) to R120 000 per bed. The ENE 2005 estimates this to be R100 199.00 per bed. The fluctuation in cost needs to be explained. Furthermore, the New Generation prisons were originally presented to this committee as a substantially cheaper option compared to conventional prison construction. It is now turning out to be more expensive per bed than the high-tech Goodwood prison. CSPRI sincerely hopes that prison construction is not regarded as a possible solution for the current levels of overcrowding.⁴⁷

In addition, the actual building of the prototype prisons has been slow to commence and, despite predictions that the first four would be ready for commissioning by now (2004/5), in fact none of them is yet complete and only the first stages have been reached. The proof of the pudding is, therefore, still awaited.

The White Paper reiterates the Department's commitment to 'a new approach to a cost-effective strategy by building low cost "Prototype" correctional facilities for medium and low-risk inmates who are the majority of the country's offender population'.⁴⁸ It links the new facilities not only to costs and the relief of overcrowding but also to the need to deliver facilities that are consistent with rehabilitation and humane treatment.⁴⁹ As noted earlier, however, while the White Paper is clear that cost-effective, practical and locally appropriate (for a developing country)⁵⁰ solutions to

47 CSPRI briefing to the Portfolio Committee on Correctional Services, February 2005 (copy on file with the author).

48 Par 2.9.4.

49 Par 2.9.4.

50 This may be a reference to the two-bed cells of the private facilities (which could be regarded as being first-world). In the prototype, this would be likely to be replaced by

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the design, procurement and building of correctional facilities need to be adopted, this does not seemingly entail further PPP contracts at this stage. The White Paper argues that 'the correctional system in democratic South Africa is not sufficiently consolidated and codified to ensure that there is a possibility for divergent approaches to be learnt and for a genuine partnership to be developed',⁵¹ which appears to mean that the government first wishes to see whether it can achieve the abovementioned goals itself.

The 'Centres of Excellence' approach (whole institution management or flagship approach) is of recent origin and is, therefore, a new development since the release of the Policy Review. First public indications of this initiative surfaced during 2004. The intention is that 'centres of excellence should be viewed as a process of aspiring to achieve excellence in the provision of correctional services, maintaining set standards, piloting best practices and benchmarking with similar systems guided by the provisions of the White Paper on Correctional Services'.⁵² These are not new institutions or buildings – existing prisons have been identified for designation as 'Centres of Excellence'.⁵³ The concept has for the most part been explicitly linked to the implementation at operational level of the White Paper,⁵⁴ in that unit management will form the basis of supervision and interaction between personnel and offenders, mechanisms will be put in place to ensure the elimination of corruption, and personnel competencies will be addressed through retraining, reorientation, staff development and performance management (amongst other goals).

The 'Centres of Excellence' programme is only now getting off the ground, and the potential impact has yet to be fully assessed. Tapscott's recent paper⁵⁵ on best practice in prison governance, which can be regarded as an initial survey of some of these centres,⁵⁶ may set the platform for a more sustained attempt at identifying and fostering not only best practice in corrections but also the proposed development of service-level standards with clear performance indicators which can be used to benchmark improvements throughout the system.

5 LEGISLATION AND POLICY REFORM

The Policy Review briefly reviewed the process of development of a 'new' Correctional Services Act (111 of 1998) intended to bring domestic legislation in line with the 1996 Constitution and to modernise South Africa's

communal cells accommodating 8 or 10 prisoners, whilst measures would be put in place to ensure that they did not become overcrowded (this is implicit in the White Paper at 12.2.1).

51 Par 12.3.2.

52 Taken from a presentation to the Portfolio Committee on Correctional Services www.pmg.org.za/docs/2004/appendices/040804excellence.htm.

53 How they were chosen is not actually clear, as in one instance it appears that an institution initially not selected requested to be included on the list.

