CHAPTER 6

The Administration of Justice

Few physical structures provide more graphic monuments to the era of apartheid than South Africa's police stations, court houses and prisons.

In central Johannesburg, the notorious John Vorster Square Police Station continues to function. Today, its stark and towering superstructure has a rather seedy appearance which belies its past reputation as a place of fear, intimidation and death.

A few blocks away lies the huge Johannesburg Magistrates' Court complex. Over decades millions of black South Africans passed through the portals of this building to be convicted of breaches of the pass laws and other apartheid legislation. Following conviction most were dispatched to one of the grim prisons provided to house those who defied the apartheid regime.

Those considered most dangerous were incarcerated in places like Robben Island, a few kilometres off the coast near Cape Town, or on death row in Pretoria's Central Prison to await execution. Both of these prisons continue in operation in 1993 but they no longer house the leaders of the resistance movement and other political prisoners.

During the course of its second phase, COMSA made visits to a range of police stations, court houses and prisons to witness at first hand the functioning of the contemporary system of justice. Most of these visits, and related meetings with justice officials, followed earlier discussions between COMSA and the Department of Justice about criticisms, voiced in the report on the first phase of COMSA, concerning the administration of justice. After these discussions the NPS kindly facilitated visits by the COMSA Chairperson to the following prisons:

- Pollsmoor Prison, Cape Town – 28 January 1993 and 10 February 1993
- Victor Vester Prison, Western Cape – 28 January 1993
- Robben Island Prison, Western Cape – 30 January 1993
- Leeuwkop Prison, PWV Region – 1 February 1993
- Brandvlei Prison, Western Cape – 10 February 1993
- Pretoria Central Prison, PWV Region – 15 February 1993

In addition to these visits, the COMSA Chairperson met twice with Lieutenant-General Willie Willemse, the Commissioner of Correctional Serv-

ices, and his senior staff, to discuss correctional issues. A visit was also made on 29 January to the Correctional Supervision Office in Cape Town.

Further to these activities relating to correction, the COMSA Chairperson met with the Attorney-General of Transvaal, Klaus Van Lieres und Wilkau; with the Chief Magistrate of the Johannesburg Regional Court and his deputy; and with members of the South African Law Reform Commission (SALRC). What follows in the balance of this chapter is a description of some of the impressions gained from these visits and meetings. A number of observations are also made about the progress being made within the criminal justice system to move away from its apartheid connections. In its report on the first phase, COMSA commented that the:

> criminal justice system, already discredited by decades of association with the structures of apartheid, has now lost the confidence and respect of most South Africans. This is especially so in the nation's townships where the formal justice system has in many cases been ignored in favour of an informal system administered by members of local communities. [*Violence in South Africa, Phase I Report*, p.35-6]

Nothing has occurred in the second phase of COMSA's mission to make it resile from this statement. There are, however, some encouraging signs that the process of change necessary to restore public confidence and trust in the criminal justice system has begun. It is a process which is closely linked to the broader movement to instil democratic principles and a respect for human rights in South African society. That movement will only ultimately realise its goals when a new constitution has been put in place by a democratically elected government.

CRIMINAL INVESTIGATION AND PROSECUTION

Police Investigation

Certainty of detention, prosecution and conviction for those who commit crimes represents one of the most effective deterrents available in any nation's criminal justice system. In contemporary South Africa, this deterrent is very weak. As was emphasised in COMSA's report on the first phase, 'few crimes are reported, fewer still are detected, and an even smaller number are prosecuted successfully in the courts' [*Violence in South Africa, Phase I*, p.50].

Recent confirmation of the situation prevailing in regard to the most serious of all crimes, murder, came in a statement made in Parliament in early May by the Minister of Law and Order, Hernus Kriel. The Minister said that, in 1992, 20,135 murders were reported to the police. In less than 50 per cent of these cases (9,374) were suspects subsequently brought before a court for prosecution. Mr Kriel was unable to give figures for the rate of conviction in these cases. He had also indicated in an earlier statement that fewer than one in four rape cases reported to the police resulted in the successful identification and prosecution of a suspect in court.

The conviction rate for violent crime committed against blacks is intolerably low. It is sometimes hard to discern if the root cause of this is the inability of the SAP to penetrate sources of information and evidence in the black community, their inexperience and lack of qualification for major investigations, their lack of concern as to the outcome, their lack of resources, or a combination of these factors.

Without doubt, some detectives have excellent qualifications while others have doubtful abilities. The most competent investigators are clearly overburdened with workloads far in excess of manageable limits. Often serious gaps exist in case management from incident to pathologist to investigator to prosecutor. The SAP is severely under-resourced in terms of modern technology for storage and retrieval of information.

