

CHAPTER 11

THE JUDICIAL INSPECTORATE

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CHAPTER 11

THE JUDICIAL INSPECTORATE

1. INTRODUCTION

The Judicial Inspectorate was set up in terms of the Correctional Services Act, which originally in section 85(2) set out the objects to include the inspection of prisons in order to report on:

- The treatment of prisoners.
- Conditions in prisons.
- Any corrupt or dishonest practices in prisons.

These objects were amended in 2001 to exclude “corrupt or dishonest practices” in prisons. The reasons given for this amendment included that the good relationship between Independent Prison Visitors (IPVs) and prison officials would be compromised and that the Department of Correctional Services already had an Anti-Corruption Unit, which investigates corrupt and dishonest practices in prisons.

This Chapter considers evidence presented to the Commission on the purpose and functioning of the Judicial Inspectorate. The Commission’s findings, including that the amendment to the Act compromised the Department’s capacity to deal effectively with corruption, are also dealt with, as are recommendations in relation to the Inspectorate and, to some extent, the fight against corruption.

2. ESTABLISHMENT OF THE JUDICIAL INSPECTORATE

The Office of the Inspecting Judge is established in terms of section 85 contained in Chapter 9¹ of the Correctional Services Act No. 111 of 1998. The Inspectorate was originally established in June 1998 in terms of an amendment to section 25 of the old Correctional Services Act No. 8 of 1959.

The objects of the Office of the Inspecting Judge are set out in section 85(2) of the Act. These objects are a matter of concern to this Commission and will be dealt with in more detail later in this Chapter.

The President of the Republic of South Africa appoints the Inspecting Judge, who is a Judge of the High Court either in active service or who has been discharged from active service. The Judicial Inspectorate of Prisoners is an independent office under the control of this Inspecting Judge.

The Office of the Inspecting Judge is based in Cape Town and conducts its functions through the various regional offices. These regional offices have Independent Prison Visitors (the "IPVs"), who the Inspecting Judge appoints in terms of Chapter 10 of the Act.² The IPVs visit the various prisons and deal with the "complaints of prisoners".

As at 31 March 2004, there were regional offices in the Eastern Cape, Gauteng, KwaZulu-Natal, Western Cape and one office to cater for the Limpopo, Mpumalanga and the North West Provinces and another to cater for the Northern Cape and Free State Provinces. In total there were two hundred and twenty three (223) IPVs in South Africa from 1 April 2003 to 31 March 2004.³

¹ Chapters 9 and 10 came into operation on 19 February 1999.

² See section 92 for the details relating to the appointment and termination of IPVs.

³ See the Annual report of the Office of the Inspecting Judge for the period 1 April 2003 to 31 March 2004.

The IPV's were distributed between regions or provinces as follows:

Regional Distribution of IPV's

	Region	No
1	Eastern Cape Region	35
2	Gauteng Region	42
3	KwaZulu-Natal Region	37
4	Limpopo, Mpumalanga & North West Region	34
5	Northern Cape & Free State Region	41
6	Western Cape Region	34
	TOTAL	223

3. BACKGROUND

The original section 85(2) of the Correctional Services Act sets out the object of the Judicial Inspectorate as follows:

“The object of the Judicial Inspectorate 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 and any corrupt or dishonest practices in prisons”. (Own emphasis)

According to the evidence of Professor Dirk van Zyl Smit, the drafters⁴ of the Act considered various countries, including England and Western Australia,⁵ which have similar offices, in deciding on the objects of the Judicial Inspectorate. On the basis of these, the drafters decided it would be appropriate for the Office of the Inspecting Judge to have the objects quoted above.⁶

In his evidence on how the drafters decided the objectives of the Office of the Inspecting Judge, Professor van Zyl Smit said there were important differences between the English model, which was the primary model the drafters considered, and decided on the model for South Africa. Firstly, England has only an inspector of prisons and not a Judicial Inspectorate. Professor van Zyl Smit said the idea in South Africa from the beginning was that the office should be filled by a Judge because of the independence and integrity that Judges are recognised to have in South Africa.

Secondly, in the British system there is both an inspector of prisons, who is there to inspect prisons rather than to deal with the complaints of prisoners, and an independent prison ombudsman. Professor van Zyl Smit said that the drafters considered this separation but consciously decided to combine the two functions

⁴ The Commission was advised that the members of the National Advisory Council on Correctional Services, namely Judge Kumbelen, Adv. N Rossouw and Professor D van Zyl Smit were appointed to advise the government on drafting the new Prison Legislation. Professor van Zyl Smit was then called upon to testify in order to clarify and motivate certain provisions in the Correctional Services Act No. 111 of 1998.

⁵ If one is looking for an African precedent, the Malawian Constitution might be of assistance in this regard. The Bill of Rights of the aforesaid Constitution deals with the rights of prisoners. Section 169 of the Malawian Constitution provides that the Inspectorate of Prisons shall be:

“charged with monitoring the conditions, administration and general functioning of penal institutions, taking due account of applicable international standard and also have such powers as shall be required for it to make investigations, and shall have the power to require any person to answer questions relating to such subjects as are relevant to those investigations and thirdly, the power to visit any and all institutions within the Malawi Prison Service without notice and fourthly, exercise such powers as may be prescribed by the Act of Parliament.”

