

## **CHAPTER 8**

# **SEXUAL VIOLENCE IN PRISONS**

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## CHAPTER 8

### SEXUAL VIOLENCE IN PRISONS

#### 1. INTRODUCTION

This Chapter highlights the horrific scourge of sexual violence that plagues our Prisons where appalling abuses and acts of sexual perversion are perpetrated on helpless and unprotected prisoners. In dealing with the subject, the Commission will examine the factors that contribute to such sexual violence, the treatment meted out to prisoners (sentenced and awaiting trial) who have been sexually abused, the existing policies within the Department dealing with such abuses and the vulnerability of gay and transsexual Prisoners.

The Commission, during its hearings in Pretoria, heard the testimony of a number of victims of sexual abuse<sup>1</sup> at Prisons situated in the Pretoria Management Area. The testimony of one particular sexual victim showed that sexual violence in Prison remains a huge problem confronting the Department. This witness described in detail the abuses that he had suffered and the Commission will deal with this witness's evidence in greater depth in order to demonstrate the shortcomings in the system as well as the Department's failure to render assistance to this Prisoner during his eighteen (18) months' incarceration at Pretoria Local Prison.

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<sup>1</sup> The Commission would have felt much more comfortable to refer to these abuses as rapes but at the time of writing this report, rape was still defined as "a male having unlawful and intentional sexual intercourse with a female without her consent." See Snyman Criminal Law (1995) at page 424. This traditional definition emphasises clearly the notion that a man cannot be raped, whilst most cases heard showed that male rape is a reality and that rape is as bad for a male as it is for a female.

The evidence of the victims who testified before the Commission underlined the fact that sex is nothing more than a tradeable commodity in Prison and that vulnerable, young Prisoners become mere possessions or sex slaves whilst incarcerated. Prison warders sell them to the highest bidder despite the fact that they are dependent on these very same Prison warders to secure their safety whilst in Prison.

Furthermore, the transmission of HIV<sup>2</sup> exacerbates the Department's problems because this dreaded epidemic impacts both on the Prison community and on the society at large. prisoners do not remain incarcerated forever and at the end of their sentences are again reintroduced into, and accommodated in, the wider society. This crisis dictates that the Department act vigorously to address the problem or face the domino consequences of its lack of action, as its failure to combat effectively the transmission of HIV within the Prison is likely to result in such infections contributing and/or spreading to the outside community.<sup>3</sup>

The evidence given to the Commission mainly by gay and transsexual prisoners also showed that homophobia is alive and very real amongst the Prison warders whose prejudice impacted negatively on how they treated prisoners who are sexually abused by their co-inmates. This was more prevalent in cases where the victims who complain are gay.

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<sup>2</sup> Human Immune Deficiency Viral Infection commonly known as HIV and also internationally recognised as the cause of Aids (Acquired Immune Deficiency Syndrome).

<sup>3</sup> Statistics show that 40% of Prisoners are incarcerated for less than one (1) year and that an average 25 000 Prisoners are released from Prison every month. Consequently, 300 000 Prisoners return to the community each year. If they are infected, whilst in Prison, then they bring their infections with them. Undoubtedly, the risk of HIV in Prison does not remain in Prison but impacts on people outside the Prison. See K.C Goyer "Prison Health is Public Health" *SA Crime Quarterly* (2002) at page 1.

The imprisonment of Karp<sup>4</sup> caused particularly interesting challenges to the Department. Karp explained that he is a woman trapped in a man's body and described himself very aptly as being "a woman mentally and at heart, but physically a man". In appearance, Karp presents himself as a woman and at all times wants to be recognised as a "woman". Karp appeared to the Commission to be confident about his distinctive sexuality and it was no doubt this confidence that led to numerous clashes with the members, who were uncomfortable with Karp's presence in the male Prison.

Another factor that added to the vulnerability of prisoners in general and placed them at risk of being sexually abused in Prison was the fact that our Prisons are completely overcrowded.<sup>5</sup> prisoners are forced to share beds and the resultant close proximity of Prisoners creates ample opportunity for sexual abuse to take place. The statistics relating to overcrowding show that there are more unsentenced Prisoners in the different Management Areas than sentenced Prisoners. The number of Prisoners who are accommodated in a cell, in some Management Areas, exceeds the norm for which such a cell is designed by anything between 200% and 400%.

The sexual abuses at Pretoria Local Prison also compelled the Commission to focus on a related issue: the slow process of finalising criminal cases emanating from the Prisons through the criminal justice system. The undue delay in finalising these matters results in prisoners being detained for longer periods than is normally necessary, which only increases the potential of them being subjected to some form of abuse at some time. Examining the matter of the prisoner, Karp, the facts, as they were presented to the Commission, indicated that Karp was in detention on a charge of motor vehicle theft after his former lover had laid a

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<sup>4</sup> Although Karp identifies himself as a woman in every respect, the legal definition of his gender defines him as a male. While the Commission would have preferred to have respected Karp's own identity of himself as a woman, because of the legal nature of this report, the Commission is compelled to refer to Karp throughout this report as a male. This is done without any intent to disrespect Karp's own self-definition.

<sup>5</sup> See the Chapter on Overcrowding for more details.

charge of illegal use of a motor vehicle without the owner's permission, which was then changed to a charge of theft of a motor vehicle. There was nothing particularly complex about the case nor did there appear to be any reason for the delay and yet the prisoner was detained for eighteen (18) months before the matter was heard and finalised.

In theory, the conditions for unsentenced prisoners should be better than those of sentenced prisoners since they are not yet convicted of any offence and should be entitled to be presumed innocent by law.<sup>6</sup> However, when the Department's policies are discussed and the procedures the Department applies are examined, it will become clear that unsentenced prisoners in South Africa have far fewer rights inside the Prison than sentenced prisoners. The inequality will be shown in a comparative analysis of the policies that apply to sentenced and unsentenced prisoners who fall victim to sexual abuse.

Through the discussion in this Chapter, it will also be shown that unless the Department takes decisive action, the basic human rights enshrined in the 1996 Constitution<sup>7</sup> are likely to have no meaning to prisoners who are sexually abused in Prison. It will also need to be considered whether the detention of prisoners under the circumstances that will be sketched in this Chapter really conform to the guarantees as stipulated in the Constitution. More so, whether the detention conforms with Section 35 (2)(e) of the Constitution, which provides as follows:

*“Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise, and the provision, at State expense, of*

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<sup>6</sup> See section 35(3)(h) of the 1996 Constitution, which provides:

*“Every accused person has a right to a fair trial which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings.”*

<sup>7</sup> The Constitution of the Republic of South Africa, Act No. 108 of 1996, which is referred to in this report as “the Constitution”.

*adequate accommodation, nutrition, reading materials and medical treatment.”*

It needs to be noted too that warders who fail in their duty to protect the physical integrity of the detainees, contravene section 12(1) and (2) of the Constitution, which provides that prisoners will be free from all forms of violence, both public and private.

The Correctional Services Act<sup>8</sup> provides specifically in section 2 of the Act that:

*“The purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by-*

- (a) enforcing sentences of the courts in the manner prescribed by this Act;*
- (b) detaining all prisoners in safe custody whilst ensuring their human dignity; and*
- (c) promoting the social responsibility and human development of all prisoners and persons subject to community corrections.”*

As the evidence discussed in this Chapter will indicate, there was a shocking lack of empathy and sensitivity by some members of the Department for the Prisoner, Karp, when a fellow inmate sexually abused him. Instead of the perpetrator of this vile deed being punished, it was Karp instead who was put in the isolation cells, ostensibly for his own protection, while the Head of Prison left the offender in his cell to mingle, without any restriction, with his fellow prisoners. It will also be shown that the case of Karp is not unique. In fact, the number of cases the Commission heard all point to the fact that sexual abuse in South African Prisons is rife and that sexual abuses should be curbed in order to uphold the basic rights of those in detention.

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<sup>8</sup> Act No. 111 of 1998.

From the evidence, it appears that Karp suffered most at the hands of members working at Pretoria Local Prison and suffered many kinds of abuse during incarceration of eighteen (18) months at Pretoria Local Prison. Karp gave testimony regarding the things that had happened during this incarceration and stated that it would be a lifelong haunting experience. It is evident from the evidence of the Chief Psychologist of the Department, Dr Lorinda van der Bergh, that it is likely that Karp is right in the assumption that the circumstances will have a lifelong impact.

On admission, this Prisoner, even though Karp was presented as a woman, was treated no differently from any other male Prisoner. Despite Karp's unmistakable female physical appearances that rendered him extremely vulnerable in any male Prison cell, no special arrangements were made to separate him from the others, pending further investigation into his sexual orientation. It was the testimony of Karp that no one even asked about Karp's sexual orientation despite the way it was outwardly presented. In fact, the only questions that were put to Karp on admission were questions pertaining to religion and home address. Karp spent the first night in the court cells, which are locally known amongst the inmates as "Marabastad", and it was here that one of the first things that was observed was the filthy state of the cell. Even though Karp was an awaiting trial Prisoner, supposedly cloaked with the presumption of innocence, he was exposed to a filthy cell with insufficient bedding for the number of inmates present to sleep on. Such was the bedding arrangement, or the absence thereof, that Karp had to sleep on the concrete floor in the corner near the ablutions.

## **2. HEALTH PROCEDURES AND POLICIES**

The Commission also gained some insight into the prevailing health policies of the Department when the evidence of Ms Kasluto Maria Mabena, the Director:

Health and Physical Care in the Department, was presented. Ms Mabena testified that she is responsible for the drafting of the health policies of the Department and for the health Service the Department provides. She was thus more than adequately qualified to comment on the procedures and applicable policies that exist in the Department in dealing with victims of sexual violence and Prisoners who have been exposed to possible HIV transmission.

She admitted during her testimony that what is lacking in the system regarding the implementation of policies is that there is, at present, no way of checking whether the doctors the Department uses are aware of the existing policies in the Department of Correctional Services. Furthermore, the Department of Health appoints the doctors in Gauteng and when such doctors are allocated to certain divisions within the Department, it is accepted that they would have been orientated regarding the policies.

Ms Mabena considered the policies of the Department contained in the 'B' Orders as the most important policies applicable in dealing with matters of sexual violence. She referred the Commission to Chapter 4 of the 'B' Orders in particular, which provides for assaults and injuries in general but then makes specific provision, in terms of Clause 5 of Chapter 4, for sexual assault. The following is stated regarding the procedure after a sexual assault has occurred:

- “1. The incident is reported to the responsible registered nurse by the Prisoner or the official;*
- 2. The registered nurse interviews the complainant in privacy;*
- 2. The examination and treatment of the Prisoner shall not be delayed two hours after being reported;*
- 3. In the absence of the Medical Officer/Practitioner such cases shall be referred to the provincial hospital after receiving the patient's consent (a standard form should be designed);*
- 4. No Prisoner shall be turned away from the Prison clinic;*

5. *Care should be taken not to interfere with the evidence as it appears on the complainant e.g. bloodstains, semen stains, tears, abrasions, etc.;*
6. *Procedure as for injuries and assaults becomes applicable – (including reporting to the Head of Prison);*
7. *In case of a minor (under 14 years of age) the child protection unit of the South African Police Service must be contacted for further investigations (within 12 hours) by the Head of the Prison;*
8. *The sexual assault survivor is to be referred to the multi-disciplinary approach team for further management;*
9. *Prisoners and officials must be sensitised on a monthly basis on sexual assaults and this should be recorded in the Division Head: Nursing Service' and Head of the Prison's diaries."*

From this specific policy, it is clear that none of the sexual assault victims who testified before the Commission was given the treatment the policy envisages. What is apparent is that the Department's well-designed policies relating to sexual abuse will remain meaningless pieces of paper unless such policies are properly communicated, implemented and adhered to.

The Commission has heard evidence over and over again, as early as the Cape Town hearings during 2003, that some of the warders consider the policies of the Department to be merely pieces of paper.<sup>9</sup> Therefore it is of vital importance for the proper functioning of the Department that all policies be properly distributed by the Department to subordinate levels. It should not be too difficult for the Department to have a plan of action to ensure that all its policies, particularly those recently amended, are made known to each and every member working at the Prisons. Furthermore, written acknowledgement should be obtained from the

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<sup>9</sup> See Cape Town transcript dated 25 February 2003 when Mr Theron, a member of the Department, acknowledged publicly that members regard some policies as mere "pieces of paper".

members, who have to implement such policies, together with some form of monitoring to ensure implementation thereof. In this way, the Department will be in a position at all times to act fearlessly against those who have transgressed these policies, leaving no excuses for non-compliance with these policies. Such action on behalf of the Department will be pro-active and will address the issue of members raising lack of knowledge as a defence on a charge of non-compliance with Departmental policies.

With regard to the Department's policy of sexual assaults, it is clear that it is designed to assist a Prisoner who has to deal with the physical and emotional trauma as best as he/she can in any Prison environment. However, when these policies are not complied with, such assistance becomes non-existent.