When queried about these matters, the Transvaal Attorney-General agreed that the criminal justice system faced formidable problems in bringing offenders to justice. He admitted that the quality of police investigations was not always satisfactory, in part because many experienced investigators had left the SAP to be replaced by young and inexperienced officers. His office sought to supervise investigations in a way which ensured that appropriate evidence was gathered to support prosecutions. Another problem confronting police was the sheer volume of cases they had to investigate. There were far too few police in South Africa in relation to the population and the state of crime. Evidence to support this view could be found in the mushrooming of private security firms around the country.

Further discussion of certain of these policing problems is to be found in Chapter 6 of the report on the first phase of COMSA. On the positive side, the SAP appears to have acted with commendable professionalism in the investigation into the assassination of Chris Hani. It has pursued its enquiries into the case despite uncovering what appears to be a complex conspiracy involving notable right-wing figures and organisations.

Attorney-General Wilkau and the SAP have also agreed to the participation of criminal investigation experts from Britain and Germany in the enquiry – a decision which reveals a welcome willingness to become more open and accountable in regard to the handling of a very sensitive case.

On the negative side, the Hani investigation has revealed the continuing use by police of the Internal Security Act, a remnant of apartheid legislation, to detain suspects for questioning. It is to be hoped that in the future legislation of this type will be repealed and that an accused person's right to silence will be protected by a new constitution.

Witness Protection

Another issue discussed with Transvaal Attorney-General Wilkau was the reluctance of witnesses to come forward to testify in criminal cases. Mr Wilkau agreed that this was a major problem, as demonstrated by a recent taxi war. He said:

> I sat with 129 bodies. I appealed to the public, to the media, the local newspapers, the radio, television to come and tell us what you know. Your life may be at stake. It may be your life that goes next. Get rid of these maniacs. Not a single response.... That is a fear factor. Its unhealthy. We cannot afford it. [Interview with Attorney-General Wilkau, January 1993]

In an attempt to deal with this fear factor the Government enacted the Criminal Law Amendment Act, No. 135 of 1991. This Act, given effect by a Proclamation by the State President (No. R85 of 1992), has established a protective custody scheme for witnesses and potential witnesses. Under this scheme, such witnesses may report to any police station or prison and ask that they, as well as their dependants, be placed under protective custody. (Criminal Law Amendment Act, No. 135 of 1991: Section 4)

Perhaps not surprisingly, very few people seem to have made use of this form of voluntary imprisonment. Greater success has been achieved with a more conventional witness protection programme put in place by the Goldstone Commission. This programme provides secure accommodation in hotels or safe houses for witnesses and, if necessary, their dependants. The programme operates under strict rules of secrecy and confidentiality. COMSA has been told that fewer than ten witnesses have been protected, all of them successfully, by the Commission.

Witness protection programmes of this type are both resource-intensive and expensive to run. None the less, most developed nations possess such programmes in order to ensure that successful prosecutions can be undertaken in major areas of crime like drug trafficking, terrorism and public corruption.

There is an urgent need for a much more extensive witness protection programme in South Africa to assist in the prosecution of those responsible for the continuing wave of murders, whether politically motivated or not.

COMSA is aware that Lawyers for Human Rights (LHR) has already commenced a comparative study of witness protection programmes in a number of countries. COMSA has assisted LHR in this study by providing information about the operation of these programmes in several member states of the Commonwealth.

The Goldstone Commission's witness protection programme provides an excellent starting point for the establishment of a national scheme in South Africa, details of which would have to be agreed in discussion with Attorneys-General, the SAP, the Department of Justice and other interested parties.

One difficult issue which these discussions would have to resolve is the selection of a suitable agency to run the programme. In Commonwealth countries like Australia, Britain and Canada, it is customary for the police to have this responsibility. Given the current credibility problems the SAP suffers in the community, this police option is probably not a viable one in South Africa. Instead, the operation of a witness protection programme might become one function of a new national prosecution agency.

At present, responsibility for the prosecution of crimes in South Africa is vested principally in the various provincial Attorneys-General. Leaving aside

the question of their standing and credibility in the post-apartheid era, the work of the Goldstone Commission has illustrated the value of a national and independent investigative body. The Commission does not, however, prosecute those it may find responsible for the perpetration of criminal acts. This task is one left to the traditional arms of the criminal justice system.

COMSA discussed this arrangement with Mr Justice Goldstone at its 30 April meeting (see Chapter 4) and suggested that perhaps the Commission might also assume responsibility for prosecuting those it believed to be guilty of crimes. Mr Justice Goldstone forcefully rejected this suggestion, stating that one of the key strengths of the Commission was its ability to attract and question witnesses without them fearing immediate prosecution because of the evidence they provided. He believed that sources of vital information would dry up if the Commission were to have dual investigation and prosecution functions.

Mr Justice Goldstone noted, however, that discussions are in progress on the feasibility and desirability of setting up an independent national prosecuting authority. In COMSA's view, this is a welcome proposal which deserves active support and encouragement.