⁶ See the evidence of Professor Dirk van Zyl Smit, which was led in Pretoria on 2 December 2003.

because it would be too expensive for a country like South Africa, which is considerably poorer than Britain, to have separate institutions. Accordingly, the Office of the Inspecting Judge was meant to do both the work of the Inspector of Prisons and the Prisons and Probation Ombudsman for England and Wales.

4. INVESTIGATION OF CORRUPTION

Professor van Zyl Smit went on to testify that the drafters of the legislation had intended that the Judicial Inspectorate would investigate both treatment of prisoners and corruption.⁷ According to Professor van Zyl Smit, the drafters saw a relationship between corruption and the treatment of prisoners, which was why there was specific reference to corruption in the Act, such as in sections 87 and 90.

Professor van Zyl Smit said that after consideration of the various models, the drafters felt that there would be no synergy in the manner in which the treatment of prisoners and corruption were dealt with unless the Office of the Inspecting Judge dealt with both these matters. In particular, the thinking was that the Office of the Inspecting Judge would play a watchdog role in the Department by overseeing the activities of the officials.

Despite the drafters' considerations during the drafting of the Act, these provisions in the Act were amended during 2001 to remove the Office of the Inspecting Judge's function of investigating corruption in prisons.⁸ Following this amendment, the objects of the Judicial Inspectorate have been defined as follows:

⁷ See pages 1 292 -1 293 of Professor van Zyl Smit's evidence.

⁸ See section 31 of the Correctional Services Amendment Act No. 32 of 2001.

“The object of the Judicial Inspectorate 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.”⁹ (Own emphasis)

As a result of these amendments, the Office of the Inspecting Judge has functioned and concentrated on the treatment of prisoners and not on investigating corruption.

According to its 2000 Annual Report, the Office of the Inspecting Judge wished to be relieved of its mandate to investigate and report on “corruption or dishonest practices in prisons”. The reasons were:

- That the good relationship between IPVs and prison officials would be compromised and the Inspectorate’s work hampered;
- The Department already has an Anti-Corruption Unit, which investigates corrupt and dishonest practices in prison;
- 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
- The presence of IPVs in prisons has an inhibiting effect on corruption and dishonesty.¹⁰

According to Mr Morris, the Director: Judicial Inspectorate of Prisons in the Office of the Inspecting Judge, the justification for seeking the amendment was the fact that it would have been difficult for the Office to deal with the treatment of prisoners at the same time as investigating corruption within the Department. The difficulty did not lie in resource or other constraints but apparently in the

⁹ See section 85(2) as amended by section 31 of the Correctional Services Amendment Act No. 32 of 2001.

¹⁰ See Annual Report 2000 at pages 18 and 19.

conflicting imperatives of attending to both the treatment of prisoners and investigating corruption.¹¹

In his evidence, Professor van Zyl Smit also made reference to the concern about the rapport between the Office of the Inspecting Judge and the Department being lost if the purpose of the Office included investigating corruption. The professor noted too that it was possible the Department might ignore corruption if the Office of the Inspecting Judge were to be involved in the investigation of corruption.

The Commission found this concern about rapport unusual given that the role of watchdog requires one to do one's work without fear, favour or prejudice.¹² Rapport is the last factor that should be considered in such a role. The concern the Office of the Inspecting Judge has that investigating corruption might affect the good relationship its staff has with the Department is an inappropriate

¹¹ See the evidence of Mr Morris at the Cape Town Commission hearings, pages 622-623 of the transcript, Vol. 7.

¹² See also the views of Professor Saras Jagwanth : “A Review of the Judicial Inspectorate of Prisons of South Africa” – CSPRI (Civil Society Prison Reform Initiative); series no. 4, May 2000 at page 40. “*Responses to the removal of corruption from the Inspectorate’s mandate varied considerably. A prevalent view was that the problem of corruption cannot and should not be ignored by the Office. In support of this contention, it was pointed out that it is often not possible to separate the conditions in prison from underlying issues of corruption and that the Inspectorate still had a role to play in this regard. An example used was the selling of food or shoes by the staff. In addition, many expressed a view that corruption has to be investigated by an outside body, particularly in the light of the limited number of effective internal investigations in the past. It was pointed out that the most obvious and appropriate body to take on this task would be the Inspectorate, as the issue of corruption fell easily within their overall mandate. The response of the Inspectorate was that they had neither the resources nor the skilled staff to investigate corruption. In addition the work would be adversely affected by the inclusion of corruption within their mandate, as they depended on the co-operation of the Department officials and Heads of Prisons for the effective performance of their duties. The limited resources and constraint mandate of the Inspectorate, including its lack of enforcement powers, was also a reason cited for the removal of corruption. It was pointed out by the staff of Department that corruption could best be pursued by a specialised body with greater powers into investigation than the Inspectorate. It was observed that neither the mediation and resolution of the disputes by IPVs, nor the role of the Office in reporting and using publicity to achieve oversight lent itself to the investigation of corruption.*”

emphasis. The Correctional Services Act gives extensive powers to the Judge's Office as well as to the IPVs to access prisons and to do their work without being subordinated to the officials of the Department.¹³

Mr Morris had this to say about the removal of corruption from the objects of the Judicial Inspectorate:

"... from our side why we felt it would be better to remove the function of corruption firstly is because we feared for the safety of our Prison Visitors. I think you've had some first-hand experience of the reaction that you may find in the prison environment if you are seen as the person dealing with corruption. So the Prison Visitors, what they will do and that's the first motivation, the other motivation is simply the view to manage a matter like corruption in Correctional Services seems to be an almost impossible task. We don't have the resources and once again we come back to the argument, that is the responsibility of Correctional Services' management ... They have also established an anti-corruption unit, so we've referred those matters back to them hoping that they will deal with it."¹⁴

It was apparent from the evidence of Mr Morris that the Office of the Inspecting Judge is more concerned about the safety of its staff than about its mandate¹⁵ and yet there was no evidence placed before the Commission to support the contention that the safety of IPVs was seriously compromised to the extent that there was no remedy. There was also no evidence to suggest that the issue of financial resources had been raised with the Department and that it had refused to provide them. In the circumstances, how can it be considered an impossible task?