The Department's policy with regard to management strategy and Aids in the Prisons was also handed in and marked as Exhibit "TT8". This document has been in operation since 14 October 2002. Those sections, which are relevant to matters of sexual assault in Prison and the way Prisoners should be treated in such circumstances, will be discussed.

The policy provides particularly for cases where there is non-consensual (coercive) sex amongst Prisoners and we quote as follows:

**"6.11. NON-CONSENSUAL (COERCIVE) SEX AMONG PRISONERS"**

- *All officials and Prisoners must be sensitised on admission and on a continuous basis about the existence of sex between same sexed persons in Prison.*
- *Both Prisoners and personnel must be sensitised about the dangers of unprotected sex, violation of human rights and the criminalisation of non-consensual (coercive) sex.*

- *All rapes and coercive sex must be reported and be investigated.*
- *Prisoners must be empowered to protect themselves from rapes, coercive sex and abuse by fellow Prisoners.*
- *Sodomy and rapes should be managed according to Departmental protocols.*
- *The victim must receive medical intervention and counselling according to Departmental protocols.*
- *Anti-retroviral medication for rape and coercive sex shall be provided in keeping with Department of Health protocols and policies.” (Own emphasis)*

When the policy, which is applicable to coercive sexual acts inside the Prison, is considered, it is abundantly clear that sexual victims must receive medical intervention and counselling when they have been sexually abused. Despite the fact that policies are in place, it is clear from the cases heard that members from the different health sectors, be they nurses or doctors, do not adhere to it. It is therefore necessary to address non-compliance by instituting disciplinary action against professional staff. However, the Department would only be in a position to act with force against these transgressors if it were pro-active in ensuring that a proper system of disseminating the policy information to different members of the health sector is in place.

It is imperative that, in order to deliver a service to Prisoners who are sexually abused, members of the health profession should adhere to the existing policies of the Department. Without adherence, these policies are truly meaningless and serve no purpose at all.

**“6.12 PROMOTION OF THE RIGHTS OF PRISONERS AND PERSONNEL TO PROTECTION**

- *The observance of human rights is critical for the protection of the vulnerable.*
- *Both Prisoners and personnel in all Prisons should be trained in human rights issues.*
- *Custodial staff must take responsibility for protecting Prisoners against sexual assaults by fellow Prisoners and to report the occurrence of such practices.*
- *All sexual assaults must be reported and recorded and criminal action taken against the perpetrators.*
- *Prisoners must be empowered to be able to protect themselves and fellow Prisoners through capacity building and the provision of information on legal mechanisms available to Prisoners.*
- *All Prisoners including HIV positive Prisoners have the right to privacy, bodily autonomy, integrity and safety and these and other rights shall be protected.” (Own emphasis.)*

It is interesting to note that, in terms of the abovementioned Aids policy of the Department, more specifically paragraph 6.9, the Department considers compliance as mandatory for all officials at all levels in the Department and for all Prisoners. However, if one considers the case of Karp and others, it is clear that, from the nurse to the custodial member to the Head of Prison, there was no compliance with the policy of the Department, despite the fact that the Department considers it mandatory that the policy is implemented.

Even though the Department has an Aids policy, the Department’s Director of Health and Physical Care handed in another document, which deals with the protocol for post-exposure prophylaxis. This however, will not be discussed, as it is merely a guideline and a working document, which was not yet in operation at the time of writing this report.

It is important that the Department, together with the Department of Health Service, consider a new protocol to address the treatment given to Prisoners, in order to combat the Aids epidemic in Prison.

### **3. SPECIFIC INCIDENTS PRETORIA: KARP**

As the testimony of Karp focused on some specific incidents, which implicated some of the warders working at the Pretoria Local Prison, it is necessary to briefly summarise some of these. These incidents will also highlight some of the shortcomings found in the Prison system in handling sexual violence.

#### **3.1 Sold For Sex**

The first incident the Commission wishes to deal with relates to the alleged sale of Karp to other inmates for the purposes of sex. According to the evidence of Karp, this incident occurred when required to share a bed with another Prisoner in a communal cell in G Block. On 18 May 2001, a warder, namely Mr Thokozani Nxumalo, took Karp and four (4) other Prisoners to a storeroom, which was located on the same floor where Karp was kept. The leader of the four (4) gave this warder an amount of cash. Shortly after the exchange of money took place, Karp was told to remove the goods belonging to him to the beds where the other four Prisoners were sleeping after which the Prisoners told Karp to sleep on the bottom part of the bunk bed. They also told Karp that from that day onwards, Karp would have to do their washing, cleaning and to obey any other instruction they gave him.

In the early hours of the morning of 19 May 2001, the other four (4) Prisoners woke Karp up and thereafter all four (4) of them penetrated him anally. Even though condoms are available in Prison, they were not used and Karp was severely injured by the conduct of these four (4) men.

During Karp's testimony, it became clear that he was extremely upset and disturbed by what had happened and struggled from time to time to keep composed on the witness stand. Karp explained that the incident was never reported to the authorities because the Prisoners threatened him that if Karp did so, then he would be "damaged beyond repair". As Karp believed that the perpetrators of this vile deed had the ability to carry out their threats, he chose rather to remain silent and, out of fear, never reported the matter.

The testimony of Karp was that there had been a close bond between the four (4) Prisoners and the warder, Mr Nxumalo. This was borne out by the fact that, on various occasions, Mr Nxumalo would bring them dagga, food and alcohol. He would pass these items to the inmates through the cell window.

### **3.2 Oral Sex With Warder**

Karp also testified regarding another shocking incident where four (4) Prisoners forced him to give oral sex to the warder, Mr Nxumalo, through a window. Karp graphically explained how fellow Prisoners pushed Karp's head against the opening of this window in order to fulfill the sexual needs of the warder, who was on the other side of the window. Shortly after having given this testimony, Karp emotionally broke down on the witness stand. It was obvious to the Commission that this whole experience was extremely traumatic and that Karp was still struggling to come to terms with it.

### **3.3 Rape**

This incident occurred on the 6 November 2002 after Karp had been told to move to Cell 14 in 'B' Section. On the day in question, Karp was doing some washing in the cell when another Prisoner, namely Mr Oupa Pahla, came into the cell. Mr Pahla then, by force, had sexual intercourse with Karp. Immediately after the incident, Karp reported the matter to Mr Desmond, who was one of the warders

in charge. Karp was then taken to two other officers, namely Messrs Mashali and Sibiya, who referred Karp to the clinic.

At the clinic, the nurse who saw Karp merely wrote down the details of the incident and thereafter Karp was sent back to the cell. Karp was never seen by a doctor nor medically attended to. In fact, the nurse never even offered to call the doctor but merely explained that the doctor's examination would only take place on the following day. The nurse did not take any swabs or run any tests. The nurse also never applied her mind to the fact that she was dealing with a sexual victim and clearly failed to offer any support or assistance to Karp as a sexual victim. She did not even offer to let the victim stay in the hospital in order that his psychological condition could be monitored throughout the night. In short, she did absolutely nothing to assist Karp. It was Karp who decided to keep the underwear, which was full of semen, and went back to the cell where he had a wash after the rape.

On the following day, Dr Kumari very briefly examined Karp. On Karp's version, such examination lasted no more than eight (8) seconds. The doctor asked Karp to stand at the bed and merely looked at the anal injury. He did not carry out any HIV tests nor did he offer any anti-retroviral treatment or counseling. In fact, the sum total of his medical effort in the matter was to merely note that it was a serious assault.

The ineptitude of the medical staff and the insensitivity with which they handled this matter left much to be desired. Karp's requests to the clinic nurse and Dr Kumari that an HIV test be conducted fell on deaf ears and they chose rather to do nothing about the matter. It was only three (3) weeks after the incident, on 26 November 2002, when Karp complained to an independent Prison visitor, that tests were conducted. Even then it appears that minimal effort by the medical personnel was the order of the day as Karp was then tested only for HIV and no other sexually transmitted diseases.

Prison officials' efforts to protect the Prisoner from further harm were ineffective or non-existent. It was rather the Prisoner Karp who took the initiative to ensure protection and asked one of the members, namely Mr van Zyl, whether they could move him to another cell so as to avoid having to face the perpetrator who had committed this foul deed. The general lack of empathy on the part of the Department in this matter can be seen from the fact that although Karp had initially reported the matter to the internal investigators. On 8 November 2002, the police did not arrive at the Prison until Monday, 11 November 2002, so that Karp could report the rape to them.

The conduct of the police who handled this matter as well as the challenges facing them when investigating criminal cases inside a closed environment like a Prison, will be discussed and examined later in this Chapter.

### **3.4 Post-Rape Treatment**

The Commission found the treatment meted out to Karp after the rape to be most alarming. It is shocking and beyond comprehension that any victim, who has experienced the harrowing trauma of sexual abuse, should be treated with so much insensitivity and contempt. A high level of professionalism is at all times expected from trained medical staff. The nurse, who was the first medical member to deal with the victim, was concerned more with the history and nature of the incident than with offering assistance to the victim. The doctor, at a later stage, also ignored the fact that the victim had been exposed to a potential HIV transmission. The conduct of officials of the Department also fell far short of the normal standards expected of officials exercising a custodian function over inmates. A far more supportive role could have been played, particularly by the staff member who escorted the victim back to the cell, who failed to offer any psychological assistance or intervention to the helpless victim. The final straw, however, was when the Head of Prison, Mr Baloyi, took a decision that was likely

to have a severe impact on the psychological well-being of any human being, let alone someone who had just been sexually abused, and moved this victim, supposedly for the victim's own protection, to the isolation cells. Under such circumstances, where an inmate has been exposed to severe trauma, such as enduring a sexual assault, the Head of Prison's decision to detain the victim in an isolation cell cannot be seen as either assistance or protection.

It cannot be emphasised enough how disturbing the conduct of the Head of Prison, in these given circumstances, was to the Commission. That such a senior official of the Department could make a decision to relocate a traumatised victim to an even more psychologically damaging environment, whilst the perpetrator remains in his safe and known environment, is beyond reason and understanding. It is commonly known that victims, like Karp, in these circumstances need the assistance and support of their fellow inmates and friends, in order to cope psychologically. The unsympathetic attitude of the members was best displayed when the victim was requested to furnish them with a written request for removal from the isolation cells and to state that Karp would take full responsibility for anything that would happen as a result of being released from the isolation cells. Clearly, victims who have just been sexually abused inside the Prison and who are under severe mental stress should not be forced to decide upon their fate. It is not unreasonable, only humane, to expect warders, senior members and Heads of Prison to treat every sexual victim with humanity and dignity after being sexually abused, especially when the protection of such inmates in the closed environment of a Prison lies squarely on their shoulders.

#### **4. SPECIFIC INCIDENTS: GROOTVLEI VICTIMS**

The Commission would fail in its duty if it did not also underline the suffering and trauma of the victims of the Grootvlei Prison. Most of the evidence of the

Grootvlei victims has been discussed and dealt with in the Fifth Interim Report.<sup>10</sup> Their pain and bad treatment was no less severe than that of Karp and others at the Pretoria Prison.

The young witness, Kenneth Busakwe, was, at the time of his detention, a juvenile who was detained at the special care section of the isolation cells at the Medium A Prison at Grootvlei. Mr Busakwe was a very brave young man who chose to tender his testimony in an open court because he wanted the whole world to know of the terrible abuses he suffered after two (2) inmates at the Grootvlei Prison had sodomised him. What makes this incident so distressing is the fact that Mr Busakwe went to the warder, Mr Sam Mohanoe, to report the fact that he had been sexually abused by two (2) of his fellow Prisoners. Instead of receiving comfort and protection, the warder, in whom he had put his trust and faith, also sodomised him. Mr Busakwe also testified about a number of abuses that followed after this warder had sodomised him for the first time.

The extent of sexual abuse is so rife that even witnesses who had themselves participated in such vile acts came forward and explained to the Commission how they got access to the other Prisoners and juveniles. In particular, a certain Mr Wilson Tebogo Mohodi, who was a Prisoner at Grootvlei Prison, testified that he worked as a cleaner in the Prison and hence had privileges and rights to move around freely. Warders opened the gates for Mr Mohodi and also brought juveniles to him when he asked for them because he had obtained the status of a cleaner and had a relationship of trust with these warders.

Besides having access to juveniles and certain illegal privileges, Mr Mohodi also explained to the Commission that the warder, Mr Mohanoe, ran a soccer club in the Prison and that Mr Mohanoe regularly called these young boys to his office to have sex with them. Sometimes Mr Mohodi would keep watch and observe how Mr Mohanoe would have sex with the juvenile Prisoners. In fact, the abuse went

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<sup>10</sup> See the Executive Summary of the Fifth Interim Report attached to this report.

further and on occasions this warder would ask him to bring a particular young Prisoner to him. After the warder had sexually abused the young boy, he would hand him over to Mr Mohodi to do with him whatever he wanted to do. This is the disgusting relationship that existed between Mr Mohodi, the young Prisoners and Mr Mohanoe, the warder.