Bail

In its report on the first phase, COMSA criticised certain bail decision-making procedures which allowed persons charged with murder and other grave crimes to be released back into the community pending their trial. While recognising the overriding presumption that every accused person is innocent until proven guilty by a court of law, COMSA was concerned that in these serious cases the ready availability of bail increased the likelihood of the intimidation of witnesses, as well as of further offences being committed.

Since the release of its first report, COMSA has had an opportunity to discuss the issue of bail with a number of justice officials, judicial officers and law reformers. Attorney-General Wilkau, for instance, commented that:

> Not so long ago R50 for a good murder was a going rate of bail. I am talking five or ten years ago. It's increased slightly now, but obviously we know from experience that robbers and drug dealers ... are the people who pull a second and third robbery when they are out on bail. [We] started a very active campaign to discourage the courts from granting bail so easily and, of course, there was a lot of public protest. [The] Bankers Association had complained, and building societies complained that they became the object of robberies and so forth. We have been collecting statistics to show how many people commit crimes while out on bail and what effort it takes the undermanned police to pick them up again. [However,] the Prison Department is complaining that there are too many awaiting trial prisoners [Interview with Attorney-General Wilkau, January 1993]

As noted in the report on the first phase of COMSA, about one-fifth of all persons currently held in South African jails are on remand awaiting trial. The physical conditions under which these remand prisoners are kept are, in most cases, similar to those of sentenced offenders.

In Pollsmoor Prison, for example, up to 30 remand prisoners were observed jammed into dimly lit cells, built for half that number, with minimal access to recreational and related activities and with no opportunity to work. Many of those spoken to had been in custody for six months or more. Many too had been convicted of what seemed to be relatively minor property offences, rather than crimes of violence. A common complaint was not that bail had been refused, but that it had been set beyond an accused person's means.

In discussions with the SALRC about bail reform, COMSA was told that the major problem in this area was not so much leniency in the granting of bail but rather the reverse. Far too many persons accused of non-violent crimes found themselves remanded in custody, often because they lacked access to legal advice at the time of their appearance in court.

The Legal Aid Board, in its 1991/1992 Report released in April, said that less than 20 per cent of the accused persons standing trial in district and regional courts had received legal assistance. It was also estimated that more than 100,000 undefended persons were sentenced to jail each year.

Having carefully reviewed the bail situation in South Africa, the SALRC submitted a report on bail reform to the Government in 1992. That report has yet to be tabled in Parliament and therefore remains confidential.

Some clues to the Commission's thinking on the subject can be obtained from its Working Paper 31, *Bail Reform in South Africa*, published in March 1991. In that Working Paper the SALRC drew attention to its earlier recommendations concerning a South African Bill of Rights where it was suggested that a person taken into custody should be put on trial within a reasonable period, and that while awaiting trial that person should be released on bail unless a court ordered on substantive grounds that he or she be further detained.

The SALRC acknowledged in Working Paper 31 that if this recommendation granting a right to bail were to be accepted it would imply a shift in the existing burden of proof in bail applications. At present under South African law, if there is any dispute about bail, the onus of proof rests on the accused. That person must make out a *prima facie* case that he or she will stand trial, and that the administration of justice will not be defeated if release is allowed.

Shifting that burden to the prosecution, and requiring a court to presume that bail should be allowed unless the prosecution can rebut that presumption, would constitute a substantial liberalisation of South African law on this subject.

If, as seems very likely, this is the main thrust of the SALRC's bail reform recommendations now with the Government, there is also every reason to believe that the recommendations have not found favour with conservative forces within the Government, the Department of Justice and the judiciary. Indeed, COMSA has been advised that it is these forces which have blocked further progress in implementing the SALRC's bail reform proposals.

In the present climate of deep community anxiety and fear about the state of crime the political prospects for liberalising bail laws may appear somewhat

bleak. In principle, however, COMSA strongly endorses the view that a right to bail should be recognised as one of the basic freedoms guaranteed by a new South African constitution.

It is a right which is not in any way inconsistent with the need to ensure that society is also protected against those who, while awaiting trial, would wish to intimidate witnesses or commit further serious crimes. In such cases the presumption of a right to bail would be overridden by other competing rights.

Sentencing and Corrections

Few countries in the world have given such prominence to the use of imprisonment in their sentencing and correctional philosophies as has South Africa. There are reported to be about 193 prisons in contemporary South Africa housing approximately 110,000 persons. As noted earlier, about one-fifth of all those in prison are awaiting trial. Of the balance, the majority are said to be serving sentences of two years or more in custody.

