We are aware of all the inconveniences of prison, and that it is dangerous when it is not useless. And yet one cannot ‘see’ how to replace it. It is a detestable solution, which one seems unable to do without.

INTRODUCTION
Throughout much of their history prisons have been notoriously failed institutions. Their capacity to effect positive change in incarcerated subjects and in the communities from which they come is contradicted by their tendency to produce more criminality than they inhibit, earning them the nickname ‘universities of crime’. While for some, prisons act as a deterrent to crime, for others, particularly in communities that produce a large number of prisoners, crime has become an aspiration and imprisonment an expected feature of life. The seeming ease with which imprisonment is accepted to be a meaningful solution to crime should be carefully interrogated. As we consider incarceration as a strategy for reducing crime, we should also consider a range of other methods, which are equally, if not more viable as methods of addressing the crime problem, such as community
service, diversion programmes, mass-based and targeted educational campaigns, socio-economic development services and the reduction of poverty and inequality.

As we have seen throughout this book, the components of the criminal justice system are closely linked, even if intersectoral cooperation remains a persistent challenge. For example, lengthy delays in the finalisation of trials contribute significantly to the size of the unsentenced prison population. The increase in the length of sentences since the mid-1990s, in part a consequence of the minimum sentencing legislation, has also added to the prison population and increased overcrowding.

Prisons house both sentenced prisoners and those awaiting trial. For sentenced offenders, prison is the last step in the process of a case. For awaiting trial detainees, those who are held in prison if they are refused bail or are unable to pay bail set by a court, this may be the start of a long wait while their case runs its course (bail is discussed in more detail in Chapter 4).

This duality in function of the prison system (holding awaiting trial detainees and implementing sentences of imprisonment) has been the source of many challenges, to such an extent that the DCS wishes to distance itself from the awaiting trial detainee (ATD) population. Ideologically the Department feels a far greater responsibility towards sentenced offenders than towards those awaiting trial, regarding the latter essentially as a nuisance inherited from the previous regime. It is clear that the DCS feels no great obligation towards the ATD population and regards them as an ‘overcrowding problem’ rather than an integral part of their mandate to which they have an obligation laid down in the Correctional Services Act. The reality is that many unsentenced prisoners spend long periods awaiting trial and many of them will be acquitted. During this period they will receive only the basic services required to house them. The Department of Correctional Services does not provide social work services, training or education services to unsentenced prisoners.

Of the sentenced prisoners, those with sentences of less than two years have had the services available to them curtailed. This has come about through legislative amendments initiated by the Department itself. The Correctional Services Amendment Act (25 of 2007) states in section 30(b) that only offenders serving a sentence of longer than 24 months must be assessed by the Case Management Committee and a sentence plan developed in consultation with them. The nett result of this seemingly innocuous amendment is that nearly 75 per cent of re-
leased offenders will not have had the benefit of a sentence plan during their term of imprisonment. This means, in effect, that they will not receive planned and focused intervention to assist them to lead crime-free and socially responsible lives after imprisonment as required by section 36 of the Correctional Services Act – they will simply have been locked up.

These shifts in legislation and policy are a move towards greater fragmentation and compartmentalisation rather than the coherence advocated for in the 2005 *White Paper on Corrections in South Africa*. These legislative amendments lessen the Department’s obligations to both sentenced and unsentenced prisoners. This is not in the best interests of reducing crime in South Africa, nor is it in line with the constitutional requirements for arrested and detained persons.

This chapter identifies the central problems faced by the Department of Correctional Services and proposes some corrective steps to achieve maximum benefits at the lowest cost. Because management of a large system, such as the prison system, is difficult and complex, changes to the system take time. Using the White Paper implementation target date of 2025, this chapter proposes changes that can be made over the next 16 years.

**IDENTIFYING THE MAJOR PROBLEMS**

**Overcrowding**

The profile of the prison population has changed significantly in the past 15 years. Changes in the size of the prison population and the awaiting trial detainee population, together with lengths of sentence and the duration of awaiting trial detention, have all had a significant impact on conditions of detention and adherence to human rights standards. The Department of Correctional Services is aware of these changes, but seems to have done little to better manage the risks associated with it.

