

CHAPTER 7

TREATMENT OF PRISONERS

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CHAPTER 7

TREATMENT OF PRISONERS

1. INTRODUCTION

The treatment of prisoners is of importance to this Commission, not only because it was tasked to investigate the issue,¹ but also because it is accepted that a nation's civilization is measured by the way it treats its prisoners.² The human rights of prisoners are internationally recognised and norms have been accepted on how prisoners should be treated. The Universal Declaration of Human Rights, for example, recognises that they should be treated with human dignity and has outlawed torture and cruel, inhuman and degrading treatment or punishment.³ There is accordingly a duty on the Department to adhere to these norms to fulfill its duties.

The Commission was therefore duty bound to investigate the complaints of the treatment of prisoners at various correctional facilities of the Department, some of which were received by the Commission directly.⁴

To put it in context we need to remember that convicted criminals have for a long time been regarded in South Africa as outlaws and a forgotten sector of our

¹ See the Commission's Terms of Reference as Proclamation No 135 of 2001 and amended by Government Gazette No 23558 dated 27 June 2002.

² See John C. Mubangizi "Some Reflections on the promotion of the rights of prisoners in South Africa" *Acta Criminologica* 15 (2) 2002 at page 34.

³ See Article 1 and 5 of the Universal Declaration of Human Rights. Also see the International Covenant on Civil and Political Rights, which sets general standards for the treatment of prisoners in Article 10.

⁴ Complaints were received via the Commission's toll free number and by mail and e-mails. Many incidents could not be dealt with by the Commission as they fell outside the Commission's mandate. They were, however, referred to the Inspecting Judge.

society. We have chosen to deny their existence and consider them as a form of subhuman species deserving of the consequences of their deeds. This lack of concern has allowed a mentality to take root amongst many correctional officials that prisoners can be treated in any manner without fear of sanction.

At the height of apartheid it was left to the courts to remind South Africans that prisoners are entitled to the same rights and protection as the rest of society. As Diemont J stated in *Hassim v Officer Commanding, Prison Command, Robben Island*:⁵

*“The fact of conviction justifies treating the offender, at least for the period of his sentence, differently from the average citizen... Nevertheless, although he lives a twilight existence, he is still a citizen who will in due course return to the community, and as a citizen he has certain basic rights. He must have the right to eat, to be clothed, to be given shelter and to receive medical aid - and if these rights are imperiled he must be entitled to ask the court for relief.”*⁶

The case of *Hassim* is significant in the discussion of prisoners' rights and treatment in that it established that prisoners have certain civil rights and that they have *locus standi* to enforce their rights. Just as the Department has the right to restrain or punish prisoners, prisoners clearly have the right not to be unlawfully subjected to impositions such as solitary confinement, for example, without the correct procedure prescribed by the Act being followed. To the extent that the authorities might exceed their delegated powers, *Hassim's* case clearly establishes that prisoners have the right to seek relief through the courts. It should, however, always be borne in mind that it is not easy for prisoners successfully to prove a wrong done to them due to the existing reporting system

⁵ 1973 (3) SA 462 (C).

⁶ *Op cit* at 472-3.

that exists in the Department and the array of forms, records and documents to which prisoners do not always have access.⁷

It is common cause that when all the political changes took place at the beginning of 1990 the basic human rights of prisoners were not being adequately recognised in the Department. The Government recognised this and prisoners today are no longer without rights when they enter a prison in our democratic country. The rights of prisoners are enshrined in the Bill of Rights of our Constitution. It provides that everyone who is detained, including every sentenced prisoner, has a right to, amongst others, conditions of detention which are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment.⁸ In addition, the Constitution also provides that the prisoner or detained person has a right to communicate with and be visited by that person's spouse or partner, next of kin, chosen religious counsellor and chosen medical practitioner.⁹

2. COMMON LAW POSITION

Even prior to the *Hassim* case and the advent of constitutional democracy in South Africa, the right to acceptable conditions of detention or imprisonment

⁷ For another perspective, see the Chapter on Sexual Violence where the shortcomings of police investigations in prisons are more fully dealt with.

⁸ See Section 35(2)(e), that provides as follows:

*“Everyone who is detained, including every sentenced prisoner, has the right-
(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment.”*

⁹ See Section 35(2)(f):

*“Everyone who is detained, including every sentenced prisoner, has the right-
(f) to communicate with, and be visited by, that person's-
(i) spouse or partner;
(ii) next of kin;
(iii) chosen religious counsellor; and
(iv) chosen medical practitioner.”*

consistent with the tenets of human dignity had long been established in our jurisprudence.

In *Whittaker v Roos and Bateman; Morant v Roos and Bateman* 1912 AD 92, Innes C J stated (at pages 122-123) that, although the freedom of the detainees had been impaired by the legal process of imprisonment, “*they were entitled to respect for what remained*”. In this regard Innes C J said:

*“True the plaintiffs’ freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been legally curtailed could afford no excuse for a further illegal encroachment upon it. Mr Esselen contended that the plaintiffs, once in prison, could claim only such rights as the Ordinance and the regulations conferred. But the directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed. They could claim immunity from punishment in the shape of illegal treatment, or in the guise of infringement of their liberty not warranted by the regulations or necessitated for purposes of gaol discipline and administration.”*¹⁰

This approach of Innes C J was further confirmed in the minority judgment of Corbett J A in *Goldberg and Others v Minister of Prisons and Others*:¹¹

“It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the

¹⁰ *Ibid.*

¹¹ 1979 (1) SA 14 (A).

circumstances in which he, as a prisoner, is placed... He must submit to the discipline of prison life and the rules and regulations, which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial residuum of basic rights, which he cannot be denied; and, if he is denied them, then he is entitled, in my view, to legal redress."¹²

The *dicta* of Innes C J and Corbett J A were approved and elaborated upon by Hoexter J A in *Minister of Justice v Hofmeyr*¹³ at 141 C – 142 A:

"The Innes dictum serves to negate the parsimonious and misconceived notion that upon his admission to gaol a prisoner is stripped, as it were, of all his personal rights; and thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations....

The root meaning of the Innes dictum is that the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common-law rights....

*As to principle, subsequent to the Goldberg case the following general proposition was stated by Jansen J A in delivering the judgment of this Court in *Mandela v Minister of Prisons* 1983 (1) SA 938 (A): 'On principle a basic right must survive incarceration except insofar as it is attenuated by legislation, either expressly or by necessary implication, and the necessary consequences of incarceration.'*¹⁴

¹² *Op cit* at 39 C-F.

¹³ 1993 (3) SA 131 (A).

¹⁴ *Op cit* at 957 E-F. See also *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and Others* 1992 (2) SA 56 (ZS) at 60 G – 61 A (per Gubbay C J), cited with approval by Navsa J A in *Minister of Correctional Services and Others v Kwakwa and*

3. CONSTITUTIONAL POSITION

The common law position as set out above has now been enshrined in the Constitution¹⁵ and the Constitutional Court has made certain pronouncements about the rights of prisoners. The Constitution provides also that every person shall have the right to administrative fair conduct which is procedurally fair, and in instances where decisions are made that severely restrict or cancel privileges enjoyed by prisoners it can be expected that such action will only be undertaken in circumstances where the Department adhered to the *audi alteram partem* rule.¹⁶

In *S v Makwanyane and Another*,¹⁷ Chaskalson A, the Chief Justice, made the following observation:

*“Dignity is inevitably impaired by imprisonment or any other punishment and the undoubted power of the State to impose punishment as part of the criminal justice system necessarily involves the power to encroach upon a person’s dignity, but a prisoner does not lose all his or her rights on entering prison.”*¹⁸

The spirit of this judgment was also followed in the Witwatersrand Local Division in the matter of *Strydom v Minister of Correctional Services and Others*¹⁹ by Schwartzman J. Accordingly.

¹⁵ *Another* 2002 (4) SA 455 (SCA) para 24-25 at 467 G – 468 D; *August and Another v Electoral Commissioner and Others* 1999 (3) SA 1 (CC) para 18 – 19 at 10 E – 11 D.

¹⁶ See *supra* (n8).

¹⁷ See *Nortje en ‘n Ander v Minister van Korrektiewe Dienste* 2001 (1) SACR 515 (SCA).

¹⁸ See 1995 (3) SA 391 (CC).

¹⁹ *Op cit* at para 142.

¹⁹ 1999 (3) BCLR 342 (W).

It is now well established in our law that prisoners have to be treated with dignity.²⁰

Notwithstanding all of the above pronouncements by our courts, it has become clear to this Commission that many members of the Department remain trapped in a mindset that prisoners lose all their rights once they enter prison. This mentality is evident from the manner in which members treat prisoners and the way they react when prisoners demand that their constitutional rights be respected. This attitude clearly shows that members do not understand the sentiments expressed above by Chaskalson A that prisoners do not lose their rights on entering the prison.

Much has been said about overcrowding and its impact on prisoners, but it is apparent from the reports and complaints received by the Commission that overcrowding is not the only abuse that affects the dignity and humanity of prisoners and should not be overemphasised when assault and general abuse of prisoners is the order of the day in many Management Areas.²¹ Whilst the Commission is very alive to the challenges that overcrowding poses it cannot ignore that overcrowding is not the only issue that impacts on humane conditions of detention. It should not be ignored that inmates are subjected to assaults, abuse, and even indirect abuse, in that they are expected to do certain duties, which they are not supposed to do in terms of the Correctional Services Act or the general Regulations of the Department. For example, prisoners are coerced into medically treating ill inmates, washing dirty or soiled linen,²² running errands

²⁰ See *S v Tcoelib* 1996 (1) SACR 403 (Nm) in the words of Mohamed C J:
“The obligation to undergo imprisonment would undoubtedly have some impact on the appellant’s dignity but some impact on the dignity of a prisoner is inherent in all imprisonment. What the Constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed of the conviction of the person per se.”

²¹ See the Chapter dealing with assaults at C-Max and also specific assaults at Pretoria Prison as per the Eleventh Interim Report and the Chapter on Sexual Abuse of prisoners.

²² See the Fifth Interim Report on the Bloemfontein Management Area and the Seventh Interim Report on the Leeuwkop Management Area.

for warders,²³ dishing out food to fellow inmates and even clipping the toenails of warders.²⁴

The situation is also aggravated by the fact that on occasion prisoners are even subjected to torture and other treatment that would be deplorable in any democratic and civilised society.²⁵ Humiliating and demeaning prisoners should not be the order of the day in modern-day correctional facilities and such conduct should be decisively stamped out by the Department.

Notwithstanding the stated objectives of the Department of Correctional Services to rehabilitate prisoners, the evidence before the Commission points to the fact that most warders are of the view that prisoners are in prison for punishment and not “as punishment”. Accordingly, it is clear that there is an urgent need to retrain warders to have a totally different approach to the manner in which prisoners are treated. Such training, however, will not achieve much unless all the complaints, which are referred to the various agencies, including the Office of the Inspecting Judge, on the treatment of prisoners are treated with the urgency and seriousness they deserve. At present there appears to be an element of discontent and general dissatisfaction in the manner in which these complaints are dealt with. Many inmates have told the Commission that they have complained to the Inspecting Judge’s office without anything arising from such complaints. It may well be that the problem is that there appears to be no structured and clear feedback mechanism for the complaints by the prisoners, which in itself perpetuates the problem. Those warders who are guilty of improper action are then not reprimanded, which allows them to continue with their conduct with impunity, ultimately creating the impression in prisons that such behaviour is the accepted norm.

²³ See the Fifth Interim Report on the Bloemfontein Management Area.

²⁴ See the Fifth Interim Report on the Bloemfontein Management Area.

²⁵ See the evidence on torture of prisoners at C-Max Prison in this Chapter below.