¹³ Sections 93(2) and 93(3) of the Act that stipulate that IPVs must get access to prisons and that Heads of Prisons must assist them in the performance of their duties.

¹⁴ See Cape Town Transcript, Vol. 7 at pages 622-623.

¹⁵ The Commission is of the view that in order to succeed as a watchdog, the Office needs to be fearless in exercising its task.

Professor van Zyl Smit stated in evidence that he was surprised by the amendment of the Act. He further expressed his views as follows:

“Speaking for myself and leaving aside the Heath decision,¹⁶ I think that it would be ideal to have the Inspecting Judge also having some role to play in at least overseeing the investigation of corruption. Again speaking for myself, I would say, which I have said already, that I think the Department itself has a primary role in combating corruption internally. I do think that the Inspecting Judge had a point when he said to me that it would be wrong if the Department could say, well we just run the Department, somebody else comes and checks whether we are being corrupt or not. I think that the nature of bureaucracy is so, that the crucial thing, not only in this Department, but in the public service in general, are checks and balances within the service itself.”¹⁷

According to Professor van Zyl Smit, sections 87 and 90 of the Act, as amended, could be of assistance in dealing with the issue of corruption. In respect of section 87, the power to appoint assistants may assist the Inspecting Judge to deal with the issue of corruption. While the Professor’s views are respected in this regard, the Inspecting Judge can only appoint staff who can deal with what he is empowered to do in terms of the Act. If the Act does not empower him to investigate corruption, then he cannot seek corruption to investigate. Section 90(1), which deals with the powers of the Inspecting Judge does make reference

¹⁶ The reference to the Heath decision is reference to the Constitutional Court Judgment in the matter of *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC) in which the Constitutional Court held that it may not be appropriate for a Judge to sit as a Chairperson of a Commission of Inquiry in highly sensitised political matters or where he is expected to investigate matters that are not legal matters. The decision was of relevance in the discussion before the Parliamentary Portfolio Committee because the Honourable Chairperson of the Judicial Inspectorate, Judge Fagan had submitted to the Portfolio Committee that one of the reasons for seeking the amendment to remove corruption from his office was as a result of the Constitutional Court decision. (Portfolio Committee meeting of 3 April 2001).

¹⁷ Pretoria transcript, Vol. 16, page 1293.

to the Office of the Inspecting Judge giving a report on, amongst others, “any corrupt or dishonest practices in prisons”. While the Commission agrees with Professor van Zyl Smit that this might be utilised for purposes of investigating corruption, there is, however, no direct power to investigate corruption in terms of the objects of the Act. The Inspecting Judge can only give a report on corruption if he comes across it. He cannot follow up complaints of corruption and *mero motu* investigate it. His role in this regard has been scaled down from the objects in the original Act. It is clear that when section 85(1) was amended, the intention was to remove the power to investigate corruption. In fact, the Inspecting Judge’s view is that his duty is merely to report to either the police or the anti-corruption unit within the Department whenever he has a “whiff” of corruption.¹⁸

Furthermore, section 85(1) gives the Office of the Inspecting Judge the power to “facilitate the inspection” of “prisons.” This imposes two major limitations on the powers of the Inspecting Judge. Firstly, he is expected to facilitate merely the “inspection” and not the “investigation” of prisons. Secondly, the inspection is limited to prisons and thus the Inspecting Judge cannot, for instance, investigate the Department or even Management Areas. He is restricted to individual prisons. Even if one were to accept that the Office of the Inspecting Judge was empowered to investigate corruption in terms of section 90(1),¹⁹ as suggested by Professor van Zyl Smit, the Inspecting Judge is excluded from investigating any aspect of the management structure of the Department.

The concerns raised before Parliament about the “Heath Decision” affecting the Office of the Inspecting Judge’s work of investigating corruption could best be

¹⁸ See Correctional Services Portfolio Committee meeting dated 3 April 2001.

¹⁹ It is interesting to note that this is the very approach or attitude that was taken by some of the members of the Department towards this Commission when it was investigating. There was a continual attempt to say the investigation should be limited to prisons and should not include the Department. It was only when such objectors were referred to the terms of reference that they allowed the Commission to investigate aspects of the Department of Correctional Services. Secondly, even the Chairman of the Portfolio Committee on Correctional Services raised this query with the Commission during the Commission’s presentation to the Portfolio Committee in August 2002.

dealt with by changing the name of the Office to another name, such as “the Inspector of Prisons” and appointing a person who is not a Judge. This office could then have additional powers, including the power to investigate corruption. Furthermore, if this does not address the concern sufficiently, a decision could be taken to disallow a sitting Judge or any Judge for that matter, from holding the office of Ombudsman.