The following figures highlight changes in the profile of the prison population:

- In 1995 South Africa had a prison population of just below 120 000. By 2005 this had grown to over 180 000, an increase of 50 per cent.
- The number of prisoners serving sentences longer than seven years increased from less than 30 000 in 1995 to nearly 69 000 by the end of 2008.
- The number of prisoners sentenced to life imprisonment increased from approximately 400 in 1995 to more than 8 000 by 2008.
• In 1995 the awaiting trial detainee population numbered 23,783, and by 2000 it had increased to 57,811. In 2005 it came down to 47,305, but then started climbing again. At the end of 2008 there were 50,284 awaiting trial detainees. 

• By the end of 2008, nearly 45 per cent of the awaiting trial detainee population had been in custody for 3 months and longer, and 26 per cent had been in custody for longer than 6 months.

To date the Department’s response to overcrowding has been to release large groups of prisoners to relieve the pressure on available capacity. The last such release took place in 2005 by remitting the sentences of prisoners. In this way 30,000 sentenced prisoners were released.

However, as discussed in the previous chapter, the number of individuals incarcerated is determined to a large extent by policy and legislation. Any changes aimed at making the criminal justice system more effective will probably result in more successful prosecutions finalised over shorter periods. Unless there are specific measures in place to ensure that imprisonment is used sparingly, and even then, that the size of the prison population is carefully controlled, the impact of an improved criminal justice system may in fact be severe on the prison system and in particular on the conditions of detention and the working environment of DCS officials. If the prison population is to increase even moderately over the next 16 years, the problem of overcrowding may be so severe as to threaten the implementation of the White Paper.

Figure 5 shows three different projected rates of increase for the sentenced prison population over the next 16 years – at 1 per cent, 3 per cent and 5 per cent per annum. Bearing in mind that current capacity is 115,000 and plans are afoot to increase it to 139,000, it is clear that only the lowest estimated increase of 1 per cent can be met by planned capacity.

Lack of capacity

The Department of Correctional Services employs a large staff, currently 42,000, however, it still lacks capacity. There are two reasons for this: firstly, staff do not in general possess the skills and knowledge to implement the White Paper and ensure compliance with the Correctional Services Act. Even the 2007/8 annual report cites lack of compliance with legislative and procedural requirements by
officials as being one of the most important risks facing the Department. Secondly, the Department experiences serious shortfalls in the area of professional skills – social workers, educators, nurses, doctors, and psychologists.

A further cause of reduced capacity is the increasing impact of HIV/Aids. Although this affects the day-to-day operation of prisons and the ability of the Department to fulfil its mandate, it is a problem that has largely been ignored.

In fact the Department of Correctional Services is not short-staffed, save for the professional skills categories. With improved management and effective utilisation of existing capacity, much more can be achieved. In his 2007/8 annual report the Inspecting Judge of Prisons said of the lack of capacity: ‘steps will have to be taken to improve production levels, reduce absenteeism and enhance efficiency levels.’

Policy confusion

The Correctional Services Act was promulgated in October 2004. Shortly thereafter, in March 2005, the White Paper was released. The White Paper gave rise to a plethora of new policy documents. The unintended consequence has been that in many respects more attention has been paid to White Paper-generated policy development than to fulfilling the duties imposed by the Correctional Services Act.

Fundamentally there appears to be a fissure characterising the regulatory
framework of the department. There is authoritative tension between the Correctional Services Act (as operationalised by the Departmental B-Orders) and the White Paper as overarching frameworks.

This tension arises from the differing philosophies underlying the White Paper and the Act. The Correctional Services Act has a restrained and considered retributionist approach to corrections: offenders should be punished, and prison is the place to do that. The White Paper, in contrast, has a rehabilitationist approach: offenders are people whose behaviour can be changed, and prison is the place to effect that change. Although the Correctional Services Act sets out to restrict any gratuitous retribution in prisons and to provide for the protection of prisoners’ rights, the White Paper goes much further in acting on behalf of the prisoner, by casting prisons as centres for rehabilitation. The White Paper’s failing is that it does not stipulate in any detail how rehabilitation is to be effected. Even more seriously, the vision of the White Paper is at odds with the reality of South African prisons, which remain fundamentally retributive mechanisms for dealing with crime.