The Commission will now deal with specific incidents of abuse, which have not been dealt with in the other Reports:

4. SOLITARY CONFINEMENT

It is commonly accepted that solitary confinement is one of the worst forms of torture that can be imposed on another human being.

The trauma caused by such detention has been described repeatedly before the Commission and has been highlighted in our courts, most specifically in *Minister of Justice v Hofmeyr*²⁶ where Hoexter J A stated that:

*“to deprive the average person of contact with his fellows is to cause him to suffer anguish of mind. It cannot be said that any enforced and prolonged isolation of the individual is punishment. It is a form of torment without physical violence.”*²⁷

Former President Nelson Mandela, who had been imprisoned in harsh conditions and forced to perform years of hard labour on Robben Island, said that he found his own brief encounter with solitary confinement, the sum total of which was three (3) days, to be *“the most forbidding aspect of prison life”*.²⁸

²⁶ 1993 (3) SA 131 (A).

²⁷ *Op cit* at 145. In an interview with the Institute of International Studies at the University of Berkeley, California, the International Red Cross’s medical co-ordinator for detention-related activities, Herman Reiss, elucidated prisoners’ reactions and assessment of torture and stated, when asked what was the worst form of torture, that it was being in solitary confinement for months on end.

²⁸ Also see *“Winnie Mandela Her Life”* by Anne Marie du Preez Bezdrob at page 156.

Mrs Winnie Mandela also did not escape the cruelty of solitary confinement. She had been in solitary confinement for thirteen (13) months. Her ordeal is described as follows:

“In solitary confinement once more, she forced herself not to think about the horror of interrogation. She tore one of the blankets to shreds, then wove the threads together as her grandmother had taught her to do when she was a child making traditional mats with a grass called uluzi. For days she knitted the strands together, undid them, wove them together again. To keep her hands and her mind occupied she unpicked the hem of her dress. When there was nothing else to do she scoured the cell inch by inch to see if she could find an insect. Once she found two ants, and spent the whole day playing with them on her finger. The wardess noticed and switched off the light plunging the cell into darkness.”²⁹

The severe impact on one’s mental health of any solitary confinement has been described before many Commissions, and not only our Commission.³⁰ Ms Z.

²⁹ *Op cit* at 149 –150.

³⁰ Another witness who testified on solitary confinement before the Truth and Reconciliation Commission was Ms Jean Middleton, who said the following:

“The prison authorities themselves know it is ill-treatment, that’s why they use it as punishment. People found guilty of prison offences are kept in isolation. It is a punishment. I can’t describe its effects on you very well, because you do go slightly crazy, and it’s very difficult to describe your own craziness. Colonel Frik van Niekerk of the Special Branch once told the court that prisoners started showing evidence of disorientation within three days.”

Mr M. Naidoo also testified and said that with regard to solitary confinement:

“After making a statement, I was taken back to my cell where I was kept in solitary for four months under the 180 day law. I must confess that solitary confinement is the worst part of torture that can be inflicted on a human being. No amount of physical torture can equal that of solitary confinement. I had absolutely no contact with any of the other prisoners who were almost entirely common law prisoners, but I could continually hear the beating and shamboking of other prisoners.”

See Volume 4 Truth and Reconciliation Commission of South Africa Report Chapter 7: Institutional Hearings.

Markedien, who was a witness before the Truth and Reconciliation Commission, described the effects of such isolation as:

“I had to go down and live in the basement in isolation for seven months. That was very painful. I don’t even want to describe psychologically what I had to do to survive down there. I will write it one day but I could never tell you but it did teach me something and that is that no human being can live alone for more than, I think, even one month ... because there is nothing you can do to survive by yourself every single day. Then my suggestion is that no prisoner, regardless of their crimes, should ever be in isolation per se.”

These short extracts of the experiences of fellow South Africans who have suffered the mental anguish and torture of being in solitary confinement, together with the comparative studies, should leave no one in any doubt as to the long-term effects of this form of punishment on prisoners. Solitary confinement is a product of our past and should not be resorted to as a norm by prison officials in our new democratic order.

It was therefore with deep concern that this Commission discovered during the course of its hearings that the imposition of this form of detention is not only not properly understood, but is being arbitrarily resorted to by Heads of Prisons in many Management Areas investigated by the Commission as a form of punishment, contrary to the clear provisions of the Act.

It is anticipated that the Department and its officials will argue that solitary confinement is hardly, if ever, used in our prisons and that prisoners are seldom placed in solitary confinement, but are merely placed in isolation or segregation. The Commission is well aware of the difference between solitary confinement and the detention of a prisoner in isolation in terms of the legislation.

Although the 1959 and 1998 Correctional Services Acts expressly permit the detention of inmates in isolation cells,³¹ it is clear, when the locality and size of such cells is examined, and the procedures followed and the reasons given by the officers when they detain prisoners in “segregation” that the practice is ultimately nothing more than solitary detention.

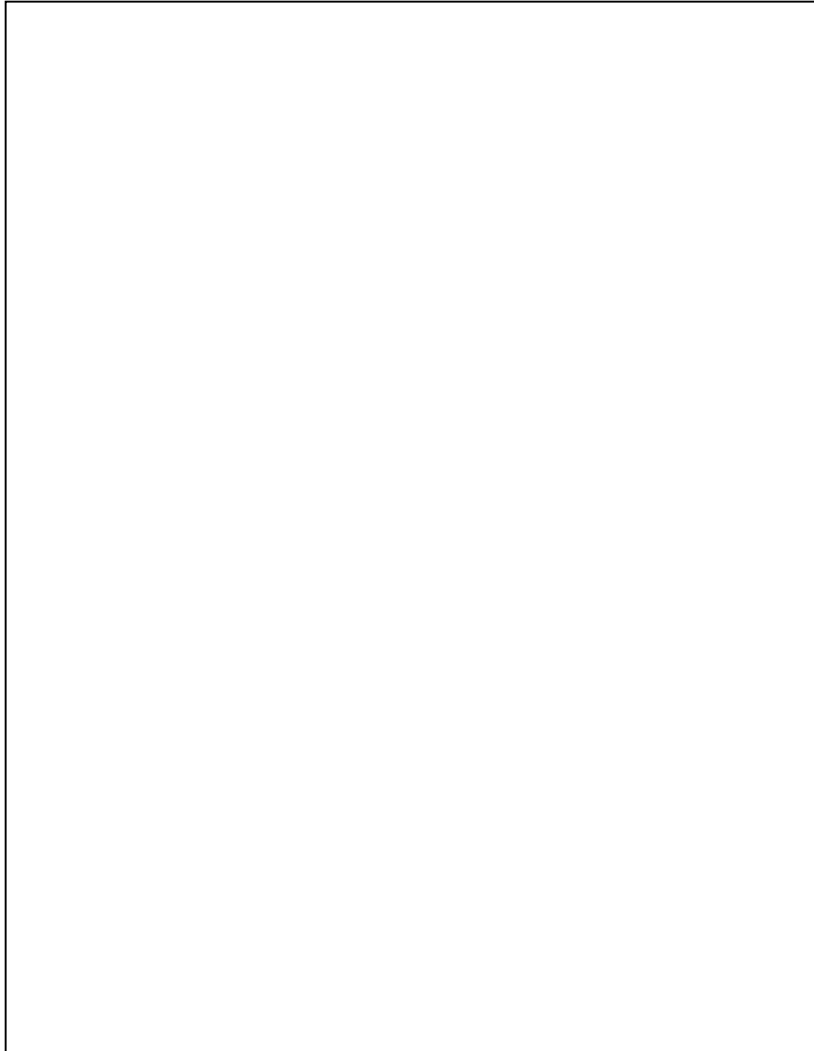
Furthermore, if such detention is used for the purposes of discipline then the detention is penal in nature and cannot be justified in terms of section 79 of the 1959 Act or in terms of section 30 of the 1998 Act which deals with the segregation of prisoners and provides in terms of section 30(9) that segregation may never be ordered as a form of punishment. The majority of examples will refer to the 1959 Act, since the 1998 Act only came into operation once the Commission had finished its official hearings.

The Commission is not, however, convinced that the 1998 Act will change the actions of members. In fact they ignored the B orders, which purported to comply with the 1998 legislation long before the legislation came into operation.

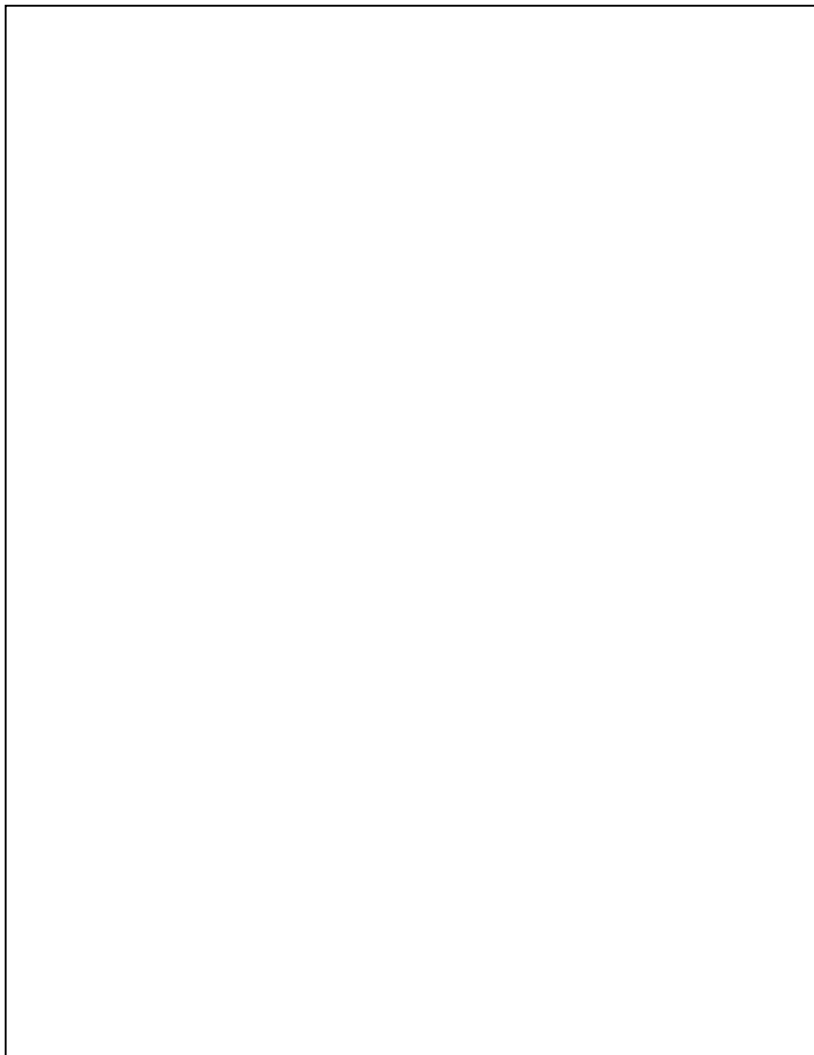
To understand the harshness of the detention conditions in isolation it is appropriate to consider some of the pictures of the cells taken at Leeuwkop prison.³²

³¹ See section 79 of the Correctional Services Act No. 8 of 1959 and section 30 of Act No. 111 of 1998. Also see: *Hassim and Another v Officer Commanding, Prison Command, Robben Island and Another Venkatrathnam and Another v Officer Commanding, Prison Command Robben Island and Another* 1973 (3) SA 462 (C) Diemont J remarking at page 408 B – C: “I can think of few greater hardships than for an active man to be locked up in a small cell day and night, week after week and months after months in enforced idleness.” Also, *Pretorius and Others v Minister of Correctional Services and Others* 2004 (2) SA 658 (T).