Notwithstanding what has been said above, the Commission is still of the view that the Office of the Inspecting Judge will not be affected by the views expressed by the Court in the Heath decision because its task is to investigate legal issues and there is no risk of failing to uphold the separation of powers, which was the Constitutional Court’s fear about Judges being used in matters involving the Executive.²⁰ If that were not the case, the establishment of this very Commission, which is investigating the Department, would have been challenged as unconstitutional. However, this hasn’t happened because of the subject matter of the Commission or the nature of the investigation this Commission was tasked to undertake.²¹

²⁰ See Heath *supra* (note 14).

²¹ See Heath *supra* (note 14) at paragraphs 34 and 35:

“[34] In dealing with the question of Judges presiding over commissions of inquiry or sanctioning the issuing of search warrants, much may depend on the subject-matter of the commission and the legislation regulating the issue of warrants. In appropriate circumstances judicial officers can no doubt preside over commissions of inquiry without infringing the separation of powers contemplated by our Constitution. The performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions – independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information. The same can be said about the sanctioning of search warrants, where the Judge is required to determine whether grounds exist for the invasion of privacy resulting from searches. 68(1).

[35] The fact that it may be permissible for Judges to perform certain functions other than their judicial functions does not mean that any function can be vested in them by the Legislature. There are limits to what is permissible. Certain functions are so far removed from the judicial function that to permit Judges to perform them would blur the separation that must be maintained between the Judiciary and other branches of government. For instance, under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police. These functions are not

Furthermore, this Commission views the distinction between the treatment of prisoners and corruption as artificial and therefore the basis for effecting the amendment is misconceived. This point was raised with Mr Morris, who conceded during his evidence that the distinction between corruption and the treatment of prisoners may, in a number of cases, be non-existent or if it is there, it is blurred.

The evidence before the Commission points to the fact that since it opened, the Office of the Inspecting Judge has never investigated corruption. Instead of pursuing its mandate to investigate corruption as required by the Act, it sought instead to amend the Act.²²

5. TREATMENT OF PRISONERS

Although the Office of the Inspecting Judge has concentrated only on the treatment of prisoners, particularly overcrowding, evidence points to prisoner dissatisfaction with how they are treated.²³

The evidence before the Commission points to the fact that the staff in the Office of the Inspecting Judge may not be challenging the Department's officials as they ought to do. In particular, the independent visitors have invariably been seen as an extension of the Department and thus have not been effective in dealing with the treatment of prisoners. The cases that exemplify this are the abuse and torture of prisoners at C-Max Prison, which apparently were reported to the IPVs without any success. This approach has affected the image of the Office of the

'appropriate to the central mission of the Judiciary' 69(2). They are functions central to the mission of the Legislature and Executive and must be performed by members of those branches of government. (per Chaskalson P.)

²² See Mr Morris' evidence in Cape Town transcript of 20 November 2002, pages 622, 651 and 652.

²³ See chapter on Treatment of Prisoners for a more detailed report on abuses in our prisons.

Inspecting Judge within the prison population. For example, Mr Strydom, a prisoner at Johannesburg Prison, rightly or wrongly, was one of the most outspoken and critical prisoners of the Office of the Inspecting Judge and the manner in which they did their work. He was of the view that they did not address the main concerns of the prisoners when it came to their treatment by the Department.²⁴ Other prisoners in other Management Areas, rightly or wrongly, expressed similar views.

Furthermore, there was evidence from the Pretoria Management Area and other Management Areas that the boxes installed to enable prisoners to give their complaints to the Office of the Inspecting Judge are placed at inconvenient spots and within the view of prison warders. Thus prisoners putting letters into the Office of the Inspecting Judge's box are visible to the warders and may be subjected to immediate harassment. This complaint of harassment following communication with the IPVs was not limited to the Pretoria Management Area.²⁵

There was also evidence that pointed to the fact that IPVs may not be getting the assistance or co-operation they are entitled to from the Department.²⁶ The reports on this lack of co-operation are shocking and include evidence from some of the IPVs that members of the Department have assaulted them. Indeed, assaults appear to be common, especially in KwaZulu-Natal and the Eastern Cape.

Briefly, the reports are that:

- Mr Thembelani Hlalukana (Eastern Cape Province Regional Co-ordinator) reported the following incidences that his staff members experienced:

²⁴ See Leeuwkop Exhibit "AA" where he refers to the Office of the Inspecting Judge as a "bulldog with rubber teeth".

²⁵ Similar complaints were received at Bloemfontein Management Area.

²⁶ See the memoranda by the Independent Prison Visitors (IPVs) submitted to the Commission, Head Office Exhibit 'Q'.

- Mr A.M. Hlamandana at Flagstaff Prison: Refused access to prison on 30 November 2004.
 - Mr Singaphi at St Albans Prison: Assaulted by a member on 21 September 2004, but member was exonerated of charges in an internal investigation.
 - Mr M.T. Kulati: St Albans Prison: Lack of co-operation and access to prison on 2 April 2004.
- In KwaZulu-Natal, Miss B.P. Shezi was refused access to Pietermaritzburg Prison on 7 October 2004 and a prison member assaulted Mr Q.K.P. Ngobese at Durban/Westville Prison on 14 February 2005. The incident is still under investigation.
 - The Mpumalanga and Limpopo Regional Offices have reported that they have problems with “access to resources” such as telephones and computers, which affects their ability to perform their duties. Sometimes, for instance, IPV’s have to wait for between three (3) hours and a whole day to have access to these facilities.²⁷
 - The Gauteng, North West, Northern Cape and Free State Regional Co-ordinators reported that they had not experienced any major problems.