54 *Ibid.*

55 Tapscott C (fn 12 above).

56 Several designated centres of excellence were amongst those included in his survey.

penal laws. The Act would replace the Correctional Services Act 8 of 1959. It was further noted at the time that the Act had not been promulgated and was, therefore, not in operation, save for chapters establishing the Office of the Judicial Inspectorate and the National Council on Correctional Services, despite the passing of more than five years since the adoption of the principal Act. It was suggested 'that there appears to have been little political will to drive the promulgation process. Indeed a lingering suspicion exists that there is possibly some Departmental resistance to the new legislation, for whatever reason'.⁵⁷

The legislation was, in the intervening period, unexpectedly put into operation on 30 July 2004, with the last remaining chapter, dealing with parole, coming into effect on 31 October 2004. Little fanfare accompanied the promulgation process and the event passed unnoticed by civil society for some weeks after the notice in the *Government Gazette* appeared. The contents of the Act do not appear to have been especially widely communicated within the DCS and the impact of the Act's provisions (as regards the minimum standards set for humane confinement particularly) remains a topic for further investigation and monitoring.⁵⁸ As regards the provisions dealing with children, for example, it would need to be established whether compulsory education in accordance with section 19(1)(a) is being provided to all children aged up to 15 years (sentenced and unsentenced, and irrespective of the length of sentence). Another concrete example relates to the implementation of section 8(5) which specifies that food must be well prepared and served at intervals of not less than four-and-a-half hours and not more than six-and-a-half hours except that there may be an interval of not more than 14 hours between the evening meal and breakfast. More crucially, the question must be raised as to how section 7(1) will be interpreted in the light of the pervasive overcrowding besetting the South African correctional system, as this section requires that 'prisoners must be held in cells which meet the requirements prescribed by regulation in respect of floor space, cubic capacity, lighting, ventilation, sanitary installations and general health conditions' that are adequate for detention under conditions of human dignity. Steinberg argues cogently that it is currently extremely unlikely that the South African courts will find that present accommodation conditions meet constitutional standards.⁵⁹

Two thorny issues related to the 1998 Act concern the establishment, composition and functioning of the new parole boards which must be

57 Policy Review p 39.

58 For instance, the regulations specify additional nutritional requirements for children aged under 18, who must receive 2800 kilocalories per day (compared to 2500 kilocalories for adults) of which 0.8 grams per kilogram of body weight per day must be from the protein group (see vol 6 no 3 *Article 40* p1 -4). According to one informant, this has been translated in practice to an extra slice of bread per day.

59 Steinberg J 'Prison overcrowding and the constitutional right to adequate accommodation in South Africa' (January 2005) *CSVV Occasional Paper*. The author does concede, though, that, whilst there is a clear case for constitutional challenges to be made, the likely (or possible) remedy remains unclear.

established under chapter VII of the Act and the effect that the new provisions on release are going to have. With regard to the former, the intention was to allow for broader community participation in the parole process, hence the adoption of provisions requiring the appointment of members of the community to serve on the newly constituted correctional supervision and parole boards.⁶⁰ Some difficulties have been encountered in the recruitment process and it would appear that the new system is going to take some time to become fully functional. Again, it is also not apparent what effect the involvement of members of the community is going to have on parole decision-making, although there is some justification for concern that a more punitive approach may emerge.

The release provisions contained in the 1998 Act (as amended) have been cited on a number of occasions as a source of concern, in that they will deepen rather than alleviate the overcrowding crisis that prevails.⁶¹ The applicable provision is section 73, which proceeds from the premise that the minimum non-parole period that each prisoner serving a determinate sentence must serve is half of his or her sentence,⁶² save where that person has been sentenced to imprisonment in terms of the Criminal Law Amendment Act 105 of 1997 (which introduced prescribed mandatory sentences for specified serious offences). In these latter instances, the person may not be placed on parole unless he or she has served at least four-fifths of the term of imprisonment imposed, or 25 years, whichever is the shorter, unless the court which imposed sentence originally specified a shorter term after which parole could be considered.⁶³ The concern is a long-term one, in that more prisoners are going to serve a long sentence, thus contributing to overcrowding through longer retention rates.