³² See further Appendix ‘E’



**Outside view of Segregation Cell at
Leeuwkop Prison taken on 13 October 2005I**



**View of the inside of the same segregation cell
at Leeuwkop Prison also taken on 13 October 2005**

The evidence of a number of Heads of Prisons showed complete confusion in dealing with solitary confinement and segregation in the isolation cells as provided for in the legislation. In fact, they called solitary confinement, “segregation” or even “detention in a single cell”. They seemed to be under the impression that the mere re-naming of the confinement removed all harm that results from this form of detention.

This problem is further exacerbated by the fact some Heads of Prison and those delegated to detain a prisoner in isolation, order such prisoners to be detained without ensuring that the amenities that should come with that form of segregation are provided for, which effectively results in the detention being nothing more than solitary confinement.³³ The only advantage for the officials is that if they call it segregation then they do not need to comply with the strict rules that should be complied with for solitary confinement. The evidence to the Commission of Mr Hlalethoa, the Head of Pretoria Central Prison, was as follows:

“[P]ursuant to what powers do you send prisoners to the Bomb³⁴?”

Well up to the SCO, they may send inmates to the Bomb.

But using that power, what regulation, what section of the Act?

Section 79(1)(a), (b), (c) and so on. Some of these are on their own request, some of them it’s for security purpose, for further

³³ See the evidence of Mr David Nkuna, who testified as follows regarding his detention for his own safety when he complained about threats made to him by gang members:

“My blankets were confiscated, I was forced to sleep on the ground. One blanket in that cold condition. Now, that meant punishment for me. That wasn’t a simple reason for taking me to isolation for safety, it was more than that.” (See Leeuwkop transcript pages 2721 and 2722.)

³⁴ The Head of Prison of Pretoria Prison described the “Bomb” as a nickname given to isolation cells at the prison. See Pretoria transcript at page 3 212.

charges, some of them for disciplinary cases.

In disciplinary cases are prisoners sent there for - as a form of punishment to the Bomb?

That's correct."

Mr Hlalethoa went further to admit during the hearings that the cells are used as a punitive measure. When questioned on whether section 79 permits such detention he stated that prisoners are sent there to correct their behaviour. He also stated the following:

"I am using it with the intention to demoralise the inmates, it's just a corrective measure, and I visit the place, and I check and talk to them, I discuss, as I say, take complaints and check whether they get medication, they get food, and they get all those. They get – the medical officer visits them also."³⁵

The evidence of Mr Hlalethoa supports what the Commission suspected regarding the use of "segregated detention". On the positive side of his testimony it should be said that unlike some others he did not try to escape the consequences of his conduct but rather took the Commission into his confidence and sought guidance from the Commission. Once it was a foregone conclusion that the detention was abused the Commission considered the testimony of the other Head of Prison in Pretoria, Mr N. Baloyi.

In the matter of Karp, it became clear that the correctness of the "solitary detention" that was ordered in terms of section 79 of the 1959 Act was questionable, particularly as it was done three times. Karp's detention in single cells played a major role in the psychological trauma he suffered. In fact, when

³⁵ See Pretoria transcript at page 3 217.

the circumstances of the three (e) instances are examined, it shows that Mr Baloyi in reality wanted to punish him, particularly when he was ordered to be detained in a single cell with mechanical constraints (leg irons). An analysis of the instances will show that Mr Baloyi ordered the first detention when he “escaped” from the prison and was brought back, the second when he ordered that he be detained as a sexual victim to comfort him and the third when he allegedly attempted to escape.

An analysis of the applicable provisions of the Act will show that there appear to be no justifiable circumstances that permit sexually abused victims to be put into isolation after having been raped. Certainly, in the case of Karp,³⁶ this action brought no comfort to him and it is clear that the officials failed in their duties to assist the victim. By placing the victim in isolation they showed that they had no understanding whatsoever of the trauma suffered by the victim.³⁷ Not only is such confinement not appropriate for protecting sexual victims but also it leads to secondary victimisation.

If one looks at the wording of the Act, it is clear that the parameters in which an official can exercise his right to order detention in isolation for a prisoner are spelt out. The rules for the segregation of prisoners are to be found in section 78 of the 1959 Act, which reads as follows:

- “(1) In the administration of prisons the rule for convicted prisoners shall, as far as possible and depending on the type of prison, be association at work and segregation at rest.*
- (2) The Commissioner may order –*
 - (a) the complete segregation of convicted prisoners at work as well as at rest for any period in pursuance of any scheme of classification or treatment or otherwise;*

³⁶ For the circumstances leading to his detention see the Chapter on Sexual Abuse in Prison.

³⁷ For a detailed discussion of the case see the Chapter on Sexual Abuse in Prison.

- (b) *the complete segregation of a convicted prisoner at work as well as at rest for any period upon the written request of such prisoner.*
- (3) *Complete segregation at work as well as at rest shall not be ordered or enforced if any particular case or at any time the medical officer certifies that any such complete segregation would be dangerous to the prisoner's physical or mental health.*
- (4) *The complete segregation described in this section shall not be deemed to be of solitary confinement for the purposes of any provision of this Act whereby solitary confinement for a limited period is or may be ordered as a punishment."*

Evidence before this Commission indicated conclusively that although the officials purported to either segregate or isolate the prisoners concerned, the steps taken by them resulted in the solitary confinement of such prisoners. The Commission therefore considers it necessary to look at some of the cases to examine the discretion exercised by the Departmental officials and the legal position regarding the exercise of discretion by a public official.

At the outset it can be accepted that in exercising their discretion the principle of *Liversidge v Anderson*³⁸ will no longer hold and hence there should be at the very least sufficient and meaningful reasons for a detention once an official orders that a person be segregated.³⁹ Evidence has shown the exact opposite and that is that officials do not adhere to the requirement of establishing sufficient and meaningful reasons when they exercise their powers to detain prisoners in single cells in terms of section 79 of the 1959 Act.

By exercising their powers without considering the psychological impact of segregation on the prisoner's mental well-being, the officers acted, in many instances, in bad faith and without applying their mind to such orders. In fact, it could be argued that in the majority of the segregated detention cases that

³⁸ (1942) AC 206.

³⁹ Own emphasis.

surfaced before the Commission, the officers lost sight of the basic common law rights of a detainee, which are stipulated in the case of *Rossouw v Sachs*,⁴⁰

“to be released with his physical and mental health unimpaired.”

It goes without saying then that when the segregated detention of a prisoner is ordered, it should be ordered sparingly and with sufficient reason because such detention has the potential to harm a prisoner’s mental health. The Commission has heard evidence about a prisoner previously detained at Leeuwkop Prison, Sonnyboy Malika, who was placed in isolation because he allegedly damaged a television set. When he reported to the chairman of his recreation committee that the television slipped from his hands as he placed it on a stand, his apology was not accepted and he was placed in isolation. The chairman of the Case Management Committee accepted the recommendation of the chairman of the recreation committee and Mr Malika was sent to isolation for 30 days.⁴¹ Mr Malika committed suicide shortly after his solitary detention.⁴²

To put the abuse in perspective the Commission shall select a few cases of prisoners who were segregated. The documentation ordering the segregation was submitted to the Commission.⁴³ One of the registers that was submitted was the Single Cell Admission Register for the Basement at Pretoria Prison. The following was written on the first page of the register:

- *“After Consultation at the basement, prisoner must consult with medical officials or doctor.*

⁴⁰ 1964 (2) SA 551 (A) at 561.

⁴¹ See Leeuwkop transcript at pages 2 591 and 2 592.

⁴² The case of Mr Malika is not unique. A number of inquiries regarding deaths in prison in the Management Areas revealed that some commit suicide whilst in solitary detention. Also see the inquiry into the deaths at Cell 227 in Pollsmoor Prison on 23 August 2004 - <http://www.pmg.org.za/docs/2005/050624raga.htm>, accessed 20 July 2005.

⁴³ See Exhibit ‘NNN5’ of the Pretoria hearings.

- *On each day at 08h00 prisoners (including awaiting trial prisoners) are eligible for an hour exercise at the courtyard.*
- *Write down surname, number, particulars in the register book including the date of admission, release date and specify if the said inmate is sentenced or an awaiting trial prisoner.*
- *After release, scratch (sic) the said prisoner's particulars and write down the date of the release in the book.*
- *Attend prisoner's problems.*
- *No other prisoners from other floors should come down to the basement."*

The Head of the Prison, Mr Baloyi, has also admitted that he had made the following inscription in the front of the register:

*Mr Sibanda, please ensure that we utilise the correct G311 register
And keep it updated.*

Signed: N. Baloyi

Date: 22 March 2004.

When the register was produced to the Commission it showed that despite Mr Baloyi's instructions that from 23 March a new register should be kept and used in accordance with Departmental instructions, the register contained the names of prisoners who were detained on 7 and 19 January 2004, before the register was supposedly opened. The confusion of the dates was cleared up by Mr Baloyi when he admitted that there were two registers for the same period. He also admitted that the registers at Pretoria Prison were in a shambles, and that they did not reflect: (a) who exercised the discretion to put the prisoner in isolation and (b) for how long the prisoner was ordered to be detained in isolation.⁴⁴

⁴⁴ See Pretoria transcript at pages 5 621 and 5 622.

What follows are a few extracts from the register, unedited and noted verbatim from the old register.⁴⁵

TABLE A – THE OLD REGISTER

Section	Name Prisoner	Date Adm	Date Release	Condition	VA/DA	Days
H	J MATHE	16/10/03	25/11/03	NO VISITS	DA	40
C	PETER MOHAPI	18/12/03	-----	POGING TOT ONTVLUGTING	VA	-----
D	DENNIS RUDMAN	28/12/03	09/01/04	SELFOON	VA	12
C	JAY RULE	30/01/04	02/01/04	AANRANDING	VA	NIE GESTRAF
D	C UGOCHUKWA	02/02/04	12/02/04	GELD IN BESIT	DA	10
G	S CHAUKE	13/02/04	15/02/04	GEPLAAS TE	KELDER VLOER	OMDAT HULLE BAKLEI HET
H	VUSI SEBOLA	01/02/04	03/02/04	AANRANDING MESSTEEK	DA	NIE GESTRAF
G	D THWALA	07/01/04	16/01/04	NO VISITS - DAGGA	VA	10
G	A SENWAMADI	07/01/04	16/01/04	NO VISITS - DAGGA	VA	10

TABLE B – THE NEW REGISTER

Reg No	Name	Condition	By Whom	Section	DA/VA	Date of Admission	Date of Release
202623658	Victor Moghoshoa	Safety	Mr Baloyi	D section	DA	2004/01/07	2004/05/03
93622921	Sipho Mziako	Studies	Mr Sekele	B section	DA	2004/01/19	
379267	Jakobus Vd Mans	Studies	Mr Sekhele	B section	DA	2004/01/19	
202383086	Z Mahlatsi	Hofsaak	Mr Baloyi	Potchefstroom	VA	2004/01/22	
203611680	P Malatsi	Hofsaak	Mr Baloyi	Potchefstroom	VA	2004/01/22	

⁴⁵ See Exhibit 'NNN5' of the Pretoria hearings.