Figures supplied by the SAIRR of prisoners held in South African prisons in December 1991 showed that, of the 96,540 sentenced offenders in custody at that time, 25,758 (26.7%) were serving terms of imprisonment ranging from two to five years, 20,026 (20.7%) from five to ten years, 7,059 (7.3%) from ten to twenty years, and 1,350 (1.3%) had sentences over twenty years. (Race Relations Survey 1992/93: 133)

According to the Minister for Correctional Services, Adrian Vlok, in January 1992 the country's prison population was rising at the rate of 1,000 prisoners a month, producing a severe problem of overcrowding.

As noted in COMSA's report on its first phase, in an attempt to alleviate this problem, the Minister announced in early January 1993 that 7,500 convicted criminals were to be released from prisons around the country. The announcement produced a storm of protest. Later in the same month, the State President, addressing the opening session of Parliament in Cape Town, said that the Government's point of view was:

> that serious crimes and especially those in which violence has played a part, should be subject to severe restrictions in respect of bail, severe penalties at sentencing and strict norms in respect of releases. A new system in terms of which prisoners will have to serve their full sentences in another manner is to be introduced... No prisoner will be released unconditionally ahead of time and [the] court's sentence will remain in force for its full duration. [State President's Address, 29 January 1993: 12-13]

Legislation to give effect to these measures has since been introduced in the South African Parliament. It is legislation which has also been accompanied by new and tough measures directed at the possession of illegal weapons (see Chapter 3). These measures will, if enacted, provide for mandatory minimum five year jail sentences for those found in illegal possession of automatic weapons like AK-47s, grenades, limpet mines and similar devices.

There seems little doubt that the current and rather desperate mood of the

Government, and probably a significant proportion of South Africans in all racial groups, is to use draconian punishment as a front-line defence against crime and violence. That mood is also leading to a review by the Government of its position on the carrying out of the death penalty. An open debate on the use of capital punishment may take place shortly in Parliament and the current moratorium on the carrying out of death sentences may well be lifted.

It was in this political climate that COMSA undertook visits to prisons, and discussed sentencing and correctional issues with a range of officials. These visits and discussions have led to a number of broad conclusions.

Rates of Imprisonment

In coming months, as a result of the new sentencing policies being contemplated by the Government, there is likely to be a substantial increase in the number of persons held in South African prisons. This increase will push the rate of imprisonment towards 400 per 100,000 of the population, or higher. The current rate is said to be about 380 per 100,000 – a rate which is already one of the highest in the world. The United States, the leader among major nations in the use of imprisonment, already has a rate which exceeds 400 per 100,000.

Overcrowding

This increase in the rate of imprisonment will exacerbate an already serious problem of prison overcrowding. The Minister for Correctional Services has indicated that the problem will be tackled by providing new prison accommodation, and by double bunking in existing accommodation.

Site visits by COMSA to the prisons listed earlier in this chapter revealed that the conditions under which the majority of prisoners are currently being housed in South African prisons fail to meet the space standards set by the Department of Correctional Services, and the United Nations Standard Minimum Rules for the Treatment of Offenders.

Overcrowding is at a crisis point in many prisons, with double bunking commonplace and instances of up to 50 prisoners crammed into communal cells designed to accommodate half that number. In these cells, lavatory, washing and related facilities are totally inadequate.

The conditions under which maximum security prisoners are being housed can only be described as primitive. At maximum security prisons such as Leeuwkop near Johannesburg and Victor Vester in the Western Cape, 20 to 25 prisoners were observed living in cavernous communal cells and sleeping on thin strips of rubber jammed next to one another.

Each cell, with floor dimensions approximately nine metres square, had a single lavatory, and in some cases a urinal, together with a shower and wash basin.

Natural light was virtually non-existent and the space available for any

personal belongings was severely restricted. Prisoners spent most of the day locked in these conditions (from approximately 1600 hours to 0700 hours) and ate most of their meals in their cells.

Work and Vocational Training

Compounding the problem of overcrowding in South Africa's prisons is the lack of available work and vocational training for prisoners, particularly in medium and maximum security institutions. In maximum security prisons there is in essence no meaningful work for prisoners beyond routine cleaning, maintenance and cooking.

The possibility of working in vocational settings, like furniture and metal construction shops, is denied to maximum security prisoners because of the perceived risks involved in allowing the prisoners to handle tools and other potentially lethal weapons. Until recently, maximum security prisoners at Brandvlei, and presumably at other similar facilities, spent hours breaking rocks. Today this form of punishment has been abandoned, but no suitable work replacement has been provided.

In medium security prisons, and even more so at minimum security farms such as those at Victor Vester and Brandvlei, work is more readily available. But there are still very limited opportunities to learn any trade or skill which may be of use to a prisoner on release. For example, the workshops inspected at Pollsmoor can only cater for about 200 prisoners in a population exceeding 1,000. It would also seem that many prisoners who do work in these places are selected because of their pre-existing vocational skills rather than to learn a new trade or vocation. Officials also suggested that they lacked sufficient funds and orders for the manufacture of items in these workshops.