It has already been stated⁶⁴ that amending the legislation is in the offing, and that quite substantial (rather than cosmetic) changes can be expected. Precisely what these will entail cannot yet be ascertained with any degree of reliability.

60 It must be pointed out that these provisions were the subject of further amending legislation in 2001 (Act 32 of 2001). For instance, the requirement that parole boards include representation from the Department of Justice was deleted due to the cost implications and inconvenience that such representation would have occasioned.

61 See, for instance, the article by the Inspecting Judge of Prisons, Judge Fagan, in *The Advocate* (2005)1, and Sloth-Nielsen J and Ehlers 'A pyrrhic victory? Mandatory sentences in South Africa' *ISS occasional paper* (forthcoming, 2005).

62 Section 73(6)(a). Judge Fagan argues that the previous position was that parole could be considered after a prisoner had served a third of his or her sentence; although legally this is correct, a new release policy was formulated in 1996 which adopted the one-half rule.

63 Section 73(6)(b)(v). As regards prisoners sentenced to life imprisonment, a further difficulty introduced by the 2001 amendments was the requirement that the parole decision be made by 'the court' (section 78). In addition, the minimum non-parole period for lifers will escalate from the present tariff of 20 years to 25 years as a result of the provisions of section 73(6)(b)(iv).

64 By Commissioner Mti at the Portfolio Committee hearings on the 2005 Budget Vote, based on the principal that the legislation must be brought in line with the new policy contained in the White Paper.

In any event, the legislative development in the second half of 2004 was entirely eclipsed by the process that unfolded around the development of the Correctional Services White Paper. The process towards formulating this new policy framework was initiated in 2001,⁶⁵ although it did not gain momentum until the second half of 2003, when draft versions of a Green Paper were in circulation. However, civil society was caught by surprise when an invitation to make submissions to Parliament on what was advertised as a Green Paper was published in late December 2003, virtually after the commencement of the December vacation period. The closing date was shortly after New Year, a couple of weeks later. The document itself only became available days before this closing date, as the committee secretary had already departed on summer vacation. When it was circulated, it was no longer a Green Paper, but a draft White Paper.

Civil society did, within the above constraints, engage with the Portfolio Committee on Correctional Services via public hearings held in February 2004, and it seems that at least some of the points generated found their way into subsequent drafts.⁶⁶ The final version of the White Paper was released on 31 March 2005. In contrast to the 1998 Act, there has been intensive dissemination of the contents and ethos of the White Paper within the DCS, and training was already being conducted well before its adoption. There has been little (if anything) in the way of civil society reaction to the policy document, which is perhaps surprising given the fact that it is a substantial and detailed document, and that it has not yet been rendered more accessible through plain language or popular summaries. This is no small undertaking, as even the executive summary of the White Paper runs to 19 pages. Suffice it to say in this article that the White Paper significantly overcomes the lack of vision and coherence evident in the 1994 White Paper, setting an agenda for transformation of the correctional environment to at least endeavour to infuse safe custody with the ideal of rehabilitation. The White Paper is also refreshingly frank about the challenges and obstacles to attaining the (very high) goals it sets, notably focusing not only on external factors such as overcrowding but also the internal barriers, such as an inappropriate organisational culture and the poor attitudes and skills of many DCS staff.⁶⁷

However, as has been pointed out by civil society stakeholders, the cost of implementing the White Paper has not yet been estimated or calculated and, whilst cost-effective rehabilitation may be a desirable and laudable

65 Policy Review 6.

66 For instance, earlier versions failed to mention the pervasive problem of gangs and gangsterism in South African corrections. The White Paper now devotes a section to the need for an anti-gang strategy and effective measures for dealing with gangs (par 10.6). Other examples of where civil society views may have had an effect on the White Paper are the areas of rehabilitation, correction, restoration and reintegration, which were in earlier versions rather confused and somewhat intertwined and which are now more lucidly addressed.