TABLE B : THE NEW REGISTER CONTINUED

Reg No	Name	Condition	By Whom	Section	DA/V A	Date of Admission	Date of Release
201384761	O Karools	Hofsaak	Mr Baloyi	Potchefstroom	VA	Transfared (sic) to Top floor	
202382947	P Zemane	Hofsaak	Mr Baloyi	Potchefstroom	VA	2004/01/22	
202382854	S Mpila	Hofsaak	Mr Baloyi	Potchefstroom	VA	Transfared (sic) to Top floor	
201620737	Daniel Mulder	Jali	Mr Baloyi	H-seksie	DA	2004/02/27	
204628667 Ontvangs	GJ Rosslee	Attempted Escape	Mr Potgieter	Section 79(1)F	VA	2004/03/20	Transfared (sic) to Top floor 2004/03/29
203640025 D section	Hans Mahlangu	Safety	Mr Baloyi		VA	2004/03/22	Transfared sic to C section 2004/03/31
202623239 C section	JM Da Silva	Attempted Escape	Mr Baloyi	Section (80)(1)E ⁴⁶	VA	2004/03/24	Transfared sic to Top floor 2004/04/07
203612577 Ontvangs	Stefaans Tlhakanye	Attending court	Mr Sekhele	Section 79(1)B	DA	2004/03/04	204/05/10 Transfared sic to H section
203642070 E/F section	D Masinga	Sodomy	Mr Baloyi	Section 79(1)C	VA	2004/03/29	2004/04/08 Transfared sic to C section
203641647 H section	Andries Makhado	Fighting	Mr Baloyi	Section 79(1)C	VA	2004/03/30	2004/04/04
203624714 H section	J Vorster	Protection	Mr Sekhele	Section 79(1)B	VA	2004/04/09	
202633829 H section	M Nkosi	In Possession Of dagga and money	Mr Sekhele	Section 79(1)C	DA	2004/04/23	2004/05/08

⁴⁶

It should be noted that section 80 of the Act provides for the application of mechanical means of restraint. Such an order is made when the prisoner is already kept in isolation, section 80(1)(e) stipulates that such order can be made to prevent the prisoner from escaping. Where a prisoner is kept in isolation it seems like overkill unless the prisoner is “punished” because he tried to escape.

The excerpts from the two registers show clearly that members do not consider the consequences for the mental state of prisoners when they order detention in isolation. The excerpts also show that they do not have any idea of the importance of keeping proper records of those prisoners sent to isolation. The first few excerpts reflect that when they made the entries they thought that what they needed to record was which section each prisoner was from and not that they had to keep record of the applicable section of the Act in terms of which they ordered the detention.

Mr Baloyi, the Head of the Pretoria Prison, tried to mislead the Commission when he was asked to produce his registers dealing with the prisoners who were kept in isolation. At first he brought photostat copies of the register to the hearing and when he was ordered to bring the originals it emerged that there were two registers, neither of which reflected all of the prisoners who were sent to isolation. He could, for example, not produce the register that reflected when Ms Karp was sent to isolation for escaping. Mr Baloyi did not comply with the provisions of even the 1959 Act and the only excuse he could offer the Commission was that they had no G311 registers in stock. One would think that in the absence of a register a prudent head of prison would still keep record of important data in whatever form. His response shows that he had no idea of the serious impact of his conduct on fellow human beings, albeit that they are prisoners.

Mr Baloyi testified before the Commission on 25 May 2004. However, it is apparent from the registers that some of the prisoners were still in isolated detention if one looks at the date of admission and the fact that there is no date of release. The release date is of the utmost importance because in terms of legislation the period of isolation should not exceed 30 days. Either the registers were incomplete on the date Mr Baloyi testified or the prisoners were still in isolation on 25 May 2004. Mr Baloyi, like many others, showed very little respect

for the rule of law. The Commission is very concerned that in the Department there is almost a culture of contempt for the administration of justice as if members consider themselves above the law.⁴⁷

The Commission has heard evidence from a number of prisoners, in various Management Areas, that detention in isolation is mostly used as punishment and that such orders are made in most instances without the application of the rules of natural justice. These orders are given despite the Act prescribing that such orders not be given as a disciplinary measure.⁴⁸ Most of the records at Pretoria for example show that detention is ordered as punishment and there is no indication that prisoners were sent there through a fair process.

The Commission has heard evidence at Leeuwkop Management Area of a prisoner, David Nkuna, who explained in detail how Heads of Prisons and their delegates abuse the power to order such detention. In his words:

“When I was taken to isolation for the first time, I asked the Head of Prison, ‘Why are you taking me to isolation. What have I done which is wrong’. I further said to him since 1991 that I’m incarcerated behind bars I have never committed a single offence in prison. I have never fought with a member. I have never fought with a fellow prisoner. Since I was given A group in 1995 I never lost it because of behaviour. So I inquired ‘Why are you taking me to isolation’. He said to me that being a member of PAMACO,⁴⁹ being the chair, I am likely to be instigating prisoners to protest against him and that that was the reason why he was taking me to isolation.”

⁴⁷ For a more in-depth analysis of the existing culture and lawlessness in the Department see Chapters 1-3 of this report.

⁴⁸ See section 79(2) of the Act that reads as follows:

“(2) The detention of a prisoner in a single cell shall take place in the manner prescribed by the Commissioner: Provided that such detention shall under no circumstances be applied as a disciplinary measure.”

⁴⁹ PAMACO was a Prisoners’ Participative Management Committee that previously existed in the Department to convey prisoners’ grievances to the management.

It is therefore important to look at the detention of prisoners who are segregated in isolation cells and what is dictated by the policy of the Department. In the matter of Karp, the Commission heard the evidence of Dr Hlongwane who explained the provisions of the 'B' Orders dealing with detention in isolation and also dealing with the use of mechanical restraints. The policy of the Department is contained in the 'B' Orders, Chapter V, Treatment Programmes for Prisoners (Service Order 6: Detention of Prisoners in a single cell and the application of mechanical restraints). The provisions of the 'B' Orders correspond in the main with section 79 and 80 of the 1959 Correctional Services Act. Of paramount importance, however, are sections 79(2) of the 1959 Act and 30(9) of the 1998 Act that provide that the detention shall not be used for discipline.⁵⁰

There is a very good reason why the 1998 Act is drafted in the way it is and that is that studies all over the world have shown that the effects of detention in isolation are psychologically very harmful and hence it should be used with caution and only in very rare instances, if at all. For example a comparative study in the United States of America describes the effects of solitary confinement as follows:

*"A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition from which it was next to impossible to arouse them, and others became violently insane, others still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be on the subsequent service."*⁵¹

It is clear from this that to be detained in isolation is, in many ways, still barbaric and affects the psychological well-being of inmates and should be used as a last

⁵⁰ Own emphasis.

⁵¹ See Sallyann Romano: "If the Shu fits: Cruel and unusual punishment at California's Pelican Bay State Prison", *Emory Law Journal Summer* (1996) at page 1 089.

resort. The Commission heard evidence from many prisoners who went so far as to say that the impact of such detention led to the suicide of some of their fellow inmates. In fact, serious consideration should be given to whether confinement in isolation serves any purpose. It is appreciated that the 1998 Act is a step in the right direction by providing strict rules for segregated detention.⁵² Whether the Department will better control such segregated detention and issue directives that prisoners should be detained under such conditions as an exception rather than the norm, remains to be seen.

The effect of segregated confinement on inmates is clearly very harsh and in most instances constitutes inhumane and cruel punishment. Clearly our system of justice gives the judiciary the power to punish persons convicted of a crime in a court of law by imposing sentences, but the one thing that the judiciary never intended doing when imposing such sentences was to allow the authorities to drive people insane through solitary confinement.

5. SUPER-MAXIMUM PRISONS

Having considered the abuse of segregated isolated detention the Commission is of the view that it would be failing the number of prisoners who testified on its impact if centres such as C-Max Prison are not dealt with.⁵³ The Commission needs to examine the use of Super-Maximum Prisons such as C-Max and others, which are merely institutions of solitary confinement. It should be obvious that, if the Department is committed to being an institution of correction, the question had to be posed whether Super-Maximum Prisons serve a purpose and whether such prisons assist in the efforts to rehabilitate prisoners and correct

⁵² Section 25 dealing with solitary confinement and section 30 of the 1998 Act, dealing with segregated confinement.

⁵³ Specific attention is paid to C-Max Prison since it fell within the Pretoria Management Area that was part of the Commission's terms of reference.

their behaviour. It should furthermore be considered whether such an institution can be defended on any constitutional basis.

The Commission will therefore review the need for such institutions because there should be no doubt that they relate to the way prisoners are treated in our prison system as a whole.

5.1 Humanity vis-à-vis Super-Maximum Prisons

The Commission will show that continued incarceration of inmates in such institutions cannot be justified in terms of the Constitution, the Correctional Services Act, the Regulations or Departmental Policies.

The rights of arrested, detained and accused persons are enshrined in the Bill of Rights. Section 35(2)(e) of the Constitution of the Republic of South Africa provides that everyone who is arrested for allegedly committing an offence, has the right –

“To conditions of detention that are consistent with human dignity, including at least exercise and the provision, at the State expense, of adequate accommodation, nutrition, reading material and medical treatment.”⁵⁴

Section 12(1) of the Constitution deals with the protection of freedom and security of a person and provides as follows:

“Everyone has a right to freedom and security of the person, which includes the right –

⁵⁴ Chapter 2 of the Constitution of the Republic of South Africa Act No. 108 of 1996.

- (c) *to be free from all forms of violence from either public or private sources;*
- (d) *not to be tortured in any way;*
- (e) *not to be treated or punished in a cruel, inhumane or degrading way.”*

The right of prisoners to be treated with dignity is also echoed in Chapter 4 of the 1998 Act, dealing with sentenced prisoners. Section 37(2) of the 1998 Act provides that in addition to providing a regime, which meets the minimum requirements of this Act, the Department must seek to provide amenities, which will create an environment in which sentenced prisoners will be able to live with dignity and develop their ability to lead socially responsible and crime free lives.

The Department of Correctional Services has at long last recognised and acknowledged that its responsibility is not merely to keep individuals out of circulation in society, nor to merely enforce punishment meted out by the Courts. The responsibility of the Department of Correctional Services is first and foremost to correct offending behaviour in a secure, safe and humane environment, in order to facilitate the achievement of rehabilitation, and avoidance of recidivism.⁵⁵

Rehabilitation and correction has been adopted by the Department as one of its main objectives and rehabilitation is placed at the centre of the Department's activities.⁵⁶ In terms of the Final White Paper it is the responsibility of the Department of Correctional Services to correct offending behaviour in a secure, safe and humane environment.⁵⁷

Pretoria C-Max Correctional Centre is one of six (6) correctional centres in the Pretoria Management Area. It is regarded as one of the most secure prisons in the Republic of South Africa. Only sentenced prisoners in the Maximum Security

⁵⁵ White Paper on Corrections in South Africa chapter 4, pages 36-37.

⁵⁶ *Op cit* at page 9.

⁵⁷ *Ibid.*

classification, who are mainly problematic cases or regarded as dangerous and awaiting trial prisoners with a high escape risk are incarcerated at Pretoria C-Max Prison. No scientific studies nor persuasive evidence have been put before the Commission that justify the establishment of institutions like C-Max or the retention of such detention conditions in our prison system. The Commission considered it necessary on a number of levels to examine the use of Super Max centres in our new democracy and also in the light of the objectives of the Department.

5.2 Admission Criteria for Incarceration at Pretoria C-Max Prison

The criteria for admission of inmates to C-Max Prison are contained in a Departmental document, referenced 1/3/13 dated 5 November 1998. In terms of this document the following criteria are used by the Department for the transfer of prisoners to C-Max Prison:

- Prisoners sentenced to longer than twenty (20) years within the last three (3) months.
- Prisoners who have been found guilty of escaping/attempted to escape or aided an escape.
- Prisoners who have been declared dangerous persons by the Court.
- Prisoners who have assaulted/murdered a DCS official, an SAPS official or fellow inmate.
- Prisoners who are troublesome and who do not show any improvement in their behaviour even after they have been demoted to C Group.
- Prisoners who are actively involved in prison gangsterism.