The witnesses were consistent about the fact that none of these abuses would have taken place if it were not for the warders, who either abused them or constantly assisted the prisoners to abuse them. For example, Mr Joseph Rampano, a twenty (20) year old inmate, testified before the Commission that he played for the Pirates soccer team, which is composed of both juveniles and adults. He stated that one of the adult prisoners wanted him to be “his baby”. This particular prisoner, who was the chief cook in the kitchen, enticed him with food and sodomised him in the storeroom of the kitchen. The most disturbing fact is that Mr Rampano would never have gained access to the kitchen if it had not been for the warders who took him there and opened the gates for him. All the circumstances of this matter showed that the warders had full knowledge of what was going on. It also showed lack of commitment to stamp out sexual abuse.

As a result of the incestuous relationship that existed between warders and adult prisoners, the environment was not conducive for these young victims to report the sexual abuse.<sup>11</sup>

The Commission has already addressed the wrongful conduct of the officials and made certain specific recommendations in its Interim Report, particularly regarding the criminal and Departmental charges that should follow. Specific recommendations were also made regarding the movement of young prisoners in the Prison and the fact that a register should be kept of the prisoners being moved around in order for the members to be accountable. It was clear in the

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<sup>11</sup> See Fifth Interim Report for a more detailed account of all the sexual abuses and the number of witnesses that testified before the Commission.

cases dealt with in the Grootvlei matter that no proper record was kept when people were removed from their cells and taken to other cells. Without limiting their liberty of moving around in the Prison, it is essential that juvenile prisoners are at all times separated from the adult prisoners and the Department will have to take proper action to adhere to these rules.

## **5. PSYCHOLOGICAL SERVICE AVAILABLE TO SEXUALLY ABUSED VICTIMS IN PRISON**

The Commission also heard the evidence of an expert in the Department, Dr Lorinda van der Bergh, the Director of Psychological Service for the Department, who was most helpful in her assessment of the Karp matter at Pretoria Prison. She generously gave her time to the Commission by not only testifying but also by observing a part of the hearing to determine the psychological impact of these abuses on a specific victim, namely Karp. A full detailed report from Dr Van der Bergh was handed in as an exhibit to the Commission.<sup>12</sup>

In outlining the Service available to sexually abused victims in Prison, Dr Van der Bergh testified that social and psychological Service had to be provided to prisoners in order to develop, support and promote their social functioning and mental health.<sup>13</sup> Prisoners, particularly those who have been harmed or traumatised, can therefore utilise and benefit from any such support or psychological Service on offer.

Dr Van der Bergh indicated further that the Department also had to provide, as far as practicably possible, any other development and support programmes, which meet the specific needs of sentenced prisoners, which, regrettably, is the only category of prisoners who have the right to participate in such programmes.

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<sup>12</sup> See Pretoria hearings, Exhibit "TT6".

<sup>13</sup> See sections 2 and 31 of the Correctional Services Act.

Understandably, due to the lack of manpower and resources, it is not always practical to address the needs of all prisoners. The Correctional Services Act does, however, attempt to alleviate the consequences of this difficulty by extending the responsibility of the Department to inform inmates of their rights regarding development and support Service that are available outside the Prison environment. The relevant provisions in the Act read that:

*“When the Department does not provide such Service, the Commissioner must inform Prisoners of Service available from other sources and put Prisoners who request such Service in touch with the appropriate agencies.”<sup>14</sup>*

The Act furthermore provides that every Prisoner has the right to be examined by a medical practitioner of his or her choice and, subject to the approval of the Head of Prison, may be treated by such practitioner, in which event the Prisoner is personally liable for the cost of such consultation, examination, service or treatment.<sup>15</sup>

From Dr Van der Bergh's testimony, it clear that the Department accepts that when trauma occurs in a Prison context, the affected prisoners are in the care of the Department and that accordingly, it is the responsibility of the Department to deliver support Service to such affected Prisoners.

In order to determine whether there was adherence to the Department's policies, it is important to consider the Service the Department should have provided to a victim, like Karp, who was sexually abused, and to compare that with the treatment actually received. The comparison will clearly indicate whether the Department really failed in its duty to assist the sexual victim.

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<sup>14</sup> See section 16(2) of Correctional Services Act.

<sup>15</sup> See section 12(3) of the Correctional Services Act.

In carrying out this exercise, the Commission is again grateful for the expert opinion of Dr Van der Bergh, who assisted in drawing a comparison of the service that should have been offered and what was offered. The following extracts from her report are of relevance:

1. *“In the instance of Karp (or any other Prisoner in a similar situation), it is my opinion that it is the responsibility of the health care official (e.g. medical practitioner/nurse) who initially/first comes into contact with any Prisoner that has been sexually assaulted/sodomised/raped to refer the person to the psychologist/social worker immediately for counselling. If this is not done, the psychologist/social worker will be unaware of the incident or the Prisoner who might be in need of counselling.*
  
2. *There are a limited number of psychologists in the Department. Therefore, psychologists (if available) will only become aware of a need for counselling if:-*
  - 2.1 *The need is registered with them (by the medical practitioner, the head of the Prison, any other correctional official, professional, family member or friend)*
  - 2.2 *If a Prisoner/offender requests to see a psychologist himself/herself.*
  
3. *On the other hand, most Prisons have at least one social worker available that can attend to the counselling Service himself/herself or in turn refer the Prisoner to a psychologist.*
  
4. *It is evident from the information provided to me by the Jali Commission that Karp was severely traumatized while in Prison by Prisoners as well as correctional officials (“every time I think of it I*

*feel a storm of fear, sadness and emptiness all over again'). (See par. 7 at page 3).<sup>16</sup> The length of time involved – several months – already indicates that severe trauma occurred ('these four Prisoners raped me over a period of two months, regularly')(See par.12 at page 4). The trauma also included sexual harassment, victimisation, verbal or sexual abuse from officials as well as Prisoners. Being in close proximity to the rapist is also traumatising to any victim, which is confirmed by this Prisoner (See par.13.7 at page 10): 'it was a nightmare to look into his face every day'.*

5. *Karp reported many incidents to various persons without success, e.g. Section Heads (see paragraphs 12.3, 12.10), Assistant Heads of Prison (see paragraph 12.10), Heads of Prison (see paragraph 12.4) and no one attended to her plight. In my opinion, the Department failed this Prisoner as she received no support, assistance or any referral to a professional (e.g. psychologist or social worker) or Independent Prison Visitor (see section 21(5) Correctional Services Act).*
6. *Even though Karp was examined by a District Surgeon and the injuries were confirmed (see par. 12.11), she was again not referred to a social worker or psychologist ("I received no counselling or any assistance in this regard")(See par. 12.11 at page 9).*

Dr van der Bergh also expressly gave the Commission her opinion as to the trauma suffered by the victim, Karp, whilst incarcerated. She also listed the following, which she thought severely impacted on the trauma Karp suffered:

1. *"Her safety and human dignity was not ensured;*

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<sup>16</sup> The excerpts quoted by Dr van der Bergh are from Karp's affidavit, which was handed in as an exhibit.

2. *Prisoners raped her over a period of two (2) months and she came face to face with her rapists on a daily basis, which was humiliating and a nightmare every day;*
3. *Totally unacceptable behaviour from Correctional officials who should have protected and supported her as this is their duty;*
4. *The disrespectful, degrading and de-humanising manner in which she was treated;*
5. *Extreme physical and verbal abuse, harassment and victimization;*
6. *The length of time during which these abuses and traumatic events occurred;*
7. *She was forced to participate against her will and was rendered helpless (she could not get away from it as she was in a confined and restricted Prison environment);*
8. *The lack of support from Departmental officials and particularly, authority figures;*
9. *The negative attitudes and unsympathetic manner in which the requests, needs and discomfort were managed;*
10. *The whole system.”*

Her concluding opinion was that she was in agreement with the evidence leader of the Commission that it was imperative that Karp should have received counselling and/or treatment for the trauma that was suffered and is still suffering. Ultimately, her view was that the authority figures that Karp contacted failed him during his incarceration.

It is clear that the distinction made between sentenced prisoners and unsentenced Prisoners, when it comes to the treatment programmes that prisoners can attend, operates to the extreme disadvantage of unsentenced prisoners in need of support. Karp, who was clearly in acute need of counselling and assistance to survive the sexual abuse and resultant trauma, was instead left unprotected to survive and deal with everything on his own. It is envisaged that

the Department will soon face court actions where awaiting trial prisoners will claim rights equal to those that sentenced Prisoners have.<sup>17</sup>

The testimony of Karp highlighted the fact that, even though the Department has many laudable programmes and policies aimed at making the Prison environment a humane and secure environment, it is most certainly the case that such policies are all likely to fail if committed and diligent staff do not implement them properly. Furthermore, much more should be done to see to it that there is a balance in dealing with sexually abused victims.

## **6. DEPARTMENT'S RESPONSE TO THE COMPLAINTS OF KARP**

While the Commission was hearing evidence on the Karp matter, Mr S.J. Wilkins, who was the Provincial Head: Prison Service as at 13 March 2003, explained to the Commission how he, on behalf of the Department, had dealt with the complaints of Karp.<sup>18</sup>

From the evidence, however, it is clear that it was only once an article appeared in *Rooi Rose*, a weekly Afrikaans magazine, on 8 March 2003, in which Karp made certain allegations about the incarceration whilst still an awaiting trial prisoner at Pretoria Local Prison, that the Department reacted. Mr Wilkins'

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<sup>17</sup> See *Pretorious and Others v Minister of Correctional Services and Others* (2004) JOL 12496 (T) at par 38:

*“Because a Prisoner awaiting trial is entitled to the full measure of his constitutional rights which are not lawfully restricted or invaded by his incarceration while his trial is being conducted, the applicants are entitled to as much of their right to privacy as may be retained by them beyond the terms of the court order which decrees that they must spend the better part of every day in solitary confinement. Instead, as unsentenced Prisoners, particular regard must be taken to respect the applicants’ dignity and privacy inasmuch as these can be accorded to them in their particular circumstances. Put differently, the order of court consigning them to solitary confinement pending the finalisation of their trial must be interpreted strictly and, in case of any doubt, restrictively.”*

<sup>18</sup> See his affidavit that was handed in and marked as Exhibit ‘TT3’.

version was that it was the Regional Commissioner of Correctional Services Gauteng, Mr Z.I. Modise, who gave specific instructions that contact should be made with Karp so as to enable the Department to institute an investigation into the allegations appearing in the magazine. After managing to get the contact details of Karp, he then requested Karp to come and see him with the view to commencing an investigation into the allegations.

The first meeting between the parties to discuss the matter and to agree on the way forward was held on 12 March 2003, in Mr Wilkins' office. Present at the meeting were Karp, Ms Wendy Isaacs, a representative of the Gay and Lesbian Equality Project, Mr Vosloo from the Office of the Provincial Commissioner and Mr Wilkins himself. Three (3) issues were identified for consideration and action at the meeting:

- Karp's needs of the Department's assistance to help overcome any fears;
- The incidents that occurred in Prison and the assistance of Karp to identify the alleged transgressors;
- A request, lodged by the Gay and Lesbian Equality Project, for the Department to assist other gay prisoners in Prison with similar problems to those of Karp.

As regards the first issue relating to Karp's needs, it was clear that psychological service were required and a follow-up HIV test and medication/treatment to deal with a skin disease, which was allegedly contracted in Prison as a result of malnutrition. Mr Wilkins' version was that the Regional Commissioner of Correctional Services had ruled that due to the fact that Karp was a self-confessed transgender homosexual, who acknowledged involvement in several relationships in this regard, the possibility was there that Karp might have contracted any disease relating to such relationships outside the Prison after his release from Prison. It was argued on behalf of the Department that by allowing Karp to go for an HIV test at the Department's expense, after Karp had left

Prison, would be an acknowledgment from the Department that, if tested positive, the disease was contracted in Prison. Consequently, the Regional Commissioner decided that the Department of Correctional Services could not be held responsible, at that stage, for any diseases Karp may have contracted and thus should Karp wish to institute a civil claim against the Department, he could do so.

During the meeting on 12 March 2003, it was also alleged that sores broke out all over Karp's body due to malnutrition in Prison but that he had been treated for such sores whilst still in the Prison. These sores initially went away, but returned after Karp's release from Prison. Mr Wilkins obtained the necessary consent and perused Karp's medical file whilst still in Prison. It appeared from the medical file that Karp had indeed complained, on 10 April 2002, about these sores. Karp was referred to a dermatologist, Dr Wentzel, but there was insufficient proof that the sores were as a result of malnutrition. It was therefore decided that the Department would not carry the burden of the medical treatment in this regard.