The policies derived from the White Paper have not been developed into new standing orders and job descriptions. Thus, young recruits to the Department, trained in the new rehabilitationist vision, have little direction as to how this vision is to be implemented into daily activities. Older Department members remain untrained in, and sceptical of, rehabilitation. The result is that prisons remain in practice excessively retributionist and largely without a rights-based agenda. A systematic rehabilitation programme is yet to emerge.

Irrational budgets

The Department of Correctional Services budget has increased meteorically since 1994. Much of the budget has been allocated to infrastructural development (e.g. two new private prisons, TVs, CCTV, fencing, and a biometric security system) and the employment of more staff. The trend towards increased budgets did not change after the release of the White Paper in 2005, and the percentage of the budget allocated to the Social Reintegration Programme of the DCS has remained stable at roughly 3,2 per cent of successive budgets since 2003/4. Thus, while the White Paper identifies rehabilitation and successful reintegration as the Department’s ‘core business’, the budget allocation places the emphasis elsewhere – on security and infrastructure development – at the cost of staff training, reha-
bilitation services, and post-release support for offenders. This disjuncture between budget allocation and policy priorities shows the Department has not yet made the paradigm shift outlined in the White Paper.

The question of how the Department should spend money on rehabilitation has also not been clearly addressed. Rehabilitation and social reintegration programmes do not involve large capital programmes or expensive equipment, as they are interventions aimed at cognitive behavioural modification of offenders, usually in the form of semi-structured programmes. These do not require significant expenditure above the personnel costs involved. Nor do post-release support services require any significant capital costs. However, securing the right staff, with the necessary skills and levels of motivation, are significant challenges. It is well known that the Department of Correctional Services finds it difficult to retain scarce skills. The Department may well find it easier to spend its budget on large capital works and technologically advanced security systems.21

Corruption, mismanagement and oversight

Between 1994 and 2000 there were attempts to transform the Department of Correctional Services in line with new democratic values. These attempts were disastrous. The Jali Commission found that the Department was fraught with corruption and not adequately under the control of the state.22 While prison systems worldwide have a tendency to resist accountability and transparency, these problems have proven to be particular challenges to the South African prison system in the new constitutional order.

Despite the efforts of the Office of the Inspecting Judge of Prisons and the Portfolio Committee on Correctional Services (especially from 2003 to 2008) the DCS has remained a difficult institution for non-DCS stakeholders to penetrate,23 resulting in the need to resort to continuous litigation on issues of prisoners’ rights.24 Financial management in the DCS has remained problematic as reflected in the five qualified audit reports from the Auditor General.25 The recently extended mandate of the SIU26 to start with further investigations regarding large contracts with service providers underscores the fundamental problems this department has with governance and accountability. The tainted image of this department amongst the public in general and, more importantly, amongst prisoners places the morality of the criminal justice process at great risk.

The Judicial Inspectorate of Prisons (JIOP), created by the Correctional Serv-
ices Act, has in many ways contributed to bringing some transparency to the prison system. It remains internationally a unique structure and is mandated to visit prisons on a regular basis and record complaints through its Independent Correctional Centre Visitors. The Inspectorate has not been without criticism, particularly from prisoners who have felt that their complaints have not been addressed. The powers of the JIOP were weakened by a 2002 amendment which removed reporting on corruption and fraud from the Inspectorate's mandate. It is not within the mandate of the Inspectorate to discipline DCS officials or prepare cases for discipline, and the extent to which it can make binding decisions on the DCS is also limited. Mandatory reporting by the DCS to the Inspectorate is restricted to a limited range of incidents, such as deaths in custody. Even so, when serious rights violations have occurred, such as deaths in custody and mass assaults, the Inspectorate has limited powers and can only make recommendations to the Minister of Correctional Services.