It was further suggested that prison farms were vastly under-utilised because of restrictive practices regarding the sale of prison products. Even other Government institutions were said to be barred from buying agricultural products from correctional institutions.

Recreation and Related Programmes

Closely related to the problems of overcrowding, work and vocational training is the additional dilemma of providing the inmates of South African prisons with adequate recreational and allied activities.

At present, these activities are for all practical purposes limited in most prisons to the period between 0700 and 1600 hours – the hours during which inmates are not locked in their cells. In other than minimum security prisons, observations suggest that even during the period that inmates are not confined to their cells the opportunity for them to engage in meaningful or sustained recreational activities is slim. Opportunities for exercise are, for the most part, provided in a closed yard. In maximum security prisons this yard is likely to be both small and vastly overcrowded.

The opportunities for private reading or study, given the conditions already described, are also unsatisfactory. Even so, prisoners were observed in the most crowded cells trying to read or study despite the noise and dismal lighting levels.

Visiting

The nature and length of visits allowed prisoners in South African prisons, as well as their entitlement to other privileges, depends upon their classification into four categories – A, B, C and D, with the most restrictive situation applying to those in category D.

In essence, contact visits are permitted to prisoners in categories A and B while those in the two lower categories may only have non-contact visits. The maximum time allowed for any type of visit is one hour, with the precise period and frequency of visiting determined according to the prisoner's classification.

Until quite recently prisoners held in maximum security prisons, regardless of their classification, were denied contact visits. This situation still prevails in regard to approximately 300 offenders who have been sentenced to death and who are confined principally at a single prison in Pretoria. The circumstances surrounding the detention of these prisoners on death row will be dealt with in more detail below.

Regardless of the specific classification given to a prison or prisoner, the existing visiting system has a number of deficiencies.

First, the physical facilities tend to be crammed, non-private and lacking in any special provision for families with young children. In maximum security prisons, like the one visited at Leeuwkop, these facilities are even more inadequate.

Officials explained that because of the previous practice of prohibiting all contact visits in such prisons, they had been designed without any provision for visits of this type. With the change in policy correctional authorities had, at short notice, been obliged to make available contact visiting areas using the best available space.

At Leeuwkop, this space consisted of a small room normally used as a reception point for new prisoners. Rows of narrow benches had been placed in this room to accommodate visitors, with an overflow area available outside, shut in by barred gates, where prison vans drew up to unload prisoners.

Second, the length of time allowed for visits seems unduly restrictive given the distances travelled by many visitors to get to the prisons. Many prisoners complained in interviews that family and friends could not visit regularly due to the distance and expense involved. Given these problems, visitors should at the very least be able to spend reasonable periods of time with inmates in private and comfortable surroundings.

At present, other types of visiting programmes, such as the provision of private accommodation for conjugal visits; making available playgrounds,

garden space and cooking facilities for family visits; or allowing home furloughs for prisoners nearing the end of their sentence, seem to form no part of contemporary correctional practices in South Africa.

Complaint Procedures

In the course of a number of conversations with prisoners, including several with offenders who were undergoing disciplinary punishment, dissatisfaction was expressed with the procedures available to register complaints. These procedures include a register of complaints in each section of a prison.

An inspection was made of one such register at Robben Island maximum security prison. The register, in Afrikaans, contained only a very brief summary of each complaint and how it was dealt with. Prisoners were asked to acknowledge, with a signature, their receipt of advice about the outcome of the complaint.

Several prisoners claimed that the explanation given to them for rejecting complaints was either too brief, or unclear.

Similar comments were made about the value of another avenue of complaint – that of visiting magistrates. Prisoners said that the infrequent visits made by magistrates to correctional institutions tended to result in perfunctory queries about conditions and issues like the quality of food. There seemed to be little confidence on the part of prisoners about using these visits to raise substantive complaints about the conduct of prison officials, or the nature of the conditions under which they were being imprisoned.

In addition to visits by magistrates, judges have long had a visiting right to South African prisons. From questions asked at each of the institutions included in the COMSA visiting programme it would seem that this is a right which is seldom exercised by members of the South African judiciary. Prisoners also have access to the office of the South African Ombudsman – a right which permits them to write with complaints but which does not involve, it would seem, any visits to prisons by the Ombudsman or his staff.

The provision of a more satisfactory complaint mechanism for prisoners is, it is believed, currently being considered by the Department of Correctional Services.

In discussions with the Commissioner of Correctional Services and staff of the department, COMSA mentioned the possibility of adopting a procedure like that used in Canada where a Correctional Investigator can conduct an enquiry into a complaint on his or her own initiative, or upon receiving a request from the relevant Minister, or on behalf of or by an inmate.

The Correctional Investigator has extensive powers to obtain testimony and demand documents from relevant persons as well as to gain access to correctional institutions. This Canadian official does not, however, have the authority to order change. The power of the office lies with its ability to investigate complaints independently, to publish its findings and conclusions

about complaints, and to make recommendations to the appropriate government authorities to address the area of complaint.