67 White Paper Chapter 8 entitled 'An ideal correctional official within an appropriate organisational culture'.

goal to strive for, fiscal realities may produce severe constraints (especially as regards the roll-out of social-work services, education and vocational training, programmes and so forth). Further, although the White Paper refers quite frankly to the negative consequences of overcrowding, to some extent the approach appears to be that some solution for this will be found: the White Paper sees 'the apparent acceptance of overcrowding as a 'long term problem'' (underlining inserted) as an indicator of ineffective organisational culture.⁶⁸ The reality, however, is that the numbers of those incarcerated continues to outstrip both available space and planned future space, with the ominous likelihood of continued increase.⁶⁹ Overcrowding poses a substantial hurdle to the achievement of the ideals of the White Paper.

6 OVERALL ANALYSIS OF THE ROLE OF THE DCS WITHIN THE GOVERNMENT, AND ASSESSMENT OF THE ROLE OF CIVIL SOCIETY IN THE TRANSFORMATION OF CORRECTIONS

Several adverse points were made at the conclusion of the Policy Review about the overall marginalisation of corrections within the government over the period 1994–2002. It can rightly be concluded that the fact that the department was beset by so many staff changes, as alluded to earlier, as well as the reality that a good degree of marginalisation was occasioned by the fact that the Ministry was not an ANC portfolio, were major contributors to this. Studies conducted subsequent to the release of the Policy Review were also critical of the role played by other oversight structures, such as the Parliamentary Portfolio Committee on Correctional Services, whose engagement with DCS policy developments over this period was neither consistent nor persistent and who failed to exert meaningful influence over corrections debates.⁷⁰

As regards the integration of correctional matters in government generally, there can be no doubt that the situation that prevailed previously has changed dramatically. For a start, the White Paper locates corrections within both community and integrated government structures, as is clear from the following statement:

The definition of the Department's core business as rehabilitation through correction and humane development within a secure, safe and humane framework impacts significantly on the role of the Department in both JCPS and Social Sector Clusters of Integrated Governance. Conversely, this also impacts significantly on the role that these Cluster Departments play in support of the mandate of the Department of Correctional Services. It is therefore our conclusion that the Department must take its place as a key component of the integrated system within the JCPS and the Social Sector Cluster.⁷¹

68 White Paper par 8.4.

69 See Muntingh L 'Prisons in South Africa: What do the numbers tell us?' elsewhere in this volume. See, too, Sloth Nielsen J and Ehlers L (fn 60 above) who discuss arguments that the increase in long-term sentences is due to the effects of the minimum sentencing legislation introduced in 1998.

70 Dissel A 'A review of civilian oversight over correctional services over the last decade' *CSPRI Research Paper* (November 2003) 4 at 35.

71 White Paper par 31.

The DCS has successfully implanted the overarching message that the problems in correctional services (especially overcrowding) are linked to performance issues in other parts of the criminal justice system. It appears⁷² that the forthcoming 10-year Criminal Justice Sector Review that is being undertaken by the JCPS cluster will examine (*inter alia*) the extent to which court backlogs contribute to overcrowding. The backlog in outstanding court cases continues to increase and the figure rose from 133 104 in October 2004 to 150 980 by January 2005, according to the JCPS cluster's Programme of Action.

The increased integration of correctional issues in broader criminal justice debates may well herald the beginnings of a more systematic approach to key questions such as the shape and size of South Africa's future prison population. Moreover, it is possible that a more integrated understanding may influence not only policy development, but conceivably law reform and judicial responses, too. A telling development in recent months was the campaign to stay the extension of the minimum sentences legislation, which was driven largely by the Office of the Judicial Inspectorate. Since coming into operation in 1998, the Criminal Law Amendment Act 105 of 1997 has been extended on two occasions without much fuss or notice. With the two-year expiry deadline looming in April 2005, a far more in-depth debate⁷³ began to surface about the desirability of mandatory sentences, based centrally (although not exclusively) on the increase in prisoners serving long-term sentences and the likely future impact this was going to have on overcrowding. For the first time since inception of this law, judges were asked for comment and it is rumoured that every division of the High Court in the country submitted a memorandum condemning the legislation. In the event, the extension was agreed to in parliament and was promulgated shortly before the deadline. However, it can be concluded that there is at least initial evidence of the emergence of a dialogue between criminal justice actors and corrections policy-makers, who until recently have proceeded in isolation from one another.