The problems in oversight of the prison system were also noted by the UN Committee against Torture in 2006:

The Committee is concerned at the high number of deaths in detention and with the fact that this number has been rising. The Committee is also concerned at the lack of investigation of alleged ill-treatment of detainees and with the apparent impunity of law enforcement personnel (art. 12). The State party should promptly, thoroughly and impartially investigate all deaths in detention and all allegations of acts of torture or cruel, inhuman or degrading treatment committed by law enforcement personnel and bring the perpetrators to justice, in order to fulfil its obligations under article 12 of the Convention.

Infrastructural problems

The outdated architecture of many South African prisons is demeaning to the dignity of prisoners. Since 1994 only a few new prisons have been constructed and some of these have been dogged by controversy (e.g. Malmesbury, Goodwood, Kokstad and the two privately operated prisons). Smaller infrastructural improvement projects have not in the past 15 years been able to address basic shortcomings in infrastructure. As identified in the audit of infrastructure and conditions conducted by the Office of the Inspecting Judge, these include:

- Prisoners at 21 prisons are required to eat with their hands and are not issued with eating utensils and containers
- At several prisons surveyed, prisoners are required to sleep on the floor,
share beds with other prisoners, or are issued with inadequate bedding
• Searches are conducted in a dehumanising manner and male prisoners are required to strip naked in front of staff and other prisoners with no privacy afforded
• There are no facilities in 94 per cent of prisons to separate prisoners with contagious diseases
• Only 56 per cent of prisons are equipped, even on a limited scale, with class-rooms
• Only 40 per cent of prisons are equipped with workshops, and only 2 per cent of sentenced prisoners are involved in production workshops
• While 72 per cent of prisons have dining halls, the majority are not used for their intended purpose and meals are taken in the cells
• More than 40 per cent of prisons are without libraries, even though access to adequate reading material is a Constitutional requirement

Under these conditions it is unlikely that offenders, such as those in the Anna Juries case, will come out of prison better citizens after serving their lengthy sentences.

Persistent overcrowding is responsible for many of the problems identified by the Inspecting Judge. Overcrowding places prison management under enormous pressure, and makes it very difficult for managers to perform optimally. This is unlikely to be relieved by the building of new prisons, since the Department’s proposal to build eight new 3000-bed prisons to be operated by the private sector have not been received well, either by Parliament or civil society. There have been objections to the high costs of construction as well as the lack of transparency that has surrounded the process. The involvement of the private sector in operating prisons for profit on such a scale has been questioned, as have the enormously high costs involved and the burden this will place on the tax-payer for decades to come.

As already mentioned, an increase in the size of the prison population over the next 16 years of more than 1 per cent per year, will already exceed available and planned accommodation. While there must be an improvement in the nature and quality of prison accommodation, it is clear that South Africa will not be able to build itself out of the prison-overcrowding problem. A more sustainable solution must be found, one that is aimed at proactively managing the size of the prison population through prevention, sentencing and effective social reintegration pro-
grammes. Smaller prisons, located closer to prisoners’ communities of origin, would also facilitate contact with family members and assist in reintegration.

RECOMMENDATIONS
Coherent policy development based on evidence

As discussed in the previous chapter (Chapter 8), South Africa’s sentencing regime has, over many decades, resulted in the over-utilisation of imprisonment and the neglect of non-custodial sentencing options. This has now been exacerbated by the minimum sentencing legislation. Disparities based on race, gender, and financial status continue to characterise sentencing.

There is a dire need to reframe the purposes of imprisonment to give effect to the values of the Constitution. Such a reframing should not be limited to the immediate treatment of prisoners and their conditions of detention, but rather it should address more broadly the purposes of imprisonment, measured against the values of the Constitution. In a constitutional democracy, the purpose of punishment and the intended functions of imprisonment must be articulated with great clarity. How do punishment and imprisonment give effect to realizing the potential of each individual? How does imprisonment give recognition to the historical nature of South African society, how can it heal the divisions of the past? Failure to deal with such fundamental questions will prevent the transformation of sentencing in South Africa.