- Prisoners who have been convicted for hijackings and who have murdered/assaulted their victims, are members of notorious crime syndicates, or are serial killers/rapists.

5.3 Duration of Incarceration at C-Max Prison

A Departmental Circular, 1/3/13, dated 22 June 1998, determines the length of incarceration of a prisoner at C-Max Prison. This document mainly deals with the management of offenders at C-Max Prison. The following are some of the important clauses of this document:

- “3. The following criteria apply when an inmate can leave C-Max Phase Two (2) and to be transferred to an ordinary prison;*
- 3.1 Prisoners with further charges who are presently in C-Max Phase Two (2) must be kept in this unit until their cases have been finalised;*
- 3.2 Escapees/inmates who are found guilty of assaulting further inmates or members must be detained in C-Max for the same period as they were sentenced for the specific crimes;*
- 3.3 Inmates serving long sentences or prisoners who murdered other prisoners/members/policemen should be kept there until they have completed approximately a quarter of their sentences;*
- 3.4 All other inmates must be evaluated after three (3) months on Phase Two (2) and depending on their prognosis, co-operating, etc, be transferred to a maximum prison;*

3.5 *Inmates in C-Max Phase Two (2) who have maintained a group status for a period of two (2) years within that phase may be considered for transfer to a maximum prison irrespective of their criteria set out in paragraphs 3.1 to 3.3 supra.”*

According to the Acting Area Commissioner of the Pretoria Management Area, Mr E. Ntebele as at 23 September 2003, more than two hundred (200) prisoners were accommodated at C-Max Prison, which has the capacity for two hundred and eighty one (281) prisoners. According to Mr Ntebele, the lower number of prisoners incarcerated at Pretoria C-Max Prison was largely due to the stringent criteria for placing prisoners in this facility.⁵⁸ The unsentenced prisoners are kept in a separate section of the prison and they are not allowed to mix with sentenced prisoners.

An official of the Commission, Ms C. Goodenough, visited C-Max Prison on 25 February 2005. She noted that C-Max Prison was being upgraded due to an alleged attempted escape towards the end of 2004 which led to the fatal shooting of two prisoners and two members, including the Head of Prison, Mr Gomba, This includes the upgrading of the CCTV system which is currently limited and the obtaining of additional equipment and scanners.

A task team was formed by the Minister of Correctional Services after the shooting of Mr Gomba and others. This team recommended that the majority of prisoners in C-Max be transferred to other prisons. This occurred between 20 December 2004 and 29 December 2004. The prisoners were transferred to centres including Kokstad, Zonderwater, Leeuwkop, Grootvlei and Drakenstein prisons.

⁵⁸ See Exhibit ‘BB’ at page 2, a presentation delivered to Commission at Pretoria Management Area hearings.

Prisoners who were not transferred were those who faced further criminal charges, particularly in Pretoria or Johannesburg, and those who were receiving psychiatric treatment. The latter were initially transferred to Kokstad Prison, but on their arrival it was discovered that no psychiatric treatment was available and as a result they were returned to C-Max Prison.

Since the transfer of prisoners out of C-Max, only one prisoner has been admitted to this institution. The details of this prisoner are dealt with later in this report. A total of twenty six (26) members have been transferred since the attempted escape and the shooting of the Head of Prison at C-Max Prison. These include members who requested to be transferred and those who have been deemed to be unfit to work at C-Max Prison.

Ms Goodenough also noted that the staff complement at C-Max Prison is to be increased. As of 25 February 2005 there were one hundred and one (101) staff members, although the total staff complement should be one hundred and fifty one (151).

She noted the following statistics about the prison:

- (a) C-Max can accommodate two hundred and fifty eight (258) prisoners.
- (b) At the time of the alleged escape there were two hundred and forty four (244) prisoners incarcerated at C-Max, whilst on 25 February 2005 there were one hundred and twelve (112) prisoners which included sixty two (62) sentenced prisoners of which twelve (12) were in Phase One (1) and twenty seven (27) in Phase Two (2).
- (c) There were also fifty (50) awaiting trial prisoners in C-Max Prison.

- (d) During 2003 one hundred and fifty five (155) prisoners were incarcerated for the following reasons at C-Max:
- (i) 6% for length of sentence.
 - (ii) 25.3% for escaping.
 - (iii) 28.7% for aggression.
 - (iv) 18.8% for behaviour.

5.4 Death of Prisoners at C-Max Prisons

Between 1997 and 2004, according to Ms Goodenough's research, six (6) prisoners died at the institution under the following circumstances:

- Two (2) during the shooting of Mr Gomba, the Head of Prison, when the prisoners committed suicide.
- Another committed suicide by hanging himself with a rope. He murdered a DCS official in 1998 in order to escape from prison and was only arrested three (3) years later. He committed suicide within two weeks of being arrested.
- The fourth died of an overdose. He ran away from Leeuwkop Prison after hitting the warder with a spade-file on a work team. He obtained medication from other prisoners at C-Max to overdose himself.
- Two prisoners died of natural causes.

5.5 Assaults at C-Max Prison

Assaults during the period 9 September 1997 to 2 February 2005.

Criteria	No of Incidents	Comments
Member on Prisoner	64	Incidents as reported to the medical staff and reflected in the G336.
Prisoner on Member	26	Injury on duty as reflected in G111 including prisoner Leso who stabbed a doctor. Only two (2) officials killed by prisoners.
Prisoner on Prisoner	63	Incidents reported to medical staff and reflected in the G336.

The evidence of Mr Gomba, the then Head of the Pretoria C-Max Prison, has been dealt with in the report dealing with assaults.⁵⁹ According to Mr Gomba, there are no communal cells at C-Max Prison, and cells are similar to the isolation cells in ordinary prisons. The prisoners incarcerated in these cells have no contact with anyone other than warders.

Phase One (1) prisoners are allowed out of their single cells, which are divided by brick walls, for one (1) hour per day. During this time they are allowed to shower and exercise and both these activities occur in locked cages. The prisoners are cuffed while being moved from their cells to the courtyard. In the first six (6) weeks of their stay at C-Max Prison, prisoners are allowed one (1) visit of ten (10) minutes.

⁵⁹ See Chapter dealing with the assaults at C-Max for more details.

Phase Two (2) prisoners are allowed out of their cells for three (3) to four (4) hours per day. They are allowed access to a television and on application they are allowed a computer in their cells. They can also interact whilst exercising in the courtyard and are not caged while showering.

They are serviced by one psychologist and one social worker. The contact between the psychologist and the social worker depends on the needs of an inmate. If they need to be seen by either the psychologist or the social worker, they are allowed to do so. No pre-evaluation procedures by either social workers or psychologists are carried out to determine if a prisoner, upon admission, is capable of sustaining the first phase of incarceration at C-Max Prison. This is a serious shortcoming and should be addressed since it is imperative that the mental state of a prisoner be established before he is put in solitary confinement for a long period of solitary detention in C-Max. The Department is in breach of its own regulations when it places prisoners in C-Max without them being psychologically evaluated. The consequences may be severe for those prisoners who are already psychologically affected by their incarceration.

Admission at Pretoria C-Max Prison is approved by the Regional Commissioner. Mr Gomba never disputed that an initial admission at Phase One (1) at Pretoria C-Max Prison amounts to a guaranteed thirty (30) days' incarceration in an isolation cell. Phase One (1) incarceration lasts for a minimum of three (3) months. Furthermore, such isolation usually lasts longer but never shorter than three (3) months. Mr Gomba conceded that sending a person to an isolation cell is a drastic step and that it is not done in accordance with the Act. He could not produce any register where he himself kept record of those prisoners that he had sent to isolation.

During Ms Goodenough's visit to C-Max Prison she observed that a sixteen (16) year old prisoner, Lewellyn Baker, was incarcerated at the prison.

The application form for his transfer to C-Max Prison reveals the following:

“He was previously incarcerated at Emthonjeni Juvenile Prison Centre. He had been sentenced to three (3) years’ imprisonment for housebreaking and theft. He is presently in C group category. The motivation for the application also states that since admission he has transgressed the disciplinary code of conduct for offenders (5) five times. The offender’s behaviour is deteriorating at a very fast rate. He has turned out to be a problematic case. He is very difficult to control at the institution. He is presently held at the isolation cell and was on various occasions requested to abstain from fighting and misbehaving. On 22nd October 2004 he once more attacked a fellow inmate and he uttered a lot of insulting words and threats to officials during that week. He is a threat to himself, to fellow employees as well as officials and therefore a high security risk to be detained in this institution.”⁶⁰

He was admitted to C-Max Prison on 29 November 2004. It was realised that he was very aggressive in the first three (3) to four (4) weeks of his admission. The official at C-Max, Mr Muller, stated that this prisoner would probably be moved out of C-Max at the next appearance before the Case Management Review Team. He had been accommodated in Phase One (1) since his detention in C-Max because in Phase Two (2) he would be at risk of mixing with hardened criminals because the prisoners have access to one another in the courtyard and in the bathrooms.”

⁶⁰ See Pretoria Exhibit ‘RRRR’ relating to the observations made by Ms Goodenough during her visit at the C-Max prison.

The Commission finds it shocking that a sixteen (16) year old juvenile who has been sentenced to three (3) years' imprisonment for housebreaking and theft could be incarcerated at an institution like Pretoria C-Max Prison. There is no suggestion in the motivation for this application that this young man actually assaulted members of the Department, save for the allegation that he threatened officials.

It is the Commission's view that the continued incarceration of this prisoner at the Pretoria Central Prison is unlawful and contrary to the criteria set by the Department itself since the prisoner is a juvenile and only serving a sentence of three (3) years.

Furthermore, the Commission is of the view that this is another example of the abuse of power by the Head of the Correctional Centre who granted the application to have this juvenile incarcerated at C-Max Prison.

According to Mr Gomba the maximum period of stay at C-Max Prison by a prisoner is five (5) years and no more than five (5) inmates have been there for five (5) years. Mr Gomba's view is that prisons like Pretoria C-Max Prison are needed in South Africa for certain categories of aggressive inmates, for example, persons who assault others.

The admission criteria at Pretoria C-Max Prison are contained in the admission policy document, which has been dealt with earlier. The management of offenders at Pretoria C-Max Prison is also dealt with in the document dated 22 June 1998, emanating from the Office of the Commissioner for Correctional Services.

Section 2 of the 1998 Act deals with the purpose of the correctional system.⁶¹ Section 79 of the 1959 Act deals with the detention of prisoners in a single cell and section 30 of the 1998 Act deals with the segregated detention of a prisoner.

A comparison between section 79 of the 1959 Act and section 30 of the 1998 Act shows that there are certainly more safeguards in the 1998 legislation than in the 1959 Act. Whether the intended safeguards will serve as better protection for prisoners remains to be seen. Much will depend on the implementation by the officials who order such detention. The Commission is of the view, however, that section 30 could be amended to ensure that abuse will not take place or at least limit the abuse of the provision.⁶²

In terms of section 24(5)(d) of the 1998 Act, solitary confinement for a period not exceeding thirty (30) days may be imposed in the case of serious or repeated infringements. The 1998 Act, however, makes provision for some safeguards in the event that prisoners who are placed in solitary confinement are abused. Section 25 of the 1998 Act deals with solitary confinement.⁶³

Evidence led before the Commission from a number of prisoners in various Management Areas indicates that detention in isolation has been used by the Heads of Department solely for the purposes of punishment. As stated earlier this conduct is contrary to the spirit of section 79(2) of the 1959 Act.

⁶¹ Section 2 reads as follows: “*The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society –*
(a) *enforcing sentences of the court in the manner prescribed by this Act;*
(b) *pertaining all prisoners in safe custody whilst ensuring their human dignity;*
(c) *promoting the social responsibility and human development of all prisoners and persons subject to community corrections*”.