It is clear that unless the status of the Inspecting Judge is enhanced and the powers of his Office increased, the right of prisoners to be detained in conditions consistent with human dignity will not be achieved. The Office of the Inspecting Judge and the IPV’s must be respected and their credibility protected by the Department for the system to succeed. In this regard, the Office must be given additional powers to deal with those members who are set on frustrating its officials in performing their work.

Section 93(1) empowers the IPV’s to deal only with “complaints of prisoners”. This means that even if IPV’s were to observe an irregularity or corruption or mal-

²⁷ See Head Office Exhibit ‘R’.

administration they may not deal with it unless a prisoner complains. It makes the office reactive instead of being pro active. This definitely disempowers a watchdog in the performance of his duties, which could not have been the intention of the Legislature. Furthermore, the Inspecting Judge should be given the means to ensure that the recommendations the IPVs make in the various prisons are carried out if he agrees with them.

Considering sections 85(2) and 90(1), one has to come to the conclusion that the Office of the Inspecting Judge is merely a reporting body vis-à-vis a disciplinary body. Internationally, however, it is accepted that an oversight body has much greater legitimacy if it also has decision-making powers. For example, the Complaints Committee in the Netherlands has the power to make binding judgements on prisoners' complaints.²⁸

Be that as it may, section 90(5) and (6) of the Act gives the Judicial Inspectorate powers to conduct its own investigations and even to sit as a Commission of Inquiry. If that is the case, then it is also empowered to subpoena witnesses to give evidence. Since July 1998 to the date of preparing this report, we were not aware of any incident or any occasion where the powers to sit as a Commission of Inquiry had been used or evidence collected in this manner.²⁹

It is also clear from reading the Act that the drafters anticipated that the Judicial Inspectorate would be an independent entity. This independence would ensure that the Inspectorate is not subject to the whim of the Department. In such an independent capacity, it would act as a watchdog and be capable of ensuring that any wrong officials commit within the Department would be brought to book. In other words, in the Commission's view, the drafters anticipated that the Office of the Inspecting Judge would be a body similar to the Independent Complaints

²⁸ See section 60-68 of the Penitentiary Principles Act, 1999 (Netherlands).

²⁹ The Commission is only aware of one such sitting by Judge Trengove, the first Inspecting Judge, who investigated mass assaults at the Johannesburg Medium B Prison in July 1998. (See Inaugural Annual Report at page 5).

Directorate of the South African Police Service, constituted in terms of Act No. 68 of 1995. The Independent Complaints Directorate Act established a body that is independent and which has acted independently to date.³⁰

6. INSPECTORATE STAFF

Evidence placed before the Commission suggests that the provisions of section 89 of the Act also compromise the anticipated independence of the Office of the Inspecting Judge from the Department of Correctional Services.

The first problem raised was that the appointment of staff has got to be done “in consultation with the Commissioner”.³¹ While this is seen as allowing the Commissioner to veto the appointment of staff, it is anticipated that the Department will say that this is not the case as the Inspecting Judge can appoint staff notwithstanding the views of the Commissioner.³² This would obviously lead to tension within the Department. Given this, section 89 may have to be amended to make it clear that the consultation with the Commissioner is merely to let him know and does not allow him to veto the appointment. This will also assist to enshrine the independence of the Office of the Inspecting Judge and prevent it from being regarded as an extension of the Department.

These provisions should be contrasted with provisions of Section 87(1) where the appointment of staff is to be made “after consultation with the Commissioner”.

³⁰ See J Sarkin (2000): “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.” (15) SA Public Law 385-425, especially pages 390 to 394 where he discussed the independence of the I.C.D.

³¹ The phrase is not unusual. The Minister in consultation with Parliamentary Committees must appoint even the Executive Director of the I.C.D.

³² The judicial interpretation of “in consultation with” is that the parties have to agree before any action is taken. (See the case of *Rollo and Another v Minister of Town and Country Planning* 1948 (1) A.E.R. 13 dealing with “after consultation”).

Given that in the two abovementioned sections there is firstly a reference to staff appointments “in consultation” with the Commissioner and secondly, a reference to staff appointment “after consultation” with the Commissioner, it is clear that the legislature intended “in” and “after” to mean different processes of appointment.

The intention of the legislature can be gleaned from the provisions of statutes. It is accepted law that when one attempts to assert an intention of the legislature, the words used are to be understood in their “ordinary meaning”, “popular meaning”, “literal meaning”, “plain meaning” or “grammatical meaning”. Furthermore, the words are to be read in the context in which they are used, having regard to other sections of the Act as a whole and other similar legislation.

In the *Oxford English Dictionary* (1998), Second Edition, Volume III, the word “consultation” is defined as follows:

- “The action of consulting or taking counsel together, deliberation, conference...
- A conference in which the parties consult and deliberate; a meeting for deliberation or discussion.”

It seems the most important ingredient of the consultative process is the “getting together” of people for purposes of “conferring with each other.” Such conferring can be oral or in writing.³³

In *Rollo and Another v Minister of Town and Country Planning* 1948 (1) A.E.R. 13, Bucknell L.J., in construing an enactment that allowed the Minister to take certain steps “after consultation with any local authorities who appear to him to

³³ See also *R v Ntomezwa* 1955 (1) SA 212 (A) at 218 D-E and *Maqoma v Sebe and Another* 1987 (1) SA 483 (CK).

be concerned”, stated that the meaning of “consultation” in such enactment means that:

“on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice.”