Discipline

Extensive powers are given to South African correctional authorities to impose discipline for breaches of prison rules. Both dietary and corporal punishment remain disciplinary options available to the authorities although in the current session of the South African Parliament the Minister of Correctional Services has introduced legislation to abolish both of these sanctions. COMSA welcomes this development which will bring South Africa into accord with modern correctional practices which have long ago resulted in the abandonment of such sanctions for disciplinary offences in prison.

During the debate in Parliament regarding this correctional reform, members of the Democratic Party, who supported the measure, pointed to the anomaly that while the Correctional Services Department was scrapping corporal punishment it was not ruled out as an appropriate court sentence.

Judicial whippings were said to have been imposed by the courts on large numbers of people in 1992, without the option of a fine or jail. The Democratic Party pointed out that the continuing use of whipping contradicts the International Convention against Torture and Cruel and Degrading Punishment recently ratified by the South African Government.

Censorship and Access to Information

It is now said to be official policy in South African prisons not to censor incoming and outgoing mail and materials, except in relation to persons under sentence of death.

However, at one juvenile prison, a stack of unsealed outgoing correspondence was observed in a library area. When queried, officials said that they randomly looked at about 25 per cent of outgoing letters before they were sealed.

In addition, very few newspapers or magazines were observed in any of the prisons visited. Officials stated that few inmates could afford to buy such publications. According to their level of personal and prison classification, the privileges of prisoners also extended to the possession of a television and radio. Few prisoners were observed with individual sets, although communal televisions seemed quite widely available.

Access to library books and related literature was said to be unrestricted, at least as far as these materials were stocked in a prison library. Library holdings were said to be changed on a regular basis, usually through the utilisation of services provided by the local province. Several prisoners complained that they lacked access to study materials for courses either because they did not have sufficient funds to purchase the prescribed texts, or because they were not readily available through the library.

COMSA believes that in general censorship should not be imposed in a correctional setting, and that subject to reasonable resource constraints prisoners should have ready access to library, media and related information sources. This area of South African correctional policies needs to be reviewed accordingly.

Health Care

Health care facilities were examined in most of the prisons visited. In general these facilities seemed to be adequate. The health care staff interviewed were usually trained nurses. They indicated that the services of fully qualified medical practitioners and specialists were available on call if emergencies should arise, and that regular visits were maintained by such practitioners and specialists to the various institutions.

In one prison, a number of inmates complained that they were not able to obtain appointments to see a medical practitioner to secure prescribed medicines. When questioned about these complaints officials admitted that the visiting hours of the doctor concerned were insufficient to deal with the demand and this situation was being remedied. The complaints, none the less, raised the possibility that non-medical staff were restricting access to medical care in a way which could be prejudicial to the welfare of inmates.

Health care staff were also questioned about the number of injuries they treated caused by assaults of various types within prison. All of those questioned said the number of assaults was small although on occasion fights between rival gangs could result in a large number of injuries. In one prison, for example, a fight in November 1992 resulted in 23 inmates being treated for knife cuts. Three of these inmates sustained serious injuries but no one was killed.

Prison Gangs

The prison conditions described in this report have long been a fertile breeding ground for gangs. During the height of the apartheid era, these gangs terrorised their fellow inmates, leading to deaths and injuries in many institutions.

Today, correctional officials claim that prison gangs have been curbed. As the head of one correctional institution put it:

> Gangs are not a problem in our three medium security prisons ... but in our maximum security prison the gangs are there. A large majority of prisoners belong to gangs and we had two isolated incidents on 16 December and Christmas Day with two gangs; members of one gang attacked another gang on the 16 December and then there was a retaliation on 25 December... We are quite satisfied that we are in full control of the gangs. Although they are there, and the prisoners belong to a gang, they are not all that active at the moment [Interview, February 1993]

When the same official was asked to describe the major gangs, he said:

> We have what we call the Big 5's, the 26's, 27's, 28's and the Air Force 3 and Air Force 4. Air Force: their policy of course is to escape. That is why they are called Air Force... The Big 5's, it is said that they [give] their co-operation to the personnel. They are usually pimps and they do not cause us any problems.

The 26's, 27's and 28's are apparently gangs involved in a range of illicit activities including prostitution within the prison, stand-over tactics, homosexuality and trafficking in contraband.

Death Row

As mentioned earlier, about 300 prisoners who have received death sentences are currently being held in a single ultra-maximum security prison in Pretoria. A moratorium was placed on the carrying out of executions in 1990. Prior to that South Africa had one of the highest judicial execution rates in the world. Between 1980 and July 1989, 1,109 prisoners were hanged of whom 3 per cent were white and the remainder non-white. These figures do not include executions in the 'independent homelands'.