Mr Wilkins testified that he had informed Karp that he would try to acquire the assistance of a psychologist from the Department (at the community corrections office) with the view of assisting Karp to talk to a specialist regarding the trauma suffered. Mr Wilkins said that Karp, however, was not interested in such Service the Department might provide and insisted upon private Service at the expense of the Department. He furthermore alleged that since the allegations of Karp had not been investigated or tested in a court of law and that Karp still had to assist in an identification parade, a decision was taken to place this particular aspect on hold until such time that a more informed decision could be made.

As regards the incidents that occurred in Prison, Mr Wilkins' stated that he had received a copy of a letter setting out the allegations in full, but that he had requested Karp to provide the office with a full statement pertaining to the alleged ordeals in Prison. Mr Wilkins further pointed out that at a second meeting with Karp and Ms Isaacs, held on 17 March 2003, he reported that the member, Mr

Kramer, from Pretoria Local Prison, had been criminally charged with *crimen injuria* as a result of their previous inquiries. The South African Police Service had investigated the case but the Senior State Prosecutor had refused to proceed with the prosecution.<sup>19</sup>

As far as the criminal case of the alleged rape was concerned, Mr Wilkins advised that he informed Karp that the court case had been scheduled for 10 March 2003, in Court 62 of the District Court, Pretoria. However, the investigator from the South African Police, a certain Inspector A.H. Matthysen, had not followed the correct requisition procedures and the case was then struck off the roll until the South African Police Service had properly summoned the alleged perpetrator, Mr Oupa Pahla. Another meeting was held on the 18 March 2003, when Karp again visited the offices of the Provincial Commissioner with the sole purpose of submitting a sworn statement in which he set out the allegations perpetrated inside Prison.

Further to this, Mr Wilkins mentioned that criminal charges were laid against the two alleged transgressors and that the case pertaining to Mr Oupa Pahla was *sub judice*.

Mr Wilkins also brought the Commission's attention to the further steps he took within the Department to give attention to Karp's matter. He alleged that he had contacted the Acting Area Commissioner of the Pretoria Management Area, Mr P.J. P. Killian, on 18 March 2003, to inform him of the matter and requested Mr Killian to send someone to collect a copy of Karp's affidavit from his office. Mr Wilkins also arranged for the Pretoria management team to handle the matter and that the South African Police Service should arrange an identification parade to finalise the complaints Karp had made. Mr Wilkins stated that on 21 March 2003, he had informed Karp of his request to the Area Commissioner of Pretoria,

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<sup>19</sup> For reference see Pretoria Police Station Cas 1437/04/02.

to arrange for an identification parade in conjunction with the South African Police Service and that the police would contact Karp for further consultation.

From Mr Wilkins' evidence, it appeared that a further meeting was held on 7 April 2003, again at the Pretoria Management Area, at which meeting Mr Wilkins maintained that Karp indicated that psychologically he was not ready to attend an identification parade. Karp rather indicated that he required at least three (3) sessions with a psychologist from UNISA (University of South Africa), Dr Jean Nel, who is an expert with regard to gay and lesbian persons, before attending an identification parade. A request was also made at that meeting that subsequent consultations with the therapist should be arranged and again that such consultations should be at the expense of the Department of Correctional Services. Mr Wilkins said that the matter was discussed with the Regional Commissioner: Gauteng on 20 May 2003, who then indicated that the Department could not pay the requested Service as it would mean that the Department would, by such conduct, be admitting guilt to the alleged neglect without any formal investigations and subsequent hearings being conducted in the matter.

Mr Wilkins maintained that Karp was informed of the Regional Commissioner's decision and was requested to contact the office if he wished to participate in an identification parade without any conditions. It is unfortunate that copies of the letter and fax to Karp and to the Area Commissioner in Pretoria could not be found on the registration file, as they had apparently been misfiled. Hence, Mr Wilkins submitted to the Commission copies from his own computer, which were then included in his statement and marked as Annexure "SJW11".

An examination of the conduct of the various officials, particularly Mr Wilkins on behalf of the Department, shows ineptitude in dealing with the circumstances that caused the psychological harm. There was almost a disregard of the Prisoner's rights after the Prisoner's discharge. Mr Wilkins was at pains to explain that the

Department cannot be held accountable, even though all factors point to the fact that the Department never properly protected Karp nor attended to his pleas for help. Instead of rendering assistance, the Department was looking for a route to escape liability. Whilst it is not suggested that the Department should blindly accept liability in each and every case, it is a reasonable expectation that the Department should apply its mind to the merits of each case with a sense of responsibility and fairness.

## **7. OTHER SEXUAL ABUSES AT PRETORIA PRISON**

The Commission also heard the evidence of Mr Jacob Johannes Maartens, who testified that he was detained at the Pretoria Local Prison in June or July 2000 and that, soon after his detention, he was raped by another Prisoner, a certain Oscar, who was the cleaner of the cell where he was staying. He further stated that different Prisoners also raped him on numerous other occasions. He testified that he complained to the Head of the Prison, Mr Baloyi, regarding these traumatic experiences and had requested that he be placed in single cells so as to receive some protection during his detention. His request, however, was not granted.

Although Mr Maartens was quite vague as regards the incidents of sexual abuse that he related to the Commission, it was clear that he suffered immense psychological trauma due to the incidents that happened to him. Warders specifically indicated by Mr Maartens were Mr Richard Freddy Makanye, who used to request Prisoners to pay for the use of the phone, and Mr Malisa, who did not consent to his request to be again moved from the 'C' section to the Court cells in 'B' section. However, other than these two warders and also the Head of Prison, Mr Baloyi, Mr Maartens could not directly implicate any other individual. This, however, did not diminish his testimony when he referred to specific incidents of sexual violence.

Mr Maartens was challenged in cross-examination regarding the fact that his memory of some of the incidents appeared to be much better in the witness stand than it had been in the past. The Commission needed to consider whether the defence's contention that what he was stating in the witness stand was a fabrication or whether Mr Maartens, due to the immense stress that he was subjected to, had suffered trauma that could have impacted on his memory. The Commission requested a psychological report from the Chief Psychologist, Dr L Van der Bergh, to be compiled, which was ultimately handed in and marked Exhibit 'UU1'. In her report, Dr Van der Bergh dealt with the fact that someone like Mr Maartens, who has been subjected to severe trauma and who suffers post-traumatic stress, will be prone to suffer from depression and anxiety and that common symptoms resulting from this would be a failing memory, difficulty in concentrating, emotional stability, headaches and vertigo.

Furthermore, she added that it was evident, from the information that was provided to her, that Mr Maartens was severely traumatised whilst in Prison by both prisoners and correctional officials. This has led to post-traumatic stress disorder, which debilitated him and resulted in extreme emotional distress. She recommended that Mr Maartens be referred for:

- *“HIV testing with pre- and post-test counselling as this is a huge concern following the many rape incidents in Prisons by several persons;*
- *Treatment for PTSD (psychotherapeutic, family therapy and trauma counselling) at a centre where they might be able to assist him by involving him in a support group which would allow him to meet and share with other sufferers of PTSD their common experiences and to learn coping techniques and strategies. In this regard referral of Mr Maartens to the following organization could be recommended:*
  - *The Wits Trauma Clinic (Johannesburg)*

- *The Depression and Anxiety Support Group (Johannesburg) – where medical and counselling Service are available*
- *Any Non-Governmental Organization who deals with such persons in his immediate environment.”*

Dr Van der Bergh stated in her report that if Mr Maartens did not receive the recommended treatment, the prognosis for his future would be poor. He appeared to have very limited coping skills and there were no support structures in his immediate environment. He had already tried to commit suicide three (3) times. The lack of adequate treatment would only heighten the bleak outlook on his future, which in turn would only increase the risk of him again attempting to inflict harm on himself.

## **8. POLICE INVESTIGATIONS**

The Karp matter also brought to the fore how the police investigate criminal offences committed within the Prison environment. Karp insisted that a charge had been laid of *crimen injuria* against a member, Mr Kramer, who had impaired Karp's dignity with some utterings. He also laid a charge of rape and, at the time of testifying, Karp had no idea what had happened to either charge and was indignant that no proper attention had been given to these charges. The officers who handled the matters were Director van Zyl and Inspectors Steyn and Gerber of the Pretoria Local Police Station, who investigated the *crimen injuria* and rape charges.

Regarding the first charge, it is clear that, on 4 July 2002, the Prosecutor at Pretoria Magistrate's Court decided not to prosecute Mr Kramer on the charge of *crimen injuria* since there was insufficient evidence. The suspect received notice that the matter would not be proceeding before the criminal court but the

complainant in this case, Karp, never received such notification.<sup>20</sup> It is clear that victims inside a Prison have to rely on the authorities to notify them whilst victims outside Prison are directly informed of the outcome of their complaints. Victims inside Prison are already disadvantaged in the manner in which their matters are investigated and should be properly informed.

When the Commission examined the charge of rape,<sup>21</sup> it was found that there is an indication on the cover sheet of the docket that was handed in as an Exhibit that it was struck off the roll because the accused was not properly brought before court.<sup>22</sup> The police officers were asked to explain their role in the criminal matter and most of them elected to testify. Based on their testimony, the Commission cannot make a finding that the officers were negligent or failed in their duty. Despite such findings, there are certain issues that raised concern regarding investigations that the police do in the Prison environment. It was the testimony of Mr Gerber that they have to share offices with the investigators of the Department and that there is no separate facility for them where they can do their investigations at the Prison. This state of affairs is unacceptable for the following reasons:

- a) The officers can never conduct an investigation freely without interference because the complainants are inside the secure environment and complaints can therefore only be brought to the police officers with the co-operation of the Department.
- b) The investigations can hardly be done in confidence because of the required co-operation of the Correctional Services members in bringing and taking complainants to the police.
- c) Most importantly, it is very problematic if a complainant lays a charge against a member. There is ample opportunity and time for intimidation

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<sup>20</sup> The reference of the case is Pretoria Central MAS No. 437/04/2002.

<sup>21</sup> The reference is Pretoria Central MAS No. 789/11/2002.

<sup>22</sup> See Exhibit 'TT4', page 7.

and interference in the criminal matter because the Department and the South African Police Service function independently from each other.

In fact, in another matter the Commission heard,<sup>23</sup> the Head of the Emergency Support Team, who assisted in the investigations at the Prison, stated that they consider themselves as working hand-in-hand with the police when investigations are done. He also said that co-operation needs to exist between the Department and the South African Police Service when criminal investigations are carried out against members of the Department. It is therefore clear that members of the Department see themselves as part of the investigation team of the South African Police and that such a relationship is not conducive to combating crime in the Prisons, particularly when the members of the Department are the perpetrators of crime.

It is plain to see that this situation is untenable. It gives the members of the Department of Correctional Services the advantage of interfering, coercing and intimidating witnesses when matters are investigated against them and at the same time, many acts of corruption, assault and criminal transgression are not reported because the person reporting such corruption will not be protected as a result of his or her exposure to the greater personnel working in the Department.

Therefore, complainants, who do complain about the conduct of Correctional Services members, are certainly not in a position to do so in confidence to the South African Police Service. The police, on the other hand, are also hampered in their investigations because they cannot investigate, without making it known to the personnel of the Department, whom they are investigating and who the complainant in the matter is. The successful completion of these investigations becomes virtually impossible and justice is seldom done due to the limited access of the police to the Prison.

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<sup>23</sup> The matter concerned a member of the Johannesburg Prison, a Mr Thloloe, who was implicated in aiding in escapes.

In demonstrating this point, the Commission has requested that charges laid against members of the Department and reported to Pretoria Central Police Station, are handed in so that a proper analysis can be made of the information received. Before going into that analysis, it is necessary to say that the investigations seldom result in successful prosecutions or in being brought before a court of law. Most cases are stopped even before they get to the criminal courts, either because there is insufficient evidence or because matters are not properly investigated due to police having fettered and hampered access to the Prisons, which does not enable a proper investigation into criminal cases.

Pursuant to the Commission's request that all the matters that Pretoria Central Police investigated in 2003 should be handed to the Commission to determine objectively how many of these matters resulted in successful prosecutions or were withdrawn etc., a copy of this was handed in, through an affidavit made by a senior member of the South African Police Service, who obtained a computer printout of all the cases reported at the Prison in 2003.

An analysis of all the cases prisoners had reported to the Pretoria Central Police Station in 2003 reflected that 92% of all the cases were withdrawn while about 7% resulted in being on the court roll, some of which were not finalised at the time of writing this report. It was, however, envisaged that given the general statistics of the successes of the criminal justice system, it is very likely that only 50% of the 7,07% would result in the conviction and sentence of the offender.<sup>24</sup>

Pursuant to the outcome of the Pretoria statistics, the Commission decided to obtain statistics from three (3) other Police Stations that serviced the area in

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<sup>24</sup> The statistics were based on the information submitted to the Commission by the South African Police Service as contained in Exhibit 'PT17', which indicated that 531 cases were reported to the Pretoria Central Police Station and that 490 cases ended up being either withdrawn or untraceable or struck from the roll. As for the rest, 41 cases ended up before court and resulted either in finalisation, where some people were acquitted or convicted, or, as in the majority of cases, were still pending and being remanded.

which there are three other Prisons, namely Kirstenhof Police Station, Prestbury Police Station and Mondeor Police Station, dealing with all reported cases of Pollsmoor Prison, Pietermaritzburg Prison and Johannesburg Prison respectively.