⁶² See the recommendations *infra*.

⁶³ Section 25(1) provides as follows:
“*A penalty of solitary confinement must be referred to the Inspecting Judge for review. The Inspecting Judge must, within three (3) days, after considering the records of the proceedings and a report from a registered nurse, psychologist or the medical officer, on the health status of the prisoner concerned, confirm or set aside the decision or penalty and substitute an appropriate order for it.*”

Mr Gomba conceded when he testified that the incarceration of prisoners in single cells at C-Max Prison is tantamount to detaining such prisoners in isolation on a permanent basis during their stay at C-Max Prison.

As indicated above, in terms of section 24(5)(b) of the 1998 Act, in the case of serious or repeated infringements, solitary confinement for a period of not exceeding thirty (30) days may be imposed upon a prisoner.

If it is accepted that the incarceration of prisoners at C-Max Pretoria Prison amounts to being placed in permanent solitary confinement or for the duration of a prisoner's stay at C-Max Prison, then the next inquiry should be whether the authorities complied with the provisions of sections 24 and 25 of the 1998 Act, when prisoners were transferred to C-Max Prison. No evidence could be led before the Commission indicating that prior to transferring prisoners to C-Max Prison, disciplinary hearings were held for those to be transferred and incarcerated at C-Max Prison.

Furthermore, solitary confinement in terms of section 24(5)(d) is limited to a period not exceeding thirty (30) days. The evidence before the Commission shows that a prisoner will remain in Phase One (1) for a minimum of three (3) months, without any compliance to the Act.

Mr Gomba testified that the maximum period of stay at Pretoria C-Max Prison by a prisoner is five (5) years and that in total five (5) inmates have been to C-Max Prison for a period of five (5) years. This therefore means that inmates incarcerated at C-Max Prison may be subjected to solitary confinement for a period of five (5) years, which is not only contrary to the policy and the provisions of the Correctional Services Act, but on all levels brutally inhumane.

Although Mr Gomba distinguished between Phase One (1) and Phase Two (2) incarceration, it has been indicated above that a Phase One (1) incarceration at C-Max Prison amounts to a minimum of thirty (30) days' solitary confinement. The analysis of Mr Gomba's evidence indicates that there is not much difference between Phase One (1) and Phase Two (2), save for the fact that in Phase Two (2), prisoners are locked up only for twenty (20) hours instead of twenty three (23) hours per day and that in the courtyard they can interact with other prisoners.

If one considers the criteria for admission of inmates at Pretoria C-Max Prison, there is no doubt that its purpose is to further punish and even torture these inmates.

The high rate of escapes in South African Prisons is not due to the physical infrastructure of South African Prisons, but is largely due to collusion between members and prisoners, which amounts to corruption and/or negligence on the part of the members.⁶⁴

Recently there was an attempted escape at C-Max Prison, which resulted in the death of prisoners and warders including the Head of Prison, Mr Gomba. South Africa has a number of other maximum security prisons, which have served the purpose of incarcerating dangerous prisoners. However, security *per se* cannot justify the existence of Super Maximum Prisons like Pretoria C-Max Prison.

The Department has adopted rehabilitation and correction as its primary purposes in the incarceration of prisoners. The question, therefore, which needs to be answered is whether or not rehabilitation and correction are possible at an institution like C-Max Maximum Security Prison. The view held by Dr Jurgens van

⁶⁴ See the chapter dealing with escapes for a more in-depth analysis of the security at prisons and the conduct of warders who aided and abetted prisoners to escape for a "fee". See comment of the National Commissioner Correctional Services who acknowledged same in *The Cape Argus* dated 27 September 2005 at page 11.

Onselen, a clinical psychologist, is that no rehabilitation is possible at a Maximum Security Prison. Dr van Onselen has described Pretoria C-Max Maximum Security Prison as “inhumane, depressing, debilitating, and destructive”. Dr van Onselen was testifying in the Pretoria High Court trial of convicted murderer, Casper Kruger, who is claiming Five Hundred Thousand Rand (R500 000,00) damages from the Correctional Services Department. He claims that he suffered emotional trauma when sent unlawfully to C-Max Prison.

Mr Kruger claims that the forty (40) months he spent in C-Max Prison have impacted on his whole existence, he can no longer sleep, has nightmares and cannot tolerate any noise of people around him. Dr van Onselen said he consulted with Mr Kruger for about eighty (80) hours following his removal from C-Max Prison. He visited C-Max Prison to examine the circumstances there. This was an experience he said he would never forget and made the following comment on it:

“It was one of the most traumatic experiences in my life. I have never seen human beings treated like that. I find it inhuman and I still get nightmares and the place still haunts me.”

He stated that being incarcerated under these circumstances, with loud music blaring all day long, can induce psychosis. He further stated:

“My Lord, today you see it. You don’t even see any ray of sunlight or blade of grass, it is just cement all around you.”

Dr van Onselen said while at C-Max Prison, Mr Kruger had to face his visitors in chains, another humiliating experience.⁶⁵

⁶⁴ The court earlier heard that Mr Kruger twice escaped from gaol (in 1996 and in 1997) and was presumably involved in an attempted escape once while on his way to court. A firearm and ammunition were found in the wheel of the vehicle in which he was due to be transported. During one of the escapes, he and a fellow inmate held a prison official

The Department of Correctional Services said it cannot allow its officials to be exposed to inmates who might harm them. Mr Kruger, however, was placed at Leeuwkop Prison after the Court of Appeal ruled that his incarceration at C-Max Prison was unlawful.⁶⁶ It has to be borne in mind that most prisoners at these Super Maximum Prisons do not have the ability or the means to approach the high court to contest their detention in isolation at the aforementioned institutions and hence remain detained in these inhumane conditions. In light of the Court of Appeal's ruling in the Kruger case the likelihood exists that the incarceration of all the inmates at C-Max Prison might be unlawful.

There is a possibility that the Department may be flooded with similar actions by inmates, as the case of Mr Kruger has opened the floodgates for court challenges to their continued incarceration.

If the major purpose of the Department is to rehabilitate prisoners and if rehabilitation is not possible at C-Max Prison, then there is no justification for the existence of an institution like C-Max Prison or any similar institution.

The Commission, whilst sitting in Pietermaritzburg, heard evidence that the construction of a prison similar to C-Max Prison has been completed at Kokstad. The Commission also heard evidence that the admission criteria at Kokstad Prison are similar to those at Pretoria C-Max Prison.

Although the Kokstad Maximum Security Prison does not fall within the Terms of Reference of the Commission, it is the Commission's view that a similar argument regarding the desirability of the existence of C-Max Prison, can also be

hostage in the prison hospital and hijacked the getaway car. Mr Kruger said he was punished for this by a month in solitary confinement in Pretoria Central Maximum Division.

⁶⁶ See *The Witness* dated 16 November 2004 – Article entitled “C-Max Prison is Inhumane”.

raised with regard to the existence of the Kokstad Maximum Security Prison. In the light of what has been said with regard to the existence and the desirability of the Pretoria C-Max Prison, it is also the Commission's view that an institution like the Kokstad Maximum Security Prison and any further proposed similar institution, cannot be justified on any legal or moral grounds.

The Commission has pointed out above that it is commonly accepted that detention in isolation is one of the worst forms of torture. The trauma caused by such detention has been described repeatedly before the Commission and has been highlighted in our hearings. It needs to be addressed as a matter of urgency.

6. DISCIPLINARY HEARINGS FOR PRISONERS

A discussion of the treatment of prisoners would be incomplete without a focus on discipline in the prison system and an evaluation of the process followed to punish those who transgress the rules. The Commission is of the view that the manner in which prisoners are treated when they have complaints or when they have transgressed any of the prison regulations clearly shows that the entire system is not meant to rehabilitate the prisoner, or to have a positive effect on the prisoner. Part of rehabilitating prisoners is to teach them to have respect for the law. One way to do that is to lead by example and adhere to rules and regulations in the disciplinary process. The disciplinary process is a prime example of abuse by officials. In our view such disregard for the law breeds contempt.

If prisoners complain, they are then subjected to punishment. For example:

- (a) The prisoners who uncovered corruption at Grootvlei Prison were victimised and subjected to searches once their “complaint” was made known;⁶⁷
- (b) The prisoner, David Nkuna at Leeuwkop Prison, who complained about the fact that the gangsters wanted to stab him, is the one who was sent to isolation and not the gangsters;⁶⁸
- (c) The prisoner in Pretoria who complained about being sodomised is the one who ended up being detained in isolation;⁶⁹
- (d) When the prisoner, Abel Ramarope, requested help from a nurse to assist in arranging food for a group of prisoners waiting to be tested for Aids, he was sent to isolation when he told the nurse that her advice was not helpful.⁷⁰

In these incidents, the prisoners could easily identify the people who were violating their rights, but they were the ones who were subjected to punishment. This is to ensure that nobody complains because then the prisoners are regarded as being orderly.

According to the prisoner, David Nkuna, the disciplinary hearings in respect of prisoners in Leeuwkop Prison are:

⁶⁷ See the Fifth Interim Report regarding the victimisation.

⁶⁸ See Leeuwkop Transcript Volume 34 at page 2 677.

⁶⁹ See the evidence of Louis Karp dealt with in detail in the chapter on Sexual Abuse of Prisoners.

⁷⁰ See Leeuwkop proceedings at page 5 469 where he described the incident as follows:

“Mrs Gabela answered me in a way that I took it, it was very illogical. It lacked some responsibility, because those people came to the hospital seeking help and I was working with them and she is the one who instructed me to work with those people, and she said to me I must get away and those people must be locked somewhere, even if they don’t get food, it is none of her business. So I said, Mrs Gabela, this lacks sense... So she charged me and I was called to Mr Shongwe who was actually the presiding officer in terms of that kangaroo court I would dub it, because it was operating illegitimately and unprofessionally, and they called me in and while I was there, there was one of the guys who was sitting as an assessor.”

- (a) Seldom held. Prisoners are sent to isolation usually without any inquiry;
- (b) If an inquiry is held at all, it is held *in camera*. No one is allowed to be at the inquiry when it is held. The warders make decisions and do whatever they want to do, without the scrutiny of observers.

Therefore it should be considered setting up a procedure, which will ensure that there are disciplinary inquiries. In addition, such inquiries should comply with the rules of natural justice, including the *audi alteram partem* rule and the hearings should be held in public. A prisoner should be allowed to be assisted by another prisoner, if he so wishes.⁷¹ That is before he is assigned to segregation.

The very essence of our Constitution is transparency, openness and accountability. There is no better way to ensure accountability than to make the hearings open to the public. The warders have to be transparent and accountable for their actions. In being accountable and transparent, they should allow public scrutiny and representation given to prisoners. Such a procedure would be a more effective instrument of accountability. If proceedings can't be open to the public to attend then the results of proceedings need to be made public. The transcripts of proceedings should be kept and be made available to the affected prisoner upon his/her request.

In terms of section 24(1) of the 1998 Act, a prisoner may be subjected to a disciplinary hearing, which must be fair and may be conducted either by a disciplinary official or the Head of Prison. This presupposes that prior to the imposition of any sanction, a prisoner must have been subjected to a fair hearing.

In terms of section 24(2) of the 1998 Act a hearing before a Head of Prison must be conducted informally and without representation. At such a hearing, the prisoner must be informed of the allegations against him or her and have the right to refute the allegations. It is in the view of the Commission not possible to

⁷¹ See section 3(3) of the Promotion of Administrative Justice Act No. 3 of 2000 *supra*.

have a fair hearing without representation of some kind. Whilst there may be a need for a summary procedure there appears to be no need for the withholding of assistance.⁷²

The procedure prescribed in section 24(2) of the 1998 Act is problematic. The Commission has seen and heard what happens in cases where Heads of Prisons ordered prisoners to be detained in isolation without adhering to the rules of natural justice or to departmental policies. The Commission is therefore of the view that it is unlikely that justice will be done in cases where a disciplinary matter is dealt with by a head of prison without the prisoner having any assistance or representation.