In other words, there must be a two-way process where an opportunity for both parties to present their side of the story is given. This is what is anticipated “after consultation” in this particular context or in this particular statute. However, it is clear that “after consultation” does not mean that there should be an agreement.

Our courts have held that the words “after consultation” with regard to a statute mean that the parties need not agree.³⁴

On the other hand “in consultation” will have the directly opposite effect of “after consultation”, namely, there must be an agreement pursuant upon the consultation. This means the Commissioner can veto the Inspecting Judge’s appointment of staff, which clearly infringes upon the independence of the Office. Even the appointment of special assistants and the determination of their salaries and conditions of service take place only after consultation with the Commissioner. This gives the Commissioner a lot of power in determining the staff complement of the Inspecting Judge’s Office and most certainly compromises the independence of the Office.³⁵

³⁴ See R v Mbete 1954 (4) SA 491 (EDLD) at page 493 E in which *Rollo and Another v Minister of Town and Country Planning* (above) was referred to with approval.

³⁵ See paper by Professor S. Jagwanth *supra* (Note 12) at 37 “Many people who were interviewed held the view that its administrative and financial links with the Department of Correctional Services undermined the independence of the Inspectorate and therefore needed to be revisited. This view was held largely by the staff of the Office of the first Inspecting Judge, although, like members of the Department who were interviewed, the incumbent Judge did not see the link as the problem. He was of the opinion that the independence of the Judge as the Head of the Inspectorate contributed significantly to

This then brings the Commission to the next point, which is the provision of section 89(3). This provision states that the employees of the Office of the Inspecting Judge are deemed to be employees of the Department. The view of staff members is that this particular provision hinders their work and their perceived independence. It is the view of the members that if they were to do anything that may be perceived to embarrass the Department, including reporting on maladministration, this would jeopardise their chances of promotion within the Department.

Given this, serious consideration might have to be given to the amendment of this provision by, for example, making staff employees of the Department of Public Service and Administration. This would ensure that they retain their independence and have equal opportunity to be promoted within the public service in future. It is not clear why the drafters of the Act preferred to give more decision-making power to the Commissioner rather than the Director-General of the Department of Public Service and Administration in this regard. An alternative option would be to retain staff as employees of the Inspectorate but make the Inspectorate wholly independent from the Department.

Finally, it is clear from a review of section 91 of the Act that the Department is responsible for all the expenses of the Office of the Inspecting Judge. It is problematic that the funding for the work of the Office comes from the

making it independent. This view was shared by some of the people who had helped draft the legislation, who pointed out that the decision to appoint a Judge or a retired Judge to head the Inspectorate was largely, due to the esteem in which Judges were held, the credibility they would bring to it and the constitutionally guaranteed independence. Some staff of the Inspectorate and many others, however, believe that its links with the Department of Correctional Services compromises its independence. Although it was acknowledged that funding requests by the Inspectorate had in general been accepted, it was felt that mechanisms needed to be put in place to guard against the possibility of reduced funding.”

Department, particularly when this is in addition to staff appointments being made in consultation with the Commissioner.³⁶

7. INDEPENDENCE

Emanating from the above, it is clear that the question of the appointment of staff, the funding for the Office of the Inspecting Judge, the nature of the consultation that has to be made with regard to the appointment of staff and the general nature of the work of the Office of the Inspecting Judge all call for greater independence of the Office from the Department. It needs to be clear that the Office of the Inspecting Judge is not an extension of the Department.

The one issue, which is of concern to the Commission, is the fact that the Act is drafted in such a manner that the Office of the Inspecting Judge is accountable to the Commissioner of the Department. At the same time, section 3(5) of the Correctional Services Act No. 111 of 1998³⁷ places the entire Department in the hands of the Commissioner. Clearly, the Inspecting Judge is reporting to the very person whom he is expected to investigate and that very person decides on staff appointments and on the finances of the Office of the Inspecting Judge. Thus, the independence of the Office required for it to investigate the Department is not properly protected.

Serious consideration must be given to the Office of the Inspecting Judge doing the appointment “after consultation with the Minister of Correctional Services” and obtaining some form of financial independence.

On the other hand, the independence of the Prisons and Probation Ombudsman for England and Wales is enshrined and protected. This independence is clearly

³⁶ See discussion of “in consultation” and “after consultation” (*supra*).

³⁷ Similarly, section 3(1) of the Correctional Services Act No. 8 of 1959 placed the Department under the control of the Commissioner.

stated in the institution's Mission Statement and Statement of Values. According to a report on this institution, the Mission Statement is as follows:

To provide prisoners and those under community supervision with an accessible, independent and effective means to resolve their complaints and to contribute to a just and humane penal system.

The Statement of Values reads as follows:

- *To be accessible to all who are entitled to make use of the office of the Prisons and Probation Ombudsman and actively to seek removal of any impediment to it.*
- *To be independent and to demonstrate the highest standards of impartiality, objectivity, thoroughness, fairness and accuracy in the investigation, consideration and resolution of complaints.*
- *To be fair in the treatment of all complainants without regard to criminal history, race, ethnicity, gender, disability, sexual orientation, age, religion, or any other irrelevant consideration.*
- *To be effective by ensuring that complaints are dealt with as quickly as possible and that recommendations are well-founded, capable of being implemented and are followed through.*
- *To be constructive in helping the Prison Service and National Probation Service improve their handling of complaints, to eliminate the underlying causes of them and to bring about a just and humane penal system.*
- *To be empowering by creating and maintaining a working environment in which staff are respected, engage in continuous learning, obtain job satisfaction and have equal opportunities for personal and career development.*
- *To be accountable to stakeholders for the fulfilment of our mission statement, our values and aims and objectives.*

- *To be efficient in the management of resources and deliver value for money.*³⁸ (Own emphasis)

It is clear from this Statement of Values that the independence of the Ombudsman is recognised and protected in England and Wales. Such independence was anticipated by the drafters of the Correctional Services Act, according to the evidence presented to the Commission by Professor Van Zyl Smit.