Despite its laudable objectives, the White Paper on Corrections released in 2005 is not in touch with daily prison realities such as the physical conditions of detention, staff morale, poor accountability and human rights violations. The White Paper has also not been subject to any independent public review that takes these realities into consideration. The policies that have been developed to give effect to the White Paper have hardly translated into any practical guidance at operational level.\(^{32}\) Policy and procedures must be based on knowledge and evidence, and subject to regular review. Intuitive notions of ‘what works’ have been shown too frequently to be ineffective, if not counter-productive. For example, there is no evidence from any reliable research that imprisonment reduces recidivism.\(^{33}\) There is indeed a growing body of domestic and international research describing effective and ineffective interventions, and this should be consulted.
Aligning the prison population size to available resources

Prison overcrowding is frequently used as an excuse for poor services, especially by the Department of Correctional Services, which claims such overcrowding is an ‘uncontrollable’ part of the criminal justice system. Decision-makers seem to believe that the size of the prison population is the result of an organic and uncontrollable interaction between law enforcement and crime. Meanwhile, studies on crime and punishment have shown convincingly that prison population size has less to do with the rate of crime than the policies and ideologies of governments with regard to incarceration. Even in a country with a high crime rate there is no logical reason why prison overcrowding must be accepted as a fixed feature of the prison system. Policy and practice across the criminal justice process need to be aimed at aligning the size of the prison population to both physical resources (buildings and infrastructure) and human resources (the staff and skills in the prison system). This is not a new idea, it was already proposed as an objective by the SA Law Reform Commission in 2002.

Efforts at promoting non-custodial sentences (where the offender is punished in some other way than prison) have not been hugely successful. In the same way that minimum sentencing legislation prescribes certain mandatory sentences, legislation needs to be developed for non-custodial sentences. Given the situation in respect of prisoners serving a sentence of less than 24 months, as described above, it follows that a non-custodial sentence should be the prescribed sentence if a court is contemplating a sentence of 24 months or less, unless there are substantial and compelling reasons to impose a sentence of imprisonment. The Criminal Procedure Act already provides for a number of sentencing options such as correctional supervision, restitution orders, suspended and postponed sentences, and community service orders.

Controlling the size of the unsentenced prison population has proven to be an extremely difficult problem. Many recommendations have been made in this regard, and some, such as increased court hours, have been implemented. A more comprehensive approach is required, which would make use of these options:

- A proper pre-trial service that offers verified information acquired before an accused person’s first appearance in court including the residential address of the accused, work and community ties, and income. In addition, it offers supervision of bail conditions by court or SAPS officials, ensuring that the likelihood of abscondment is lowered.
Avoiding unnecessary arrests for minor offences and strengthening existing mechanisms (e.g. police bail) for the South African Police Services to deal with such offences in a manner that avoids detention.

Screening cases early in the criminal justice process to verify that there is indeed a *prima facie* case on which to proceed, and avoiding unnecessary postponements for further investigations.

Establishing a monitoring and liaison mechanism at prisons to deal with unsentenced prisoners. Such a mechanism needs to facilitate communication and cooperation between prison management, unsentenced prisoners, the Legal Aid Board, prosecutors and magistrates in specified magisterial districts.

Establishing a mechanism that would enable and facilitate plea-bargaining soon after the prosecutor has made a decision to prosecute.

### Aligning budgets to strategic priorities

There is a need to refocus the Department’s budget away from the current disproportionate investment in hi-tech infrastructure, private prisons, and high-cost prison construction. The budget should be used to attract scarce skills, set up rehabilitation and education programmes, improve existing infrastructure, provide post-release support services, and offer community-based sentence options. It should finance staff training to meet the situations envisaged by the White Paper, the Correctional Services Act and to comply with basic human rights. All these line items are currently neglected, yet they have the most potential to give the greatest effect to the aims of the Correctional Services Act and the White Paper. Refocusing the budget in this way will result in an alignment of finances to the strategic priorities of the Department, and would address concerns raised in the past by the Portfolio Committee on Correctional Services. The objective should not be just to spend more money on prisons, but rather to allocate funds to where they will have maximum impact and to ensure that current human resources are used optimally. This requires budgeting for a well-functioning performance management system to ensure that officials are performing their duties as required.