In 2003 in Pollsmoor Prison, three (3) rape cases were reported as well as two (2) cases of indecent assault. The total number of cases reported from Pollsmoor was one hundred and twelve (112). From this total, 34% were withdrawn while 33% were “undetected”.<sup>25</sup> Of the twenty (20) reported cases in which the suspects were warders, 10% were cases of rape. Prisoners were suspects in the cases of indecent assault. With regard to the rape cases, one warder was found guilty and sentenced to six (6) years imprisonment, while two (2) cases, one against a warder and another against a Prisoner, were withdrawn. It should be noted that in 2004, when the Commission did the investigation, there was only one policeman at the Kirstenhof Police Station assigned to investigate all cases emanating from Pollsmoor Prison.

The statistics from the New Pietermaritzburg Prison show that one (1) sodomy case against a prisoner was reported to the Prestbury Police Station, which serves the whole of Pietermaritzburg Prison. In total, sixty nine (69) charges were laid in 2003. Twenty two (22) cases involving warders were all cases of assault, 41% of these were assault with the intent to do grievous bodily harm and the rest assault common. The outcomes of these complaints were that the prosecution withdrew 36% while complainants withdrew 14% and 7,25% (five cases) resulted in convictions and were successfully finalised.

Although Mondeor Police Station also provided the Commission with statistics, the statistics did not reveal the names of the suspects or whether the Department employs them. In fact, no indication was given whether the suspects were

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<sup>25</sup> This is a general term used by the Police to convey that the crime is not solved, due to either the suspect not being known or traceable or in some other way it is not detectable.

warders or prisoners. Of the two hundred and sixteen (216) cases reported in 2003, 78% of the suspects were unknown. Of the cases reported, 31% were assault common, 19% were theft, two (2) cases were sodomy, two (2) rapes and one (1) attempted rape. At the time the police provided the information to the Commission, the suspect had been identified in both rape cases but the cases were still under investigation, while the one sodomy case had been withdrawn and the other sodomy investigation was closed as “undetected”.

The statistics the Commission obtained relating to crimes committed on Prison premises show that the number of successfully prosecuted cases are extremely low. This is a reflection on both the functioning of the police Service in an environment like the Prison and the functioning of the criminal justice system as a whole.

It shows that criminal investigations in Prisons are extremely problematic and, further, that there is no incentive for victims to report any crime committed in a Prison, be it corruption at the highest level or abuse, because it is unlikely that the matter will be successfully prosecuted and the risks are higher for the victim to complain than not to complain. The discussion and analysis above of the statistics of the four (4) Police Stations servicing the Prisons reveal a shockingly low success rate of detection of crime and prosecution. Most of the crimes committed in the Prisons end up being closed and filed by the police as “undetected”.<sup>26</sup>

This brings the Commission therefore to the conclusion that, unless something is done in the immediate future to address the problem, Prisons will continue to be fertile ground for criminals to commit crimes with impunity. If an environment

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<sup>26</sup> The reasons for this could either be that the victims fear to report the crime, knowing that such complaint will expose them, or, if they do complain to the police, that the police are hampered in their investigation because they have to rely on the Department to get access to the complainant or permission to investigate the premises.

prevails where more crimes are committed inside Prison than outside, then the whole aim of transforming or rehabilitating Prisoners is *per se* defied.

## **9. SUBMISSIONS MADE TO THE COMMISSION BY NON-GOVERNMENTAL ORGANISATIONS**

During the sexual violence hearings in Pretoria, the Commission also received submissions from the following non-governmental organisations:

- the Treatment Action Company (TAC);
- the Lesbian and Gay Equality Project;
- OUT (previously the Gay and Lesbian Organisation – Pretoria), and,
- the AIDS Law Project of the University of Witwatersrand.

All four of these organisations testified before the Commission and submitted documentary evidence to the Commission.<sup>27</sup>

On behalf of the AIDS Law Project and the TAC, Mr Yusuf Saloojee testified before the Commission and explained their interest in the hearings regarding the sexual offences committed against Prisoners. In short, Mr Saloojee, on behalf of the two organisations, testified that they viewed their submission as important because HIV/Aids exacerbates the existing problems in Prisons. He said Prisons are an intervention opportunity to reach a segment of the population most likely to need government Service related to HIV/Aids but is also least likely to receive them through any other channel.

It was their submission that, without an appropriate response to HIV/Aids in Prisons, the potential consequences will be increasingly tragic for both Prisoners and the communities they represent. Prisoners are most likely to come from a

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<sup>27</sup> For the formal submissions made to the Commission see Exhibits ‘KKK’ and ‘LLL’.

group made up of young, unemployed or uneducated black males and many of the socio-economic factors already place these individuals at high risk of contracting HIV/Aids.

According to them, a substantial proportion of prisoners will have HIV/Aids even at the time of entering the Prison. Once inside the Prison, which is a closed environment, there is high-risk behaviour for transmitting HIV/Aids, which includes sexual assaults, high-risk sexual encounters, same sex intercourse, tattooing and the use of contaminated instruments. It is generally accepted that conditions of overcrowding, stress and malnutrition compromise the health and safety of all the inmates and particularly those living with HIV or Aids.

Very importantly, the focus of this group was on the existing policies of the Department to deal with HIV/Aids, criticism of these policies and the evidence of senior personnel in the Department that deal with HIV/Aids. As stated by these organisations, the recommended HIV/Aids policies will accomplish very little in the absence of basic Prison management. Overcrowding has adversely affected Prison conditions to the point that they are inhumane and unconstitutional and anyone who visits a Prison or otherwise knows about the situation, has the right to be outraged. However, the demand for action must be correctly directed, as the Department does not determine the size of the Prison population.

It has been said earlier in this Chapter that the transmission of HIV poses a major challenge for the Department because prisoners do not remain incarcerated and therefore conditions affecting them will flow into the society at large. The Commission will now quote from the submission of Mr Saloojee, which cannot be faulted in any way and which clearly puts the problem of the Department in context:

*“There are approximately 188 000 Prisoners incarcerated in South African Prisons at this time. However, this does not mean that 188 000 criminals are locked away, isolated from the public, and unable to impact on the*

*lives of those in the general community. Over 40% of Prisoners are incarcerated for two years or less; only two percent are serving life sentences. On average, more than 50 000 people are released from South Africa's Prisons and jails each month. During 2004, nearly 400 000 former Prisoners returned to the community. If their illnesses or infections are not properly treated whilst in Prison, the Prisoners will return with these to their communities and may constitute a health risk. The greatest concern should not be directed at the risk of HIV transmission inside of Prison, but a potential impact of former Prisoners living with HIV outside of Prison. As heard before, the prevention of HIV transmission in Prison has more to do with improving Prison conditions in general by specifically addressing HIV. One cannot ignore, as has been submitted to the Commission, that overcrowding, corruption and gangs are the primary culprits behind sexual violence in Prisons and that this environment is horrifying even without the risk of HIV infection. Security and the provision of safe custody therefore should be a priority for the Department. No society would accept that Prison is necessarily a brutal environment. If a Prison is intrinsically and inevitably violent then the necessary course of action is to change the institution. Therefore policy to address HIV transmission in the Prison cannot be effective without immediate and urgent Prison reforms.*

It has been argued that the prevailing causes or reasons for transmission of HIV in the Prison environment are high-risk sexual activity, sexual assault and contaminated needles or other cutting instruments. In the context of determining HIV transmission, the difference between sexual activity in Prison and in the general population is significant. Three (3) aspects of sexual activity inside the Prison make it a higher risk for transmission. These are: anal intercourse, rape and sexually transmitted infections (STIs).

Anal intercourse and sexual assault often result in tearing, which creates a high risk of HIV transmission. In addition, a common characteristic of a Prisoner's

background is the history of STI. The risk of transmission and acquisition of HIV is greater amongst individuals with an STI. The probability of transmission of HIV from anal intercourse is much higher for the receptive partner than the insertive partner because the acceptance of the semen into the rectum allows for prolonged contact with mucus membranes. Unprotected receptive anal intercourse carries the highest probability of infection, at 0,5% to 3%. In comparison, the probability of infection for a man participating in unprotected intercourse with a woman living with HIV, is 0,033% to 0,1%. Comparisons of transmission probabilities between sexual behaviour sometimes yield conflicting results; yet one maxim remains true throughout research to date:

*“It is clear that unprotected anal intercourse has the highest potential for transmitting the virus.”*

The submission submitted to the Commission very much corresponds with the evidence heard by the Commission:

*“Of particular interest was the interviewees’ explanation of sex as a currency in Prison.”*

If a person is poor and does not have any money, he will not be able to buy influence or protection within the Prison gang system. His only option is to agree to be the passive partner of another prisoner with power or money in order to obtain his protection and influence.

The *Mail and Guardian* carried the story of a fifteen (15) year old boy who:

*“for protection in the lethal environment of the Prison gang network ..... eventually became the ‘tronkmaat’ (sex slave) of a bigger, stronger gang member”.*

The submission corresponds with the testimonies of other witnesses on the same topic, namely, that Prisoners, particularly first time offenders, are at the greatest risk of being designated as “women” or “wyfies”. It is common knowledge that in these “marriages”, the man essentially owns the “woman”, whose sole purpose is to submit to sex and provide material comforts or basic necessities, such as food or blankets.<sup>28</sup> This is also very much illustrated by the evidence of Karp and that of Kenneth Busakwe, who testified about the sexual exploitations they experienced.

The Aids Law Project and the TAC also again brought to the Commission’s attention that gangs, corruption and overcrowding increased the potential for sexual violence and victimisation in the Prison environment, precisely because Prison warders participate in the buying and selling of sex slaves and augment their income with such sales. Warders also have immense power because they can refuse to report the complaint made to them and can control a prisoner’s access to psychological and medical Service. The cases of the Pretoria sexual victims clearly illustrated how vulnerable and dependent prisoners are on warders for access to psychological and medical attention. The conduct of the warders that dealt with Karp’s case clearly demonstrated an indifference to sexual assault and the trauma victims suffer.

It cannot be ignored, however, that overcrowding leads to high-risk behaviour and that the increasing scarcity of simple items, such as blankets and shoes, result in them being used as commodities that can be exchanged for sexual favours. In their submission, the Aids Law Project highlighted that prisoners complained to them that in some cells there are fewer beds than there are Prisoners. It is therefore not surprising that sharing a bed with another prisoner will lead to sexual exploitation in exchange for the privilege of having a bed to

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<sup>28</sup> Also see the Chapter on Gangs, discussing the different roles of men, particularly those belonging to the 28 gang.

sleep in. The only other option for some prisoners is to sleep in the showers or toilets since sometimes even floor space is not available.

It has been submitted to the Commission that the Department does not know the real HIV/Aids prevalence rate in Prisons. In its submission, the Aids Law Project together with the TAC, informed the Commission about the Westville report, which presented the results of a study conducted on the nature and extent of HIV prevalence at Westville Medium 'B' Prison, a maximum security Prison in KwaZulu-Natal. It was stated that from January – April 2001, a team of researchers led by Heard, in conjunction with the Medical Research Council (MRC), collected urine samples from two hundred and seventy one (271) prisoners for anonymous, unlinked HIV tests. The samples were connected to a survey questionnaire, which included questions on age, race, income, education and criminal activity, as well as high-risk behaviour both prior to and during incarceration.

In addition to this data collected from the prisoners, a series of interviews were conducted with Prison management staff as well as Department officials, relevant NGO's and academics.

### **9.1 Department's Response to the Westville Research**

In order to understand the Department's response submitted to the Commission, it is necessary to quote, in full, from the submission of Mr Saloojee:<sup>29</sup>

*“Prior to commencing the research, the Department of Correctional Services (DCS) required the study co-ordinator to sign a contract agreeing not to release the results without prior approval from DCS. During the latter half of 2001, with the assistance of funding from the Ford Foundation, the findings of the study were compiled in a report entitled*

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<sup>29</sup> See exhibit 'JJ' at page 22.