The process prescribed by the Act also goes against the grain of just administrative action. Furthermore it is noted that in terms of section 24(5) a hearing before a disciplinary official is silent on representation, as opposed to section 24(2) where the provision explicitly states that the hearing should be conducted without representation. It is hard to follow the reasoning for such explicit exclusion in an environment where there is such an unequal power balance, albeit for minor transgressions.⁷³ The Commission is of the view that the provisions add to the unfairness of the disciplinary process and that they should

⁷² See section 3(3) of the Promotion of Administrative Justice Act No. 3 of 2000 that provides as follows:

“In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to-

(a) obtain assistance and, in serious or complex cases, legal representation;”

⁷³ An analogous provision would be section 112(1) of the Criminal Procedure Act, No. 51 of 1977 that provides for a summary procedure in cases of petty offences. The court has limited punitive jurisdiction in that it can impose a maximum fine of R1 500 or three (3) months' imprisonment. Despite its limited punitive jurisdiction an accused may still be represented by a legal representative, which shows that the right to be legally represented is not compromised by either a summary procedure or a limited punitive jurisdiction.

be amended to be in accordance with other administrative guidelines and basic constitutional guarantees.⁷⁴

It is doubtful that justice can truly be served in cases of serious offences against the discipline of the prison where the adjudicator is the disciplinary official.⁷⁵ The Commission is well aware of the need for discipline in the prison⁷⁶ for the proper functioning of the system. However, the Commission is also alive to the procedure adopted by officials and the negative attitude of the members towards prisoners. It is therefore unlikely that the word of a prisoner will be believed above that of a colleague. Should the Department consider fairness as the cornerstone of its disciplinary system it is the view of the Commission that in cases of serious transgression the disciplinary matter be referred to an independent adjudicator⁷⁷ similar to the practice in the United Kingdom. The role of the adjudicator would be to preside in those cases that are so serious that a conviction requires a possible sentence to restricted detention.

The Commission is of the view that a three-tier process of discipline would take care of the concerns of the prisoners that they are not treated fairly and at the

⁷⁴ See *Campbell and Fell v United Kingdom* (1985) 7 E.H.R.R. 165 and more specifically Article 6(1) of the European Convention that reads as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.”

⁷⁵ See section 24(5), which deals with the penalties imposed by a disciplinary official.

⁷⁶ See *Campbell and Fell v United Kingdom* at para 69;

“However, the guarantee of a fair hearing, which is the aim of Art 6, is one of the fundamental principles of any democratic society, within the meaning of the Convention (see the Golder J judgment...) As the Golder Judgement shows, justice cannot stop at the prison gate and there is, in appropriate cases, no warrant for depriving inmates of the safeguards of Art 6.”

⁷⁷ In the UK the adjudicators are district judges who visit the prisons on a regular basis and similarly such duty could be exercised by the district court magistrates in the district of the prison.

same time such process would ensure that any detention in isolation for the purposes of punishment will be restricted to those deserving of such punishment.

It should never be overlooked that a guilty finding has severe implications for the prisoner and when sentenced to restricted confinement the finding can impact on his/her consideration of parole. Ultimately this could make the difference between early release or extended incarceration, should the prisoner be found in contravention of the prison discipline.⁷⁸

The Commission is therefore not convinced that the safeguard in terms of section 25 goes far enough. Whilst the finding has to be reviewed by the Inspecting Judge when a prisoner is sent to isolation to confirm the finding of solitary before the prisoner is placed in solitary confinement, the likelihood is that a member, not legally trained, would have presided in the matter, drafted the record and given his view of what transpired on the day. Independence is compromised by the procedural provisions of the Act. The mischief, which the 1998 Act sought to remedy, will thus not be remedied because the Office of the Inspecting Judge will still be reviewing a document where the disciplinary official has an opportunity to favour the case of the Department. Simply put, it would be like sending criminal matters on review to the High Court in instances where the South African Police had been the judge, jury and the prosecutor. Thus, the necessity for an independent adjudicator, a proper transcript of the hearing, or even a handwritten transcript by an independent person who would act as secretary of the disciplinary tribunal, can never be over-emphasised in a case which could have serious implications for the transgressor. The evidence before the Commission, however, supports that officials have very little regard to any statutory provisions.

⁷⁸ See *Ezeh and Connors v United Kingdom* (2004) 39 E.H.R.R.1 and when a disciplinary hearing would be labeled as a criminal charge.

7. SHORTENING OF VISITS

There is a bigger problem regarding visits, as they are either abused in that prisoners have to pay for visits, or they are deliberately shortened for no apparent reason. Sometimes they are shortened because the members want to attend to their personal affairs and thus do not have time to sit most of the day on Saturdays to allow prisoners to get their visits.

Before evaluating the evidence presented to the Commission regarding the extra special visits, the Commission wishes to comment on other disturbing evidence that emerged at these hearings regarding prison authorities unilaterally shortening the visiting time that inmates are entitled to.

In this regard, the Commission heard the evidence of the prisoner, Mr David Nkuna, who testified that this practice was commonplace at Leeuwkop Maximum Prison.⁷⁹ Instead of receiving their full quota of forty five (45) minutes per visit as they are entitled to, prisoners were only allowed a visit of ten (10) minutes. The shortening of the visiting time is largely due to the prison authorities attempting to accommodate the large number of prisoners receiving visits on any particular day.

From what has been heard by the Commission, the problem is not only confined to Leeuwkop Prison. On 12 August 2003, the Commission heard the evidence of Mr T. Tana, the Head of Medium A Prison, Johannesburg, who admitted that prisoners at Johannesburg Prison also only enjoy visits of five (5) to ten (10) minutes, due to the prison being overcrowded. Mr Tana admitted that the Departmental Orders governing the duration of prisoners' visits were not being adhered to. He attempted to justify the infringement of the privileges of prisoners

⁷⁹ See Leeuwkop transcript 17 June 2003, at pages 2 744-2 745.

on the grounds of the prison being overcrowded and that the Department does not have enough personnel to supervise these visits.

It is essential that prisoners have the full benefit of contact with their families and friends and prison authorities depriving prisoners of their full visiting time is clearly not in accordance with the Department's policy and is also inhumane and unconstitutional.

Imprisonment is a harsh and humiliating experience with inmates being deprived of their liberty and many of their fundamental rights. The right to receive visits from family and friends in these desperate circumstances is surely one of the few cherished rights and privileges that any inmate clings to and relies on to maintain his family ties during incarceration. Such visits represent hope and surely have a positive rehabilitating effect on the inmate. They represent the hope of eventual freedom and a return to a normal life in society. Tampering with this right by the Department could result in serious and dangerous consequences.

Whilst it is recognised that overcrowding remains a huge challenge facing the Department, the Commission would expect the Department continuously to explore alternative and innovative ways to address the problem. The B Orders clearly authorise Heads of Prison to allocate "more than one" weekday to alleviate visit-congestion over weekends.

The Department should investigate and address this problem as soon as possible.

8. NUTRITION

The Commission has heard numerous complaints from prisoners in almost every Management Area regarding the fact that they do not receive three meals every

day, that warders eat the food that is intended for them,⁸⁰ that they seldom get sufficient meat and so forth.

In its earlier reports the Commission has acknowledged the fact that food is an important commodity inside the prison and that it is used as a commodity not only by prisoners but also members. Internal corruption was ultimately exposed in Grootvlei Prison where a number of members augmented their income by selling chickens to the prisoners.⁸¹ The only reasonable inference that we could draw from the facts is that if the intended food gets sold then there would be a shortage of food that should have been served for prisoners and that such corruption impacts on the nutritional value of the food served to prisoners. To add to the dilemma, prisoners work in the kitchens and they also contribute to the corruption by smuggling the food out of the kitchen and selling it to their fellow inmates. In some Management Areas like Pretoria Central prisoners dish out the food to the prisoners in the cells, so even if they do not work in the kitchen they work with the food and once more have control over it and have opportunities to favour some prisoners above others. This works to the detriment of the health of some prisoners. There can hardly be a right more basic than the right to nutritional food for everyone and that includes prisoners.

The 1998 Act recognises the importance of proper nutrition in terms of section 8 that provides as follows:

- (a) Each prisoner must be provided with an adequate diet to promote good health, as prescribed in the regulations.
- (b) Such diet must make provision for the nutritional requirements of children, pregnant women and any other category of prisoners whose physical condition requires a special diet.
- (c) Where reasonably practicable, dietary regulations must take into account religious requirements and cultural preferences.

⁸⁰ See chapter dealing with the Theft of Prisoners' Food at the Pretoria Management Area.

⁸¹ For more details see the Fifth Interim Report.

- (d) The medical officer may order a variation in the prescribed diet for a prisoner and the intervals at which the food is served, when such a variation is required for medical reasons.
- (e) 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.
- (f) Clean drinking water must be available to every prisoner.

The supply of food is a well developed industry in South Africa. It requires special skills and training and its focus is on the supply of nutritional food, whether the supply is to an airline, hospital or business. The focus of the Department and its members should be on its core functions, namely securing prisons and rehabilitating prisoners. In outsourcing the supply of food the Department can combat corruption on two levels. Firstly, it can get rid of its kitchens which have been rated by prisoners as the most corrupt places in any prison. Secondly, the Department will have time to focus on its core business since the responsibility to give prisoners food on time and to ensure that the food meets the necessary nutritional norms, will no longer rest with the Department but with the company that takes care of the food supply. The members who work in the kitchen could then be utilised in other areas where they are better trained.

The Department could also address overcrowding by outsourcing the kitchens. If the Department is innovative it will assign some space to the outsource company where the food will be delivered and then use whatever space that is no longer needed, like store rooms, dining halls etc, to make room for prisoners. The Commission has heard evidence that at some prisons, prisoners do not use the dining halls at all because of internal management problems.⁸²

⁸² See the evidence of Mr Motsepe at the Pretoria Management Area as per transcript pages 3 143-3 144.

The Commission is aware that the Department has embarked on a programme to outsource its kitchens in some areas. These programmes are only pilot programmes to determine the success of outsourcing the supply of food. The Commission did not investigate the viability of these programmes, but is of the opinion that by outsourcing the supply of food, members will be able to free up their time to take care of other duties and hence alleviate the burden on their colleagues that is caused by overcrowding. Whilst outsourcing can hold benefits for the Department on a number of levels, the Commission is mindful that such recommendation can only be accepted once a proper cost analysis is done, taking into account the cost and the responsibilities that the supply of food holds for the Department as opposed to the cost of an outside catering company supplying and making the food.

It is also clear that the Department is not acting in accordance with section 8 of the 1998 Act since at most prisons only two meals are served and this means that prisoners receive their lunch and their supper at once. If one takes into account that lunch is served between 12h00 and 13h00, then it means that in some cases eighteen (18) hours have elapsed between the meals, a situation that is untenable and inhuman.

9. FINDINGS

9.1 Solitary Confinement

The Commission finds that the Department uses *de facto* solitary confinement without adhering to the safeguards of the Act, which has severe implications for the psychological well-being of prisoners. Having considered all the evidence and the trauma suffered by prisoners detained involuntarily in isolation once convicted for a disciplinary transgression, the Commission can find no justification for such detention other than that the objective is to punish prisoners

who transgress the rules of the prison. To allow the use of mechanical constraints when a prisoner has attempted to escape and then been placed in isolation is inhuman and reduces the person subjected to such constraints to the level of a hobbled animal.⁸³

Solitary confinement has a shameful past in South African history. The Commission recommends that the concept of solitary confinement be abandoned in order to recognise the trauma suffered by so many who were detained in this way. In its place the Commission recommends that the term “restricted confinement” be used, but that it may only be ordered in very serious disciplinary cases. It should be subjected to strict monitoring to ensure that it is not abused.