### Strengthening oversight

While the Judicial Inspectorate of Prisons has established a significant presence in the prisons across the country, it remains a watchdog with small teeth. The
Inspectorate must be mandated to investigate human rights violations independently, and submit cases for prosecution to the National Prosecuting Authority. It should furthermore be mandated to compel the Commissioner of Correctional Services to take disciplinary action against officials. The Inspectorate should also be mandated to publish its inspection reports if a satisfactory response from DCS is not received in good time.

CONCLUSION

The South African prison system has faced many challenges over the past 15 years, some as a result of external influences, others of its own making. There is reason to believe that progress is being made and that the situation is improving. But the gains made need to be carefully protected and not inadvertently undone by decisions resulting from reviews that have not thought out all the consequences of their decisions. The greatest risk that the review process holds for the prison system is to marginalize it from the rest of the criminal justice system. The prison system is an integral part of the criminal justice system and not a dumping ground at the end of it for which only the DCS is responsible.
NOTES

1. The author wishes to thank Kelly Gillespie for her comments on an earlier draft.
4. Department of Correctional Services, *White Paper on Corrections in South Africa*, Pretoria: paragraph 2.6.3. Despite this policy shift, the Department of Correctional Services continued to be saddled with the responsibility of keeping awaiting-trial detainees within its facilities, as a legacy from the time when the Department of Prisons was administered under the Ministry of Justice and was perceived to have a single ‘custodial mandate’. There is a policy gap in relation to the responsibility for awaiting-trial detainees.
5. The sentence plan must contain a proposed intervention aimed at addressing the risks and needs of the offender as identified during an in-depth risk assessment. The plan should spell out what services and programmes are required to target offending behaviour and to help the sentenced offender develop skills to handle the socio-economic conditions that led to his or her criminality. Programmes to enhance the offender’s social functioning must be included in the plan, as should time frames and responsibilities.
8. Ibid, 30.
10. Everyone (except those serving life sentences) received a remission of sentence; the result was that 30 000 prisoners were released with near immediate effect. Even a person with a sentence of 20 years got some time off. This remission applied to all sentenced prisoners who were in custody at the time.
12. Linear projections such as those in figure 1 should be treated with caution as they seldom turn out to be correct. However, they do serve to illustrate the impact of growth in the prison population on available capacity.
paragraph 8.1.3.
15. Ibid, 152.
18. By the end of the 2006/07 financial year 76 new policies had been registered and 45 approved by the Minister of Correctional Services: Department of Correctional Services, *Annual Report of the Judicial Inspectorate of Prisons 2006/07*, 16.
19. Civil Society Prison Reform Initiative, Submission by the Civil Society Prison Reform Initiative to the Parliamentary Portfolio Committee on Correctional Services, 4, 5.
23. The Portfolio Committee expressed itself as follows at the end of its tenure: ‘The Committee’s relationship with the entity and the department it oversees was generally very good. Unfortunately the relationship with the DCS’ Executive Authority was less so. The extent of the breakdown in the relationship between the Committee and that authority is starkly illustrated by the latter’s neglect to inform the Committee of the re-deployment of the former National Commissioner in November 2008’: Portfolio Committee on Correctional Services, *Overview report of the oversight activities of the Portfolio Committee on Correctional Services (2004-2009)*, Cape Town: Parliament of the Republic of South Africa, 2009, 3.
24. In recent years, access to antiretroviral medication and decisions by the Correctional Supervision and Parole Boards have been the substantive foci of litigation against the DCS.
27. These refer to, for instance, detention in solitary confinement and the use of mechanical restraints.
28. Article 12: Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe
that an act of torture has been committed in any territory under its jurisdiction.


31. Portfolio Committee on Correctional Services, Overview Report of the Oversight Activities of the Portfolio Committee on Correctional Services.


37. In 2008 the Judicial Inspectorate of Prisons (JIOP) implemented a pilot project that had broadly these objectives. The project was able to demonstrate significant successes in facilitating decisions in respect of unaffordable bail.
The term “prison” refers to the institution where individuals convicted of crimes spend a definite amount of time, having lost their freedom until their sentences are over. For example, prison is where people go who have committed crimes like murder or drug trafficking. Most state prisons offer a system of “good time,” which allows the early release of inmates who behave themselves during incarceration. State Prison Example. As an example, California state prisons have what they call “half time.”