*“HIV/AIDS at WMB: An Analysis of Prevalence and Policy. The research team was invited to present the findings at a research workshop, attended by the DCS National Commissioner, Linda Mti, and approximately 30 other high level DCS officials in Pretoria on 14 May 2002.*

*The following week, Judge Fagan referred to the findings of the Westville report in his presentation to the Parliamentary Portfolio Committee for Correctional Services. When newspapers ran headlines with the Judge’s estimate that HIV prevalence could be as high as 60% in Prisons, DCS immediately distanced itself from the estimated figure and the Judge was called to report back to the committee to provide further explanation. On the same day that a copy of the Westville report was given to committee chairman, Mr Ntshikiwane Mashimbye, the primary author received a fax from Commissioner Mti prohibiting release of the report into the public domain until seven “concerns” were resolved. The following week, on 28 May 2002, Judge Fagan apologized to the portfolio committee, explaining that his 60% HIV prevalence statistic was “a guesstimate, which was not intended to be taken as a scientific fact.”<sup>30</sup>*

*In a press conference later that day, Commissioner Mti said the report from the Westville study was confidential and that the Department was seriously questioning much of its content. “The Judge found himself vulnerable to an unscrupulous NGO with a particular agenda (to obtain more funding). Let us forgive him,” Commissioner Mti said.<sup>31</sup> A few days earlier, DCS Communications Director, Luzuko Jacobs, released an official statement, which criticized the Judge for disclosing such information and also told the press that there had never been a prevalence survey conducted in Prisons.<sup>32</sup>*

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<sup>30</sup> South African Press Association: 28 May 2002.

<sup>31</sup> South African Press Association: 28 May 2002.

<sup>32</sup> BuaNews: 24 May 2002.

*The researchers of the Westville study wrote a detailed response to the seven concerns presented in Commissioner Mti's fax, but received no further communication from the Commissioner or the Department regarding publication of the findings. The research team also requested an opportunity to present, and defend, the findings of the report to the parliamentary committee but this request was refused. ANC MP and chairman, Mr Mashimbye, explained that the report was intended for the Commissioner and thus presentation to the committee would be "inappropriate".*

*A few weeks after the Commissioner specifically prohibited the release of the report, Special Assignment aired an expose of corruption at the Grootvlei Prison in Bloemfontein. Less than a week later, Commissioner Mti then declared a three-month moratorium on all Prison research. The last directive received from the Commissioner regarding the Westville report was a command to remove any and all reference to the possibility of future research, particularly any statements about the need for a study of a selection of several Prisons across the country. Almost two years later, the findings of the Westville report, the only study ever conducted on HIV prevalence in a South African Prison, remains under embargo by DCS. Any and all publications that draw from the data must be first submitted to DCS for review. The actual report is considered the property of DCS and cannot be released into the public domain without DCS approval."*

In comparison to the statistics submitted by the researchers of the Durban/Westville Prison, the Aids Law Project and TAC also cited the statistics kept by the Department of Correctional Services.

## **9.2 Department's Aids Statistics**

The Department of Correctional Services includes statistics on HIV/Aids in the Prisons annual report. However, these statistics only reflect on the reported cases from the Health Service at each Prison and are not considered reliable. The Department statistics underestimate the extent of HIV infection because reporting is inconsistent and often Aids related deaths are recorded only as TB or pneumonia. According to the Department's 1999 annual report, there were 2 600 registered HIV positive cases, one hundred and thirty six (136) Prisoners with Aids and 2 897 new cases of TB as of 31 December 1999.

This translates into an HIV prevalence rate of 1,6% and an Aids prevalence of 0,08%. It is clear that the Department's statistics have underestimated HIV prevalence in South African Prisons.

## **9.3 Lesbian and Gay Equality Project Presentation**

The Commission heard the evidence of Mr Evert Knoesen, who made submissions on behalf of the Lesbian and Gay Equality Project (hereinafter referred to as the "Equality Project"). It is a non-profit, non-governmental organisation that works towards achieving full legal and social equality for lesbian, gay, bi-sexual, transgender and transsexual people in South Africa. Mr Knoesen submitted that part of the aim of the organisation is to affirm that lesbian and gay rights are human rights, which does not mean claiming new or special rights. What it means, in their view, is to demand that everyone, regardless of sexual orientation, is guaranteed the fullest enjoyment of their civil, political, social, economic and cultural rights.

The Lesbian and Gay Equality Project also submitted an expert opinion to the Commission that was received after the oral hearings were finished. A qualified psychologist working at UNISA's Centre for Applied Psychology, Mr Juan A. Nel,

drafted this opinion. Mr Nel is a qualified expert in Clinical and Research Psychology and he obtained his qualifications at the University of Pretoria.

Considering that he is a member of many different organisations and societies,<sup>33</sup> it is clear that Mr Nel is capable and competent to give an opinion regarding how gay, lesbian and transsexual people are to be treated. He could also proffer an opinion regarding the treatment of such people within the Prison system. He used the case of Karp as a backdrop to the recommendations he made:

*“that Prison warders and managers need to understand that even though they do not necessarily agree with the homosexual lifestyle or unconventional gender presentations, that they have a duty and a responsibility as custodians of the state to afford LGBTI persons fair, equal and proper treatment within Correctional facilities; it’s been conceded that Correctional staff have their own values concerning certain issues regarding sexual orientations. However, they ought to be accurately informed of stereotypes and provided with the necessary training opportunities to develop skills in working with people whose values differ from theirs. A Prison culture respectful of diversity should also be encouraged amongst inmates.”*

It is his view that sexual behaviour commonly occurs in a Prison environment, be it voluntarily or involuntarily. South Africa is obliged to subscribe to the rights contained in the Sexual Health Charter and is therefore obliged to ensure that the sexual rights of all persons, including those in Correctional facilities, are

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<sup>33</sup> In his submission he stated his experiences as follows, namely: that for nine (9) years he has been an activist and “out gay psychologist” conducting voluntary work in several organisations and structures in South Africa. Mr Nel has played a leadership role in the UNISA Sexual Orientation Forum. He was the Chairperson from 1997 until 1998, the Gauteng Coalition for Gay and Lesbian Equality Chairperson in 1997, Pretoria Gay and Lesbian Forum Chairperson in 1998 and 1999 and Gay and Lesbian Organisation – Pretoria (GLO-P), now named OUTLGBT, Chairperson from 1997 until 2000 and a Board Member since 2001.

respected, protected and fulfilled. Mr Nel is of the opinion that sexual education through information, skills building and values clarification will enable prisoners to make choices about their sexuality and to take charge of their sexual lives. Respect for bodily integrity (security in, and control over, one's body) and consensual sexual relations are rights that those in the custody of the state must be guaranteed.<sup>34</sup>

Furthermore, he considers, as an urgent priority, that policy makers and service providers within Correctional Services should enhance their understanding and awareness of the plight of sexual victims. Similarly, he argues that preventative measures for all should be prioritised, such as providing protection to effeminate male Prisoners, irrespective of their sexual orientation, as research indicates that they are at greater risk of sexual abuse and victimisation. Once more, his view

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<sup>34</sup> More recently the Office of the Inspecting Judge also argued that if sexual activity inside the Prison cannot be policed then “there is a need to control/regulate sex and proper steps must be taken towards a progressive realisation of a controlled sexual climate”- See “Prison Sex Okay”, <http://iol.funnel.co.za> accessed on 22 March 2005. Since this Chapter deals with sexual abuse, the Commission will refrain from commenting on conjugal rights, since it falls within the realm of rights of Prisoners and will only be relevant to the discussion if it is suggested that conjugal rights will deter or combat sexual violence in Prison. In order to come to such a conclusion, empirical research would be required, which was not put before the Commission.

Also see “Prisoners have no right to have sex, says Balfour’ – *The Mercury*, 31 March 2005.

On a comparative note see D v Zyl Smit and Frieden Dünkel “ImPrisonment Today and Tomorrow” where the authors state the following regarding such spousal visits in other countries on page 837:

*“In Russia there is a long tradition of such visits. In Spain the 1979 Prison Act determined that special apartments must be provided for Prisoners who are not yet entitled to furloughs, to enable them to spend time with their spouse (or cohabiter) and children. In Denmark, the Netherlands, Sweden and Switzerland several Prisons also have similar facilities for visits by family members, over weekends for example. The same is true in India and many Latin American countries. As a result of increasing the number of longer visits that allow for heterosexual contact the incidence of violent sexual crime in Spanish Prisons has been significantly reduced. It should be emphasized that the concern here is not only with allowing sexual contact, but also with creating the opportunity for interpersonal contacts, which are consonant with human dignity and that encourage constructive relationships between Prisoners and persons close to them”*

underlines the fact that useful and good-looking men and women are most at risk of sexual abuse while “out” gay males are prime victims of harassment and hate speech. The prevention of repeated victimisation and perpetration of abuse against these individuals should receive priority with the policy makers.

Furthermore, the in-service education and training of healthcare professionals, namely medical practitioners, nurses, social workers and psychologists within Correctional Services will ensure that the health needs of LGBTI Prisoners are also addressed. At the very least, training sessions should be scheduled to introduce these guidelines for psychotherapy with lesbian, gay and bisexual clients and the GBIGDA standards of care for transsexuals to the healthcare professionals. It is his view that this kind of sensitisation and education of medical professionals can be dealt with in workshops and by introducing them to lesbian and gay problems.

Like many others, he understands that the low number of psychologists in the Department obviously limits the amount of psychological help that can be given to victims of sexual abuse. At the end of this Chapter, the Commission will consider the views of Mr Nel on behalf of the Equality Project.

#### **10. DUTY OF PRISON OFFICIALS TO PROTECT PRISONERS AND TO CONTROL THE SPREAD OF AIDS AND OTHER INFECTIOUS DISEASES**

It has been said throughout this Chapter that Prison officials have a duty to protect prisoners, including those who have different sexual orientations, from victimisation and sexual violence in Prisons. So when Prison officials ignore prisoners’ cries for protection, there is very little that can be done for them, except protection offered by the Courts. The Commission thought it would be wise, under the circumstances, to look at the situation of sexual violence in

Prisons elsewhere, particularly in the United States, since there are no examples from South Africa.

It is apparent that when officials in the United States do not render the necessary protection, prisoners who are being victimised turn to the judiciary. They claim protection, particularly under the eighth amendment, which prohibits cruel and unusual punishment.

The Supreme Court of the United States, in *Farmer v Brennan*,<sup>35</sup> held that Prison officials have a duty to protect inmates from sexual assault at the hands of other prisoners. In response, the Massachusetts State Department of Correction then enacted reforms intended to decrease Prison rape.<sup>36</sup> In line with this duty of care, a landmark decision was handed down in the United States in *Estelle v Gamble*.<sup>37</sup> The Supreme Court of the United States recognised that certain Prison conditions might violate the Eighth Amendment, particularly when Prisons do not provide adequate medical care to prisoners. This adequate medical care in the South African context should be seen in the light of medical care post sexual violence and rapes in Prison. In the same decision, the Court established that the constitutional standard of care required Prison officials to care for the medical needs of America's incarcerated prisoners, including taking reasonable steps to control and prevent the spread of HIV and Aids. In *Helling v McKinn*<sup>38</sup>, the Supreme Court reaffirmed the Prison officials' Eighth Amendment duty to protect inmates from the spread of serious communicable diseases. This case is important because it deals with the issue that if officials fail in their duty to render the necessary medical care and protection to prisoners, they would then be contributing to the spread of HIV and Aids.

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<sup>35</sup> 511 US 825 (1994).

<sup>36</sup> See Charles M. Senate, "Prison Systems enacted reforms to stop inmate rape", Boston Globe, 9 November 1994 at page 37 (discussing State Prison Official's reactive measures taken in response to Boston Globe's Prison Rape Articles.)

<sup>37</sup> 429 US 97 (1976).

<sup>38</sup> 509 US 25 (1993).

The case of *Farmer* is of particular importance, since the facts are so similar to the issues that were dealt with in the matter of Karp. Farmer, a transsexual inmate, was allegedly raped by a fellow prisoner and claimed that the Prison officials failed in their duty to protect him. It was demonstrated that there was deliberate indifference in placing Farmer in the general population of the Maximum Security Prison for males. Farmer alleged that the officials knew that the Prison had violent inmates with histories of inmate assaults and that Farmer was particularly vulnerable to an attack because of being a transsexual. Importantly, the case focused on the duty of officials, where it is made known to them that someone has a particular appearance and where it is likely that someone might attract the attention of the other male inmates that they should try to minimise the risk of that inmate being sexually assaulted. Also of importance was that the Courts found that the Prison officials deliberately acted indifferently to the prisoner's safety by utilising open dormitories or barrack style cells that inevitably heighten the risk of violent assaults. It has been suggested that isolating prisoners, who are obvious victims, is a better way of dealing with this problem.

This brings the Commission to another point, which was discussed earlier, that awaiting trial detainees do not enjoy the same rights as sentenced prisoners. In fact, awaiting trial detainees, as Dr Van der Bergh has emphasised, have no rights to claim under the current dispensation. As said earlier, it is only awaiting trial prisoners who retain their right to be presumed innocent and, if we look comparatively at the situation, then it appears that, even in the United States, the Courts have held that pre-trial detainees are entitled to a higher level of protection than the amount of protection afforded to convicted Prisoners under the Eighth Amendment.<sup>39</sup>

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<sup>39</sup> See *Inmates of Suffolk County Jail v Eisenstadt*, 360 F. Supp. 676, 686 (D.Mass.1973).