The issue of the independence of the watchdog is not unique to England and Wales. In South Africa, the institutions constituted in terms of Chapter 9 of the Constitution are also independent and are accountable to Parliament. However, the Office of the Inspecting Judge is not one of the Chapter 9 institutions and thus one should look for models from other institutions that are founded by statute. In this regard, the Independent Complaints Directorate, which is the watchdog in the Department of Safety and Security, is the best example to consider for the Office of the Inspecting Judge.

Section 50 of the Independent Complaints Directorate Act gives partial independence to the Independent Complaints Directorate in that it provides that the employment of staff is done “in consultation with the Minister”. It is not consultation with the Commissioner who is also responsible for the Department. However, what is reassuring is that in section 50(2) of this Act, it is stated: “The Directorate shall function independently from the service.” The service referred to is the South African Police Service. Accordingly, that should be the approach that is adopted in dealing with the Office of the Inspecting Judge in the Department.

³⁸ See the Annual Report of the Prisons and Probation Ombudsmen for England and Wales for the period 2003-2004.

Similarly, the Minister of Safety and Security appoints the Executive Director of the Independent Complaints Directorate in consultation with the relevant Parliamentary Committees. This once again reiterates the point that the Commissioner of Safety and Security, who is in charge of the police force, has nothing to do with the watchdog that is supposed to oversee that his department functions within the law. Instead, it is left to the Minister to deal with the watchdog in consultation with the Portfolio Committee in Parliament.

The Commission is of the view that independence is fundamentally important for the proper functioning of the Office of the Inspecting Judge particularly since its task is to guard the Department and ensure that the Department applies its policies and directives in accordance with the law. It is therefore important to look at what scholars have said about the independence of bodies like the Inspectorate.

Corder and Others have stated that independence has two facets:

“In the first place to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of government. Approval by the executive of budgets, or other issues of staffing is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases.”³⁹

It goes without saying then that if the Office of the Inspecting Judge has sole authority with respect to the appointment of staff and the appointment of, for

³⁹ See H. Corder, S. Jagwanth and F. Saltau (1996): *Report on Parliamentary Oversight and Accountability* (June 99). See http://www.pmg.org.za/bills/oversight_and_account.hdm and also *New National Party of South Africa v Government of the Republic of South Africa* 1996 (6) BCLR 489 (CC).

example, special assistants for specialised investigations, that the procedures would be streamlined and would eliminate any unnecessary delay or interference. It would also mean that the Office of the Inspecting Judge is completely independent and thus able to fulfil its function in terms of the Act.

Considering the negative responses from the prisoners during the Commission hearings, it is clear that the full independence of the Office of the Inspecting Judge would most certainly mean that the prisoners as well as the public have more trust and faith in the Office of the Inspecting Judge.

8. CONCLUDING REMARKS

Corruption, maladministration and overcrowding are all challenges facing the Department. While over population of prisons is clearly an issue for the Department, corruption and the treatment of prisoners are similar challenges that ought to receive at least the same prominence and attention given to overcrowding. Corruption, particularly, is a challenge that not only the Department in South Africa faces but is one faced internationally. Furthermore, corruption and maladministration in the South African context are issues not only for the Department but also for government as a whole. In dealing with these challenges, it is the Commission's view that the issue of overcrowding should not overshadow the issues of corruption and maladministration. In light of this, it is the Commission's view that the amendment of the Correctional Services Act to remove the investigation into corruption from the Office of the Inspecting Judge was ill-conceived.

It is clear from the Act that the Office of the Inspecting Judge was supposed to be an independent office, which was originally empowered to investigate the treatment of prisoners, corruption and dishonest practices.⁴⁰

⁴⁰ Refer to the evidence of Professor Dirk van Zyl Smit above.

Whilst the drafters of the Act intended the Office of the Inspecting Judge to investigate corruption and dishonest practices within the prisons, it is clear that the staff in the Office was, and still is, not interested in investigating corruption and dishonest practices. This is supported by the facts, which have been referred to above including, amongst others, that the Office has never investigated corruption and that it sought to amend the Act instead of empowering staff so that they could investigate corruption.

Since this is the situation, referring the investigation of corruption back to the Office of the Inspecting Judge is unlikely to help.

The Office of the Inspecting Judge should, at least, have an obligation to receive complaints on corruption, which can then be passed onto the independent agency (“Prisons Ombudsman”), which will be formed in terms of the recommendations contained in this report.

The view that the Office of the Inspecting Judge should receive complaints is based on the fact that this Office has a big presence on the ground in the form of the Independent Prison Visitors, who are located in the various prisons, as set out above.

This will help ensure that the fight against corruption is conducted on all fronts. Accordingly, the Commission’s recommendations are motivated by the need for all agencies, staff and prisoners to complement one another in the fight against corruption.