9.2 Super-Maximum Prisons

The Commission finds that institutions like Pretoria C-Max Prison are institutions of torture and further punishment of inmates.

- (a) Correction and rehabilitation are not possible in an institution like Pretoria C-Max Prison.
- (b) These institutions are designed to break down the spirit of prisoners and make them suffer.
- (c) These institutions cannot be justified in terms of the Constitution, the Correctional Services Act, the Regulations or the policies of the Department of Correctional Services.
- (d) These institutions are not consistent with the basic common law right of prisoners to be released with their physical and mental health unimpaired.
- (e) The Commission has found that in various Management Areas, escapes of prisoners are a result of either negligence or corruption of members and

⁸³ See *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 2000 (6) BCLR 671 (Nms) where the court had to make a value judgment on the use of leg irons or chains, and declared such use unconstitutional.

therefore these institutions cannot be justified on the grounds of safety and security of prisoners.

- (f) The safety and security of maximum prisoners can be adequately achieved in ordinary maximum prison centers.
- (g) Prisoners incarcerated in these institutions are subjected to indefinite solitary confinement, contrary to the Department's policy.

9.3 Admission Criteria for Super-Maximum Prisons

In this report, the Commission deals with the criteria for admission of prisoners to C-Max Prison. The Commission would like to make the following comments in respect of criteria No. 1 and No. 6:

- (a) With regard to criterion No. 1, it is clear that the juvenile who was found by Ms Goodenough at C-Max Prison was there notwithstanding the fact that he had been sentenced to a shorter period than twenty (20) years. The question then is, why was the juvenile at C-Max Prison contrary to the Department's own policies and directives.
- (b) The Department has a problem with gangsterism, which it does not convincingly deal with in its White Paper.⁸⁴ This is notwithstanding the fact that it is a major problem, which is affecting the functioning of the Department in general. The question then is, why are the gang leaders still in the various prisons and why are they not at C-Max, if C-Max was meant to achieve what the Department purported to be the intention at the time of establishing the prison? The gang leaders are known to the various Heads of Prisons. Some of the Heads even told the Commission that they have regular meetings with the gang leaders to try and achieve peace within the prisons.

⁸⁴ See Chapter on Gangs for more details.

- (c) The majority of the prisoners who were at C-Max at the time when the Commission investigators were there, were prisoners who had either escaped or assaulted DCS officials. The likelihood is that C-Max Prison is being used as a form of punishment for those who attack officials. The Commission finds that all evidence points to the fact that it is not used to correct general bad behaviour within our prisons.

10. RECOMMENDATIONS

10.1 Dirty Linen

Prisoners should under no circumstances be required to wash contaminated and dirty linen in prison hospitals. This puts them at a very high risk of contracting various diseases. It is accordingly recommended, that this practice cease with immediate effect and the Department is directed to provide a laundry service in all its prison hospitals, including Leeuwkop Maximum Hospital.

10.2 Prisoners' Disciplinary Tribunals

The Department should give serious consideration to setting up a disciplinary procedure for prisoners, which will recognise their Constitutional rights and also the rights of natural justice including:

- the right to call witnesses;
- the right to cross-examine witnesses;
- the right to be assisted/represented, at least, by another prisoner;
- the right of appeal or review;
- the reasons for the judgments or decisions, which are given against them;
- the right to be tried in an open hearing where fellow prisoners and members of the prisoner's family may be allowed, provided that security

permits it. In cases where security prevails, the right to have the decision of the disciplinary tribunal be made public.

10.2.1 Re-training of Warders

The Department should give serious consideration to the re-training of the warders, in the following:

- The Constitution and human rights culture;
- Conflict resolution skills;
- Chairing and prosecuting in the Prisoners' Tribunals.

10.2.2 Amendment of Legislation

The Department should give serious consideration to changing the existing procedures as prescribed by the 1998 Act since the likelihood exists that some provisions will not pass constitutional muster. It is therefore recommended that section 24 of the 1998 Act be amended as follows:

- (1) Disciplinary hearings must be fair and may be conducted either by a disciplinary official, a Head of Prison or an adjudicator in serious cases of discipline, who will be either a magistrate or any legal practitioner.

- (2)
 - (a) A hearing before a Head of Prison may be conducted informally.
 - (b) At such hearing the prisoner must be informed of the allegation against him or her, whereupon the prisoner has the right to refute the allegation.
 - (c) The proceedings of a hearing contemplated in paragraph (a) must be recorded in writing.

- (3) Where the hearing takes place before the Head of Prison the following penalties may be imposed severally or in the alternative:
- (a) a reprimand;
 - (b) a loss of gratuity for a period not exceeding one (1) month;
 - (c) restriction of amenities for a period not exceeding seven (7) days.
- (4) At a hearing before a disciplinary official or an adjudicator a prisoner-
- (a) must be informed of the allegation in writing;
 - (b) has the right to be present throughout the hearing, but the disciplinary official may order that the accused prisoner be removed and that the hearing continue in his or her absence if, during the hearing, the accused prisoner acts in such a way as to make the continuation of the hearing in his or her presence impracticable;
 - (c) has the right to be heard, to cross-examine and to call witnesses;
 - (d) has the right to be represented by a legal practitioner of his or her choice at his or her own expense, unless a request to be represented by a particular legal practitioner would cause an unreasonable delay in the finalisation of the hearing in which case the prisoner may be instructed to obtain the services of another legal practitioner; and
 - (e) has the right to be given reasons for the decision.
- (5) (a) Serious disciplinary transgressions may only be heard by an adjudicator.
- (b) The Commission determines whether a charge is serious.
 - (c) The Commissioner must refer a serious transgression

to the adjudicator within twenty eight (28) days of the alleged infringement.

- (d) At a hearing before an adjudicator a prisoner has the right to be legally represented.
- (6) Where the hearing takes place before a disciplinary official, the following penalties may be imposed severally or in the alternative:
- (a) a reprimand;
 - (b) a loss of gratuity for a period not exceeding two (2) months;
 - (c) restriction of amenities not exceeding forty two (42) days.
- (7) Where the hearing takes place before an adjudicator, the following penalties may be imposed severally or in the alternative:
- (a) a reprimand;
 - (b) a loss of gratuity for a period not exceeding two (2) months;
 - (c) restriction of amenities not exceeding forty two (42) days;
 - (d) in the case of very serious infringement, restricted detention for a period not exceeding thirty (30) days.
- (8) The penalties referred to in subsections (3), (6) and (7) may be suspended for such period and on such conditions as the presiding officer of the tribunal deems fit.
- (9) (a) At the request of the offender proceedings resulting in any penalty other than segregated confinement must be referred for review to the Commissioner.
- (b) The Commissioner may confirm or set aside the decision or penalty and substitute it with an appropriate order.

The Commission recommends that the term “solitary confinement” be deleted from the 1998 Act. It is recommended that the term be replaced throughout the Act with the term “restricted detention.”

10.2.3 Appeal or Review Committee

The Commission recommends that a Committee be set up in each Province or Management Area under the Chairmanship of the Inspecting Judge or his nominee to act as an Appeal or Review Committee in respect of transgressions by prisoners.

10.3 Segregation

It is recommended that section 30 be amended to read as follows:

- (1) Segregation of a prisoner for a period of time, which may be for part of or the whole day and which may include detention in a single cell, other than normal accommodation in a single cell as contemplated in section 7 (2) (e), is permissible-
 - (a) upon the written request of a prisoner;
 - (b) to give effect to the penalty of the restriction of amenities imposed in terms of section 24 (3) (c) or (6) (c) to the extent necessary to achieve this objective;
 - (c) if such detention is prescribed by the medical officer on medical grounds;
 - (d) when a prisoner displays violence or is threatened with violence;
 - (e) if a prisoner has been recaptured after escape and there is a reasonable suspicion that such prisoner will again escape or attempt to escape; and

- (f) if at the request of the South African Police Service, the Head of Prison considers that it is in the interests of the administration of justice.
- (2) (a) A prisoner who is segregated in terms of subsection (1) (b) to (f)-
 - (i) must be visited by a correctional official at least once every four (4) hours and by the Head of Prison at least once a day; and
 - (ii) must have his or her health assessed by a registered nurse, psychologist or a medical officer at least once a day.
 - (b) Segregation must be discontinued if the registered nurse, psychologist or medical officer determines that it poses a threat to the health of the prisoner.
- (3) A request for segregation in terms of subsection (1) (a) may be withdrawn at any time.
 - (4) Segregation in terms of subsection (1) (c) to (f) may only be enforced for the minimum period that is necessary and this period may not, subject to the provisions of subsection (5), exceed seven (7) days.
 - (5) If the Head of Prison believes that it is necessary to extend the period of segregation in terms of subsection (1) (c) to (f) and if the medical officer or psychologist certifies that such an extension would not be harmful to the health of the prisoner, he or she may, with the permission of the Inspecting Judge, extend the period of segregation for a period not exceeding thirty (30) days.

- (6) All instances of segregation and extended segregation must be reported immediately by the Head of Prison to the Area Manager and to the Inspecting Judge.
- (7) (a) A prisoner who is subjected to segregation must be advised of his right to refer the matter to the Inspecting Judge to be reviewed immediately when taken into segregation.
- (b) A prisoner who is subjected to segregation may refer the matter to the Inspecting Judge who must decide thereon within seventy two (72) hours after receipt thereof.
- (8) Segregation must be for the minimum period, and place the minimum restrictions on the prisoner, compatible with the purpose for which the prisoner is being segregated.
- (9) Except in so far as it may be necessary in terms of subsection (1) (b) segregation may never be ordered as a form of punishment or disciplinary measure.

10.4 Overall Recommendations

Accordingly, the Commission makes the following recommendations:

1. The admission criteria and the rules covering prisoners at Pretoria C-Max Prison and Kokstad Maximum Security Prison should no longer be utilised in their present form.
2. The incarceration of inmates at these institutions in their present form should cease to exist.
3. The policies governing these institutions should be upgraded by the Department to be brought in line with ordinary Maximum Prisons as they exist in various management areas.

10.5 Short-Term Recommendations

1. The Department should ensure that in sending people to restricted detention and/or segregation to Super Max Prisons that it complies with its own regulations in that there is a proper medical evaluation as to whether the person can survive the detention in segregation, as anticipated in terms of the Act.
2. A proper record of all people sent to isolation in the C-Max Prison should be kept and proper reasons recorded and the provisions of the Act, which are applicable, be recorded.
3. The circumstances of the juvenile who was sent to C-Max should be investigated and the officials who abused their powers, should be charged accordingly.
4. The Department should review the cases of all the prisoners who are currently at C-Max to see:
 - (a) whether there was full compliance with the rules and regulations in terms of proper hearings, prior to sending them to C-Max;
 - (b) the reason for sending them there;
 - (c) the duration of their incarceration; and
 - (d) whether there is medical evidence to indicate that the said inmates could withstand incarceration at C-Max.

The Inspecting Judge should confirm the above review.

10.6 Nutrition

It is recommended that the current practice of serving three (3) meals at two (2) specified times be ceased and that prisoners be served as specified by the 1998 Act.

It is recommended that the Department as a matter of urgency do an analysis of the costs and benefits of outsourcing the supply of food since the Department lacks the necessary capacity to comply with the supply of food.