## 11. FINDINGS

It is clear from the discussion in this Chapter that sexual violence is rife in South African Prisons and that something drastic should be done to address the challenges that this poses for the Department. It is also evident, from the evidence of Karp and the other victims that testified before the Commission, that there are severe shortcomings in the system, particularly relating to the treatment meted out to awaiting trial prisoners.

Besides all the specific incidents that relate to Karp and the others, there are also some general findings that the Commission can make, namely, that Heads of Prison clearly use, and abuse, confinement in isolation as punishment.<sup>40</sup>

The Department has also failed sexual victims in not implementing its own policies that relate to the assistance that should be rendered to them as well as the psychological service that should be available.

The conduct of the Head of Prison, Mr Baloyi, also showed that he abused his power in the manner in which he dealt with the Karp matter and is clearly not competent to run a Prison like Pretoria.

It is evident from the testimony, as well as the experiences of the different individuals, that it is not the Department's policies that are at fault but that the implementation of the policies leaves much to be desired. It is imperative that systems are put in place to deal with the shortcomings in communicating these policies and, furthermore, that procedures are designed to implement those policies and proper monitoring mechanisms are activated.

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<sup>40</sup> See Chapter on Treatment of Prisoners for more details on segregation and solitary confinement.

It has also been found that some of the Department's actions, in certain respects, show a disregard for the rights of unsentenced prisoners because it appears that the Department is not sensitive to court orders and decisions. Considering the lack of Service for unsentenced prisoners that are raped, particularly counselling Service, the Department is ignoring the decision of the Supreme Court of Appeals<sup>41</sup> where the court held that unsentenced prisoners may not be subject to a privilege system that places them in a worse position than sentenced prisoners, particularly if *"there is a substantial part of the Prison population that spends a lengthy period of time waiting for their trials to commence or be finalised"*.<sup>42</sup>

The Commission is fully mindful of the fact that other factors also have an impact on the awaiting trial Prison population. The relatively new bail laws, which limit the circumstances under which an accused person can be released on bail, certainly contribute to the high number of accused persons languishing in the awaiting trial section of our Prisons. Furthermore, the renewed minimum sentence legislation also impacts negatively in that many prisoners who have been convicted in the regional courts on serious charges have to wait extraordinarily long periods for High Court dates before they are sentenced. All such unsentenced prisoners during this waiting period retain the status of awaiting trial prisoners and, accordingly, cannot claim any rights that protect and guarantee their safety and well being because the Department does not offer equal rights to all.

It is further found that certain prisoners are prone to sexual assault the moment they enter a correctional facility, either due to their age, their particular looks, sexual orientation or other characteristics that mark them as candidates for abuse. These characteristics include a small physique, physical weakness, being a first offender, possessing feminine characteristics such as long hair or a high

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<sup>41</sup> *Minister of Correctional Services and Others v Kwakwa* 2002 (4) SA 455 (SCA).

<sup>42</sup> *Op cit* at 719 I.

voice, lack of aggression, shy, intellectual, not street smart or having been convicted of a sexual offence against a minor.

The Department should therefore be alive to the fact that all the aforementioned characteristics make these prisoners potential targets and should offer protection to them. The importance of profiling at the admission stage, in order to be proactive in combating potential abuse, will be discussed later in the recommendations.

It is clear from all the evidence heard, not only in the case of Karp, but also the evidence of sexual violence at the Grootvlei and Pretoria Prisons as well as public statements that Correctional Services officials are well aware of the fact that sexual violence contributes to the incidence of HIV/Aids in Prisons. As early as 2002, the then Minister of Correctional Services, Mr Ben Skosana, responded in a statement that the following factors contribute to HIV/Aids in Prison:

- Consensual sex.
- Male on male rape.
- The prevailing culture of violence in Prisons (including sexual violence).
- Overcrowding in Prisons.

The matter of Karp demonstrated that the correctional authorities failed in their duties towards vulnerable inmates. They also failed to respond and act appropriately to complaints of sexual abuse, which results in the necessary physical evidence in cases of rape and other sexual assaults not being adequately collected and preserved. This lack of proper action impacts on the proper investigation of rape and sexual assault cases and ultimately defeats the possibility of any successful criminal prosecution of sexual crimes committed in Prison.

The Department can no longer ignore the fact that it has an important role to play in the prevention of sexual violence and sexual abuses in Prison and that it has to put measures in place to combat the high occurrence of such abuses. Ultimately, the Department also has a duty to prevent the spread of Aids and, in order to fulfill this duty, it has to combat sexual violence in Prison.

While in outside society it is accepted that rape is by far one of the most degrading experiences that any person can suffer, the reaction of the very same society to Prison rape is very different. Such reaction ranges from denial to disgust and even, in some instances, to merciless disregard of the trauma suffered. The attitude appears to be that Prison rape is part and parcel of the punishment that the inmate justly deserves.

Irrespective of these views, it is ultimately still the duty of the Department to uphold the norms of our Constitution and therefore, in the light of the frequency of the sexual assaults behind bars, the Department has to do far more to protect inmates from such violent assaults.

It can also not be ignored that the number of HIV infected prisoners is escalating and that incoming prisoners face the grim and real prospect of contracting HIV from other inmates unless they are sufficiently protected by those whose duty it is uphold their rights. Being violently raped and infected with a fatal disease is a cruel and unusual punishment that is disproportionate to any sentence that a prisoner has to face. Being sentenced to imprisonment should not result in an unwritten death sentence. The Constitutional Court in *S v Makwanyane*<sup>43</sup> declared the imposition of the death penalty as unconstitutional and that decision should be respected. However, if the Department keeps on ignoring the fact that sexual abuse is rife in our Prisons and that there is an extreme likelihood that prisoners who are exposed to violent unprotected sex will

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<sup>43</sup> 1995 (3) SA 391 (CC).

in all likelihood contract Aids, then it is effectively, by omission, imposing a death sentence on vulnerable prisoners.

## **12. RECOMMENDATIONS**

### **12.1 Karp**

The Commission considers it appropriate to deal separately with the persons Karp implicated since the recommendations regarding those implicated will be specifically linked to incidents of misconduct that occurred at the Pretoria Prison and which are not, in every instance, related to the general discussion of sexual violence in Prisons. Accordingly, the recommendations dealing with the specific transgressions of the Correctional Services members in abusing Karp are set out hereafter in section 13, headed "Specific Misconduct Recommendations". The Commission's general recommendations regarding sexual violence in Prisons are set out below.

### **12.2 Sexual Violence in Prisons**

12.2.1 In the light of the findings, it is essential that members of the Department be sensitised in dealing with rape survivors and giving assistance to rape victims.

The Commission therefore recommends that a group of Correctional Services members be nominated in each Prison to receive the necessary training to act as rape counsellors. Such training would be necessary in order properly to counsel the prisoners who have suffered the trauma of being raped. The availability of such trained personnel will make a positive contribution towards protecting the psychological well being of such

victims. Furthermore, prisoners will also be encouraged to come forward to report such crimes, which will in some measure have an impact on decreasing the high rate of rape at the Prisons.

12.2.2 It needs to be accepted that it is extremely likely that members of the Department will at some time during their careers, be exposed to prisoners of different sexual orientations and will need to accommodate those prisoners within the Prison premises and treat them all with the necessary dignity and respect as anticipated in our Constitution. To ensure a general sensitivity of all members to these situations, the Commission recommends that all newly recruited Correctional Services members, during their initial training towards qualifying as fully fledged members, be made aware of the enormous diversity of prisoners that will at some time be entrusted into their care. This training will also, no doubt, positively take care of the general homophobia that currently exists amongst most members of the Department.

It is recommended that the curriculum of the aspirant Correctional Services members include chapters/modules such as:

- (a) diversity,
- (b) sexual orientation,
- (c) sexual practices,
- (d) homophobia, and
- (e) cultural differences.

12.2.3 It is recommended that upon admission to the Prison, the Department ensure that procedures are put in place to profile each and every prisoner entering the correctional facility. Such profiling will take into account all the distinct features of the Prisoner relating

to appearance, evidence of femininity, age and any similar indications that should indicate to the officer that such inmate is a vulnerable potential target for sexual abuse. The prisoner should, as far as possible, not be placed in the same environment as extremely violent prisoners with histories of assault.

Accordingly, it is recommended that the Department's admission criteria be re-examined and amended where necessary.

12.2.4 Newly arrived, first time offenders are clearly the most vulnerable group because they are ignorant about certain existing Prison practices and hence easily fall into the trap of becoming a sexual object. The institution also overwhelms them, since the warders, who are the ones who should inform them about the gangs and the discipline system in Prison, do not properly orientate them towards Prison life. The availability of such information will go a long way to protect the prisoners. They would be aware of the fact that when goods are offered to them they would be put in a position where they are in debt to the provider and that the debt would then be claimed at a particular point as, in most instances, a demand for sex.

It is therefore recommended that all first time offenders, when admitted to Prison, be put together in a cell for the first few days on their own. There should be no sentenced prisoners either as a monitor or a cleaner, as is currently the practice. This will enable the Department of Correctional Services personnel to orientate the prisoners and inform them about the existing gang activities and any other practices in Prison that could lead to sexual and other abuses. Once they are informed of this kind of behaviour, they would be able to minimise the risk and they should be able to then

guard against such behaviour or recognise patterns and eminent dangers.

Such protection would be much better than the current situation where, in the view of the Commission, prisoners themselves arrange and control such orientation which, in fact, then leads to the gangs exerting and abusing their power over first time offenders. In some instances, such orientation is done by the monitor of the cell, which defeats the purpose of ensuring protection for the arriving first offender.

12.2.5 It is recommended that warders be educated regarding the different kinds of sexual preferences that exist amongst prisoners. Such education would be crucial in dealing with their attitude towards sexual victims in Prisons. Lack of education has been shown in that warders have little or no empathy or sympathy towards sexual victims. It is envisaged that such sexual education will also address the homophobia that exists amongst warders. The Commission is alive to the fact that this homophobia may to be reduced once all the new recruits are trained.

12.2.6 It is also recommended that when a prisoner commits a sexual offence, the offender, in addition to the appropriate discipline applied in accordance with the disciplinary system of the Department, or the laying of a criminal charge, be assigned to specific rehabilitation programmes. These programmes will directly address the question of sexually offending behaviour as well as any other auxiliary factor and issues that indirectly feed into the offender's sexual behaviour. Accordingly, it is recommended that the Department design rehabilitation programmes that are

specifically and exclusively aimed at sexual offenders inside and outside Prison.

- 12.2.7 It is recommended that more psychologists be appointed to address the Department's lack of counselling and trauma Service. Psychologists fulfill a major role in addressing the victimisation and trauma sexual victims suffer and it is clear from the evidence before the Commission that there are far too few psychologists in each Prison to deal with the needs of awaiting and sentenced prisoners.
- 12.2.8 It is also recommended that the policy designed for sexual victims apply not only to sentenced prisoners but also to awaiting trial prisoners, who are as in much need of such Service as their sentenced counterparts.
- 12.2.9 It is recommended that proper complaint mechanisms and channels be put in place to encourage rape and sexual survivors to come forward and report the offences committed.
- 12.2.10 It is further recommended that the current system that exists to investigate criminal matters within the Prison by the South African Police Service be stopped. These investigations leave much to be desired since the police constantly interview, consult and take statements inside the Prison with the assistance of the Prison authorities, under circumstances where members of the Department are implicated in offences being investigated.

It is recommended that when prisoners lay criminal complaints, they are moved to the Police Station where the interviewing of the complainant will take place. This procedure will ensure that the investigation will then be done independently at the Police Station

and without the “assistance” of members of the Department. Such recommendation will indeed lead to better and far more reliable information being received from the complainant regarding the offences committed inside the Prison. Prisoners laying charges will be in a position to request protection, if it is required, and to lay charges without fear of reprisal from the Departmental officials.

- 12.2.11 It is recommended that in cases of sexual offenders, the release of the prisoner either on parole or correctional supervision be considered only after assessing information gathered from a variety of sources, including psychological, psychiatric and pre-sentence reports, behavioural observations and victim impact statements.
- 12.2.12 It is recommended that a long-term policy for awaiting trial detainees be drafted as soon as possible since the absence of such policy has a huge impact on the lack of Service rendered to awaiting trial detainees and, more specifically, the lack of support Service rendered to those in this section of the Prison who have suffered abuse.
- 12.2.13 It is recommended that better liaison procedures be set up between the Department of Correctional Services and the Department of Health in order to orientate and inform medical personnel of all the existing policies in each of these Departments. Alternatively, that doctors working for the Department of Correctional Services are seconded to the Department in order to discipline those who are working for the Department of Correctional Services who disregard the policies of the Department and who put it in disrepute.
- 12.2.14 It is recommended that a new system for distributing the Department’s policies be designed. Without being prescriptive, it is

necessary, at an operational level, that such a system has a method of ensuring that each and every member acknowledges having received or being aware of any policies applicable to him or her and that such acknowledgement is in writing.