At the time of declaring a moratorium on executions the Government established a Review Panel to examine the case of each person then held on death row.

This examination was required following a change in the law relating to the imposition of the death penalty. Under the former law, the death penalty was mandatory for murder, unless there were extenuating circumstances. The new law now requires a judge to consider any mitigating factors before deciding whether or not to impose a death sentence in a murder case. It was felt that persons who had been sentenced under the old law should have the opportunity of making representations to the Review Panel to take advantage of the more lenient criteria under the new law.

It is understood that the Review Panel completed its examination of the existing death row cases during 1992. It is not known how many death sentences were commuted to life imprisonment or lesser terms as a result of this examination. In addition to these commutations, a number of death row inmates have been freed over recent years as part of the programme to release political prisoners.

On 15 February, the COMSA Chairperson visited death row and spoke to about 15 offenders selected at random from the population of sentenced prisoners. All death row prisoners are kept under extremely stringent security conditions in a special facility located in the Pretoria Central Prison complex. The facility, like all of the maximum security facilities visited by COMSA, was overcrowded, with up to five persons per cell in many cases. According to the authorities, many inmates preferred to live in these larger communal cells rather than in single cell accommodation. Despite the overcrowding, these death row prisoners' cells were in general of a superior quality to those observed in other maximum security prisons.

The time spent on death row by each prisoner interviewed varied substantially, with some offenders stating that they had been sentenced to death as long ago as late 1988 or early 1989, spending the intervening years awaiting their fate.

Most prisoners seemed to be both vague and confused about the work of the Review Panel. A number mentioned that in making a submission, in writing, to the Panel they had been assisted by a member of LHR. But in the case of all of the offenders spoken to the Panel had eventually decided that their sentences should not be commuted.

The conduct of the interviews proved a gruelling experience for all concerned. Several prisoners became very distressed and could not continue the interview. Others expressed extreme anguish about the uncertainty surrounding their future, and about their mental state.

One inmate said he would prefer to be executed rather than continue to live in this situation. Another offender, in a single cell, had recently set fire to his mattress and other material. Marks could be observed in the cell where the flames had scorched the walls. Officials said that this prisoner was mentally unbalanced – a view which seemed confirmed by an attempted conversation with the man, who claimed to hear secret voices and to believe strange people were watching him in his cell.

Several inmates stated themselves to be political prisoners, expressing bitterness about being abandoned by their supporters following the earlier releases made of this category of offender. Other prisoners spoke of their frustration and resentment about the quality of legal assistance they had received at their judicial trial. In almost all cases this legal assistance was in the form of a court appointed *pro bono* lawyer.

In general, based on these interviews and on the observations made of the conditions under which death row prisoners are being kept, the following conclusions seem justified:

- The psychological trauma being experienced by death row inmates is extreme. That trauma has in many cases been continuing for a number of years. In the past few months the Government has hinted that it may end the moratorium on executions – a threat which has heightened the anxiety and tension experienced by all death row inmates.
- The physical conditions under which death row inmates are being held are lacking in basic recreational facilities, and in vocational or related programmes. An inmate's day is typically taken up with playing cards or similar games, watching television, viewing videos supplied by the authorities, or in some cases studying. The death row facilities were never intended to hold long term prisoners. Thus, the available exercise areas are very limited and no provision has been made for work opportunities. Correctional authorities admitted that it was a very difficult environment in which to maintain the morale of both inmates and staff.
- Visiting privileges for death row inmates are, as noted earlier, limited to

non-contact visits. These visits take place in cramped cubicles under the eye of staff members. Given the level of security already maintained in the facility there would seem to be no reason why carefully monitored contact visits should not be allowed as is now the case in other maximum security prisons in South Africa.

- Reference has already been made to the need for more equitable and effective complaints procedures to be put in place in South African prisons. In the case of death row prisoners this need is particularly acute because of the rigidly controlled world in which they live. All inward and outgoing mail is censored; visiting by outsiders is strictly monitored; and regular access to legal and related advice seems difficult to arrange.
- Several prisoners interviewed complained about the difficulties they were experiencing in purchasing books and materials required for courses they were enrolled in. (Until recently, according to officials, funds for such purchases had been made available by charitable groups.) Most of the offenders on death row were impoverished, and none of the inmates received any stipend. This situation appears unfair, given the absence of all but the most rudimentary facilities for death row inmates. Those seeking to further their education should be encouraged by, at the very least, some subvention for the costs associated with their studies.

In the longer term, the fate of all of those now held on death row will hinge upon political decisions made either by the existing Government, or by its democratically elected replacement.

In its report on the first phase, COMSA stated that it hoped that the existing temporary moratorium on executions would become a permanent one. Certainly, there would seem to be a strong case to be made for keeping this moratorium in place until decisions have been made about a new constitutional structure for South Africa, and in particular the provision of a Bill of Rights. In the meantime, the conditions under which those sentenced to death are kept require immediate review.