To address the second theme raised in this section, it is submitted that, whether coincidental or not, it would appear that the concentrated focus on oversight over correctional matters that has been a core advocacy thrust of the Civil Society Prison Reform Initiative has borne some fruit. For instance, the Portfolio Committee on Correctional Services has developed a far more proactive programme, combining a series of planned prison visits to hear of problems on the ground, with dedicated briefings by the Department, by invited NGOs and other stakeholders.⁷⁴ It is notable that, from being one of most inactive committees, meeting at one stage very infrequently (6 times only in one year, evidently), this committee

72 This issue was explicitly mentioned in a speech presented by the Minister of Justice and Constitutional Development at the University of the Western Cape on 14 June 2005.

73 For example, a civil society roundtable on the topic was hosted by the Open Society Foundation on 31 January 2005.

74 The recent briefing of the Committee on the progress of the Child Justice Bill is a case in point. The Judicial Inspectorate regularly provides input to the Committee, as well.

appears to have one of the busiest schedules of all portfolio committees, in that meetings are frequently now held more than once a week. Of course, frequency of engagement does not necessarily entail improved quality of oversight; nevertheless, the gradual increase in energy and availability of public knowledge about the sector must ultimately be for the good.

7 CONCLUSIONS

The policy developments highlighted in the preceding sections are, of necessity, selective and omit a range of interesting and notorious events (the 2004 shoot-out at C Max prison furthered by corrupt officials, and in the presence of the Minister, comes to mind). Recent efforts to manage and address corruption within the Department are not discussed here in great detail nor has the ongoing acrimony between organised labour and the Department been paid particular attention. The important move to a seven-day working week has not been dealt with, although this will have serious implications for the budget and staffing of the DCS.

The choice of issues raised here was, to a degree, based on the themes identified in the 2003 Policy Review. However, the intention was also to assess the extent to which a platform for the future has been established, and, if so, what the main elements of that platform might be. The promulgation of the 1998 Correctional Services Act in the second half of 2004 and the adoption of the new White Paper in March 2005 clearly establish an adequate legislative and policy architecture for the sector, with the Report of the Jali Commission expected to add a third dimension with recommendations relating to governance, administration and the curtailment of corruption. There is, thus, evidence of a much improved and coherent policy environment by comparison to what prevailed at the time of the 2003 Policy Review. Thus, the questions that arise now are forward-looking.

In this regard, perhaps the most significant overall shift in emphasis that can be discerned is that issues related to physical facilities, which dominated the agenda in the 1990s, have been eclipsed by a focus on people-centred issues. This is obvious from the White Paper's slogan: every official becoming a rehabilitator; every offender becoming a nation server through correction.⁷⁵ Even more closely examined, the current plan appears to hone in on the staff of the DCS (numbering some 35 000 people), whose lack of capacity, skill and motivation is so frankly acknowledged in sections of the White Paper. As mentioned earlier, the new 'Centres of Excellence' programme is not building-oriented but aimed at service delivery and management, which are staff-related. Consequently, the recently formulated DCS strategic plan contains numerous indicators related to capacitating, training and energising staff around their new roles as rehabilitators and managers of offending behaviour.

75 See Department of Correctional Services Strategic Plan for 2004-5 - 2006-7 (Department of Correctional Services, 2005).

The implications of this deliberate re-orientation in policy direction may be profound. Once the DCS personnel corps are identified as the subjects of the main policy focus for the future, it becomes clearer why the implementation of the 1998 Act, with its core mission of laying a framework for human-rights standards for prisoners, has received so little glory or credit to date. The crude indicators of prisoner rights and well-being, such as nutrition, exercise, accommodation and rights to parole, are to be downplayed because the spotlight has turned to their keepers.

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