It is suggested that in order to disseminate effectively all the information of all the policies as soon as possible, the Department arrange a series of workshops where these policies will be made known to the members and where they can come to terms with what is expected of them.

- 12.2.15 It is recommended that sexually abused prisoners not be put in solitary confinement nor segregated detention but rather be kept under observation in the Prison hospital. Furthermore, that if the victim cannot be accommodated in the Prison hospital, consideration be given to detaining the alleged perpetrators in single cells until the disciplinary matter is finalised.
- 12.2.16 It is recommended that cameras connected to closed circuit television be installed in all communal cells in order to monitor the activities between prisoners at all times. Such monitoring would be in the interests of the Department and the safety of all the prisoners who are detained.
- 12.2.17 It is recommended that the movement of juveniles in the Prison, as stipulated by the Commission in its Fifth Interim Report, be followed in order to combat sexual abuses of young prisoners under the age of twenty one (21) years.
- 12.2.18 It is recommended that all prisoners, upon admission, including juvenile and awaiting trial prisoners, be informed of their rights,

including that they are entitled to be separated, that they are entitled to certain counselling Service etc. The Department is expected to inform them fully of their rights in the form of either a booklet or a compendium of rights of prisoners. Having due regard to the Constitution, it is recommended that such a booklet be drafted in all eleven (11) official languages.

It has also come to the Commission's attention that there are still some prisoners who are illiterate and unaware of their rights. It is recommended that in such cases, the *onus* should be on the admission's office to inform illiterate prisoners in person of their rights and only then to hand them a booklet or compendium of rights.

### **13. SPECIFIC MISCONDUCT RECOMMENDATIONS**

As stated in the main report, the Commission considered it appropriate to deal separately with the persons Karp implicated since the recommendations regarding those implicated will be specifically linked to incidents of misconduct that occurred at the Pretoria Prison. Many of these misconduct incidents are not in every instance related to the general discussion of sexual violence in Prisons.

The evidence of Karp has been discussed in this Chapter and it should be clear from this that he made a positive impression on the Commission. At all times Karp appeared to be confident, despite the witness having graphically to describe intimate and personal details of the harrowing experiences. Furthermore, most of Karp's testimony was substantiated with either documentary or other evidence.

By contrast, the implicated parties, who had no difficulty in subjecting Karp to the rigours of cross-examination, decided to hide behind a shield of silence by not

taking the witness stand. Although the Commission is fully aware of their constitutional right and choice not to testify, they most certainly cannot exercise such choice in the face of strong and incriminating evidence and expect to escape the consequences of their decisions. They elected not to testify under circumstances that required them to at least speak up in the face of direct accusations. They were given ample opportunity to come forward and give their version of what happened and be questioned, yet they elected to be silent. Despite there being a strong *prima facie* case against those implicated, not an ounce of evidence was presented by them to counter the accusations. Given the specific accusations against them, the Commission has to draw an adverse inference from their silence. It would be reasonable to say that those implicated did not testify because they were trying to hide behind their silence.

Despite Karp's traumatisation, Karp was still able to give the Commission a coherent and detailed account of what he was subjected to at the hands of the warders at Pretoria Local Prison. The Chief Psychologist, Dr Van der Bergh, also agreed that Karp would continue to suffer for a long time and would definitely need psychological counselling to deal with the trauma.

Ultimately, in dealing with the specific incidents perpetrated, it is the finding of the Commission that Karp was a truthful and forthright witness who presented his evidence in a satisfactory manner and that there was no evidence to rebut anything that he said.

The Commission therefore makes the following findings and recommendations against the implicated parties:

### **13.1 Mr Baloyi**

By not paying any heed to the policies of the Department, Mr Baloyi demonstrated clearly that he is not competent to manage a Prison as big as

Pretoria Local Prison. This lack of competence may be explained by Mr Baloyi's alleged lack of training as to the duties of a Head of Prison<sup>44</sup> but clearly does not justify or excuse the misconduct he committed.

Clearly, when one assumes a particular position of authority, it is your own responsibility to fulfill all the daily duties that come with the position – one of which would be to make decisions in terms of section 79 of the Act as to who should or should not be detained in terms of the provision and particularly, and most importantly, not to abuse the provision as a method of punishing Prisoners.<sup>45</sup>

In dealing with the matter of Karp, it was clear that Mr Baloyi never applied his mind as to Karp's detention in a single cell. In fact, during cross-examination, he responded by saying if someone escapes then they are sent to isolation. This indicates that there was no application of the mind and certainly no reasons given when such a drastic decision was taken. Clearly, as can be seen from the outcome of his decision, Mr Baloyi abused the provisions of section 79 by using it as a form of punishment. Mr Baloyi also abused his powers in ordering that mechanical restraints be used on the prisoner.<sup>46</sup> His conduct was definitely not in accordance with Departmental policies.

The Commission accordingly recommends that Mr Baloyi be charged with:

- (a) Contravention of Column A, clause 2.1, in that he was grossly negligent in execution of his duties by ordering that Karp be placed in the isolation cell;

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<sup>44</sup> Mr Baloyi, in his own words, said that he had not received any training for the position as Head of the Prison and had never attended a course on what heads of Prison do. Mr Baloyi's abuse of the provision is dealt with in detail in the Chapter on Treatment of Prisoners.

<sup>46</sup> Mr Baloyi ordered that the prisoner Karp also be put in leg irons when he was arrested for his escape. The record shows that Karp could not pose a security risk after being put in segregation and that the only reason for such an order was to further "punish" him.

- (b) Contravention of Column A, clause 2.1, in that he was grossly negligent in the execution of his duties by ordering mechanical restraints when this was not authorised by Departmental policies or any other regulation.
- (c) Contravention of Column A, clause 2.1, in that he failed to keep proper record of prisoners sent to segregation, or kept proper data as required by legislation and the Department's policies.<sup>47</sup>

### 13.2 Mr Nxumalo

The Commission finds, in the light of the evidence presented by Karp, that Mr Nxumalo was indeed under the influence of alcohol on the day that he ordered the prisoner, Karp, to perform oral sex on him.

Mr Nxumalo, like many of the others, decided not to testify at all despite the *prima facie* case against him being presented to the Commission. The testimony of Karp becomes therefore conclusive evidence given the specific circumstances.

Accordingly, with regard to Mr Nxumalo, the Commission recommends that:

- (a) He be charged with contravention of Column A, clause 5.5 of the Disciplinary Code in that he committed an act of sexual harassment by compelling a prisoner to have oral sex with him and that by doing so he injured the sexual dignity of the prisoner, Karp;
- (b) He be charged in terms of the Disciplinary Code of contravening Column A, clause 6.4 in that he permitted a prisoner or any other person subject to community corrections to take alcohol or prohibited drugs and had that in their possession.

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<sup>47</sup> See Pretoria transcript pages 5621 and 5622 and Exhibit 'NNN5'.

Should it be shown that Mr Nxumalo was not on duty on the day in question, then, it is the view of the Commission, that he should not escape discipline. If that is the case, it is our opinion that, by being under the influence of alcohol, he breached the security arrangements and that he then should be charged in the alternative with contravening Column A, clause 5.10, breach of the internal security arrangements.

- (c) He be criminally charged with an act of indecent assault, alternatively *crimen injuria* by forcing the prisoner, Karp, to perform oral sex on him.
- (d) He also be charged criminally with contravening section 119 of the Correctional Services Act No. 111 of 1998, in that he supplied intoxicating liquor to prisoners whereas the Act provides that no person may supply prisoners with any intoxicating liquor. In this particular instance, this will take care of the fact that he was not on duty should the documentation prove that he was not on duty.

### **13.3 Mr Shilaaz**

Regarding Mr Shilaaz, it is clear that he committed an act of *crimen injuria* and the Commission therefore recommends that:

- (a) He be charged criminally with an act of *crimen injuria* in that he insulted the prisoner by saying certain things to him, which indeed affected and impaired his dignity. The insults that were leveled at Karp were homophobic insults, which infringed upon his dignity.
- (b) He be charged in terms of the Disciplinary Code with a transgression of Column A, clause 5.5 in that he impaired the sexual dignity of the prisoner by stating certain insults, which were homophobic.

#### **13.4 Mr Kramer**

The Commission's findings are also that Karp was confident regarding what Mr Kramer said. Karp was in fact so confident that a charge was laid against him. The words spoken that insulted him were "*you're a pig, you're a rubbish.*" Even considered separately, the words seem to be insulting in nature. Added to this was the repeated discrimination of saying "*you look bad moffie*", words clearly intended to degrade Karp and to impair his dignity.

As the prosecution service has already decided not to proceed with any criminal charges, the Commission will only deal with the internal transgressions committed by Mr Kramer. In this regard, it is recommended that Mr Kramer be charged:

- (a) In terms of the Departmental Disciplinary Code, contravening Column A, clause 5.11 in that he used improper language.
- (b) In terms of the Departmental Disciplinary Code, contravening Column A, clause 5.13 in that he willfully and intentionally discriminated against Karp on the basis of Karp's sexuality, which is outlawed by the Constitution.

#### **13.5 Mr Gerber**

Karp's evidence was also clear with regard to Mr Gerber insulting Karp by saying the words "*aren't you ashamed of mixing with kaffirs*" because Karp had befriended a black prisoner, Ms Shelley Ndlovu.

It is recommended that Mr Gerber be charged:

- (a) in terms of the Departmental Disciplinary Code, contravening Column B, clause 5.11, the use of improper language to another person or alternatively,
- (b) contravening column B, clause 5.16, that he used words that discriminated on the basis of race, gender and sexuality.

### **13.6 Mr Moswanganyi**

The evidence of Karp is also accepted regarding his implication of Mr Moswanganyi and his actions. It is recommended that Mr Moswanganyi be charged:

- (a) In terms of the Departmental Disciplinary Code, contravening Column B, clause 5.11, the use of improper language to another person, alternatively;
- (b) Contravening Column B, clause 5.16, that he discriminated against another on the basis of race, gender, disability and sexuality.

### **13.7 Mr Cloete**

As Mr Cloete also used derogatory terms and insulting words against Karp, the Commission recommends that:

- (a) He be charged in terms of the Departmental Disciplinary Code, with contravening Column B, clause 5.11, in that he used improper language to another person, alternatively;
- (b) Contravention of Column B, clause 5.16, in that he discriminated against Karp on the basis of race, gender, disability and sexuality.

### **13.8 Mr Pahla**

It is clear from the evidence before this Commission that Mr Pahla violated Karp in that he forcefully raped him.

As was stated earlier in this Chapter, the Commission is mindful of the fact that the common law offence of rape has still not been extended by legislation in South Africa to cover such sexual assaults; as such conduct is clearly an act of rape.

The Commission, however, cannot go beyond the boundaries of the law despite the fact that the common law is not in tune with gender equality.

The Commission therefore recommends that Mr Pahla be charged with:

- (a) A charge of indecent assault. This is, however, a recommendation and does not detract from the fact that the right to institute prosecution lies with the National Director of Public Prosecutions (NDPP). Given the circumstances, it is recommended that the docket be sent to the NDPP, together with this Chapter of the Commission report and the Commission transcript in order to put the NDPP in a position to make a decision.

### **13.9 Dr Khumari**

The evidence against Dr Khumari was astounding. The Commission was shocked to hear that a medical practitioner could be so insensitive and reckless regarding the emotional plight of a patient. Dr Khumari failed in not properly investigating or adequately assisting a patient in desperate need of help.

The Commission recommends that:

- (a) A transcript of Dr Khumari's evidence, along with the relevant documentation, be sent to the Health Profession's Council for investigation;
- (b) The Department review Dr Khumari's contract in the light of his own admission that he mismanaged the patient, Karp.

### **13.10 Mr Wilkins**

The Commission's findings are that Mr Wilkins was ordered to deal with the matter of Karp. Although Mr Wilkins' conduct, in some respects, clearly does not correspond to that of a prudent Correctional Services member, the Commission is of the opinion that it would be regrettable if he alone were to face any disciplinary action since many of his actions were born of instructions from his superiors.

The Commission would, however, like to recommend in general that matters like sexual violence and sexual transgressions against prisoners are given higher priority in the Department and that all involved personnel deal with them with empathy and sympathy.

It is clear from the evidence of the Chief Psychologist, Dr Van der Bergh, that the assistance rendered to Karp by Mr Wilkins and others fell short of what should have been done for a sexual victim. Given the lapse of time and the hierarchy of the different role players, it will serve no purpose to pursue any disciplinary action against him alone. The Commission therefore does not recommend that any action be taken against Mr Wilkins. However, he should be better trained in the psychological trauma sexual victims suffer in order to be of better assistance to these victims in future.