A CLIMATE OF CHANGE

The comments made so far in this chapter about the state of South Africa's correctional system may appear to be unremittingly negative. There are, however, a number of developments which suggest that a climate of change is gathering momentum.

There is perhaps no better evidence of a major shift in correctional philosophy and practice than the access COMSA has been given to South African prisons. In the past, these institutions have for all practical purposes been off limits to any foreign or local observers with the limited exception of some visits, at times suspended, by the International Red Cross.

Today, it is an explicit policy of the Department of Correctional Services to open the correctional system to outside scrutiny, including that of the media.

A new senior appointment has been made of a public relations manager to oversee this important initiative. COMSA met this manager, an experienced journalist in his own right, shortly after his selection for this new position.

It was clear from discussions about his proposed work programme that the top management in the correctional system is committed to a new era of openness and accountability. This commitment is also linked to a desire to inform the community about the role of correction, and to emphasise the responsibilities that the community itself has in assisting with the rehabilitation of offenders.

Community-based correctional programmes are still in their infancy in South Africa, but a well planned and expanding system of correctional supervision is beginning to spread around the nation. The system combines elements of probation supervision, community service, home detention and related alternatives to imprisonment which are familiar features of correctional programmes in many western nations.

At the time of COMSA's visit to one of the first offices opened in the Western Cape to administer this new sentencing option, about 700 cases had been dealt with in this way. A sense of enthusiasm pervaded the discussions with the individuals staffing this office. They spoke of the new challenges and opportunities for rehabilitation that a correctional supervision programme offered, in stark contrast to the traditional use of imprisonment. Offenders who were interviewed serving a sentence of community supervision also expressed positive feelings about the programme.

Although it is still too early to judge the long term efficacy of correctional supervision as a rehabilitation tool, initial reports suggest that well over 90 per cent of the offenders receiving such a sentence successfully complete their period of supervision. This high rate of success is pleasing but it may well be influenced by the stringent eligibility criteria established for those offenders who receive this type of sentence. These criteria favour offenders with strong community ties – a situation which seems likely to preclude many non-white offenders from participating in the programme.

A similar enthusiasm about the new programme was found at the level of the Commissioner of Correctional Services and his senior management team. After decades of isolation from their corrections colleagues in most countries of the world, these officials were remarkably candid about their need for information, advice and assistance in setting fresh directions for South Africa's correctional system.

When questioned about many of the issues which have been raised in this chapter they responded in a frank and positive way, admitting certain deficiencies but also pointing to the enormous problems they had confronted as administrators in seeking to change an apartheid-driven culture dominated by retributive and deterrent philosophies of punishment.

Like their counterparts around the globe, the managers of South Africa's correctional system tend to have only a limited influence on policies which affect their work-load in prisons. Reflecting what they perceive to be community standards and desires, and guided to varying degrees by legislative dictates, it is judicial officers who sentence convicted offenders to prison or alternative forms of punishment. In South Africa, these overwhelmingly white judicial officers have long demonstrated a capacity and willingness to impose draconian penalties on an overwhelmingly non-white offender population.

Changing this situation, and instilling a new approach to the sentencing of offenders, with an emphasis on their rehabilitation and reformation, is a formidable task. Fortunately, there are already judicial officers who are showing a willingness to respond to such ideals. Thus in a recent speech, Mr Justice P H Tebbutt of the Cape Supreme Court urged his colleagues to consider the benefits of community-based sentences in preference to the use of imprisonment:

> Judicial officers are encouraged to make greater use of fines, suspended sentences, the performing of community services and the form of sentence introduced in 1991 known as correctional supervision. In this the offender can be placed under house arrest, can be obliged to perform community service, be monitored by the authorities of the Department of Correctional Services and/or be obliged to undergo rehabilitation programmes or treatment e.g. for drug or alcohol abuse or, if necessary, psychiatric treatment. The main feature is that the offender is kept out of prison. His return, hopefully, to the straight and narrow path involves his fellow citizens. [Address to Fedics Breakfast Club, Cape Town, 28 April 1993: 7]

It will be the citizens of South Africa as a whole who in the future will have the responsibility of deciding whether or not they wish to continue support for a hugely expensive and largely ineffectual prison system. The daily cost of maintaining an offender in prison in South Africa is said to be about R42. The equivalent cost of correctional supervision is about R8. In the longer term economic factors may be as persuasive as social justice arguments in achieving change in this area. There is also the possibility that a new Bill of Rights will provide the opportunity for legal challenges to be mounted against the Government for permitting what amounts to cruel and unusual punishment to occur in the nation's vastly overcrowded prisons. Many of the leaders of the new South Africa are also likely to be in a unique position to speak about the effects of imprisonment – a situation which may in itself act as a powerful catalyst for change.