In the various Management Areas it has investigated, the Commission has heard evidence of how prisoners’ rights are violated by members who end up not being

disciplined for that misconduct.⁴¹ For as long as the Department continues to allow its members to violate prisoners' rights, it will not achieve the objectives of correction and rehabilitation as set out in the December 2004 White Paper. The establishment of an independent entity or agency will go some way to assisting the Department to meet its goals of correction and rehabilitation.

9. FINDINGS

9.1 The Office of the Inspecting Judge was originally meant to be a body that investigates:

- the treatment of prisoners;
- corruption; and
- dishonest practices.

9.2 The Office of the Inspecting Judge has never, since its inception, investigated corruption. It might even be said that it has shown a reluctance to deal with corruption and dishonest practices.

9.3 The amendment to the Act to remove the investigation of corruption and dishonest practices was ill-conceived as there is a need for an independent body to investigate corruption and dishonest practices in the Department.

9.4 The Office of the Inspecting Judge has been rendered ineffective by the removal of its independence and making it appear as though it is an extension of the Department.

⁴¹ See chapters on Treatment of Prisoners and also Disciplinary Inquiries for more details.

- 9.5 The Independent Prison Visitors have been rendered ineffective and some members of the Department in some Management Areas have treated them with disrespect.
- 9.6 The independence of the Office of the Inspecting Judge is crucial for the purposes of it being able to conduct its work effectively.
- 9.7 The Office of the Inspecting Judge needs to be given more powers to enable it to function effectively and also to execute its mandate.
- 9.8 The independence of the Inspecting Judge should also be shown or protected in the appointment and seconding of staff, including the appropriate terms and conditions of employment.
- 9.9 There is a need for the Government to set up another independent agency to ensure that corruption is investigated and that those who are corrupt are punished. This will also ensure that the rights of prisoners are protected and that members who violate prisoners' rights are punished.

10. RECOMMENDATIONS

Accordingly, the Commission recommends that:

- 10.1 The Correctional Services Act should be amended to provide that the Office of the Inspecting Judge should also deal with complaints of "corruption and maladministration". In this regard, the IPVs should have an obligation to take reports or complaints of corruption from complainants and prisoners for onward transmission to the new corruption-fighting agency or Directorate to be set up in terms of this report. Such

amendment should expressly set out the aims and objectives of the Office of the Inspecting Judge.

- 10.2 The Office of the Inspecting Judge to consider the amendment of the Act to incorporate the appointment of deputies to the Inspecting Judge to deal with specific areas that may need to be investigated.
- 10.3 Section 90(1) of the Act be amended to ensure that the investigations can be conducted in respect of the entire Department by deleting the word “prisons” and substituting it with the words “Department of Correctional Services including various Management Areas and the prisons.”
- 10.4 The Correctional Services Act be amended so that:
 - (a) The independence of the Office of the Inspecting Judge is protected in the Act. The Office should be subject to the Constitution and law so that it can exercise its powers and perform its duties without fear, favour or prejudice. No person or organ of State should interfere with the functioning of the Office of the Inspecting Judge;
 - (b) The Office of the Inspecting Judge is accountable to the Minister of Correctional Services and reports on the activities and the performance of its duties and functions to the Minister at least once a year;
 - (c) The Office of the Inspecting Judge functions independently of the Department and in particular the Commissioner, as he is responsible for the prisons and prisoners;
 - (d) The functions of the Office of the Inspecting Judge are funded by money appropriated by Parliament for that purpose;
 - (e) The Inspecting Judge is the accounting officer for the Office of the Inspecting Judge in terms of the Exchequer Act No 66 of 1975 ;

- (f) The powers of the Office of the Inspecting Judge are increased to include powers of:
 - (i) search and seizure to make its work more effective. (See Regulations 13 and 17 of the Regulations governing the work of the Commission);
 - (ii) enforcing the recommendations of the Office of the Inspecting Judge within the Department. Foreign experiences in this regard should be considered after due consultation with civil society organisations, the Department and the Correctional Services Portfolio Committee;
 - (iii) for the moment the responsibility set out in (ii) above should be entrusted to the Heads of Prison to provide regular feedback on the recommendations made by the IPVs in various prisons.

- (g) Section 87(1) and section 89(1) are amended so that the appointment of staff occurs “after consultation with the Minister” and not “in consultation with the Commissioner”.

- (h) Section 89(3) is amended so that the employees of the Office of the Inspecting Judge are deemed to be members of staff of the Department of Public Service and Administration or the Department of Justice, or any other Department other than the Department, to retain their independence from the Department.

10.5 The necessary arrangements be made with regard to budget, accommodation, employment of staff and opening of branch offices to enable the Office of the Inspecting Judge to perform an effective job with regard to the fight against ill-treatment of prisoners in the various prisons in the country.

- 10.6 In order to accord the officials of the Inspecting Judge adequate protection against officials of the Department who frustrate them in the performance of their work, Chapter 16 of the Correctional Services Act No. 111 of 1998 should be amended to include a further section that makes it a criminal offence for members of the Department to interfere, hinder or frustrate the officials of the Inspecting Judge in the performance of their duties. A penalty clause should accompany the criminalisation of this conduct, like all other criminal offences created in terms of Chapter 16 of the Correctional Services Act.
- 10.7 Lastly, the general amendment of the entire Chapter is advised to stress that the fight against corruption is a paramount issue in the Department and the Office of the Inspecting Judge cannot ignore it, notwithstanding its amended mandate. The Office of the Inspecting Judge should give this serious consideration when it is investigating the various prisons, as corruption goes hand in hand with the treatment of prisoners.