

**THE EFFECT OF SENTENCING ON THE SIZE
OF THE SOUTH AFRICAN PRISON
POPULATION**

By

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Executive Summary

South Africa has a serious prison overcrowding problem. The total number of prisoners has grown steadily and dramatically over the last 11 years. The cause of the increase has changed during this time. Between 1995 and 2000, the major driver of the prison population rise was a massive increase in the size of the unsentenced prisoner population. After 2000, the number of unsentenced prisoners stabilised, and then began to decrease. But the prisoner population continued to grow, now as a result of an increase in the number of sentenced prisoners. This growth continues, despite the fact that the number of offenders admitted to serve custodial sentences is decreasing. The bulk of this increase consists of prisoners serving long sentences. Thus, the rate of release of sentenced prisoners is slowing down.

Much of the blame for the increase in the size of the prisoner population has been placed at the door of the so-called minimum sentences legislation, enacted in May 1998. However, the minimum sentences legislation had a delayed impact, and prisoners sentenced under these provisions did not begin to swell the prisoner population until early 2000 at the soonest. Although there was a significant increase in the size of the sentenced prisoner population at this time, the increase had in fact begun earlier, largely as a result of public and political pressure. As yet, the minimum sentences legislation has not had a major impact on the size of the prison population. The full impact will be felt in the years to come when those who would otherwise have been released, remain in prison due to the stipulated minimum sentences with longer non-parole periods.

The exception to this trend was sentences for sexual offences. Longer sentences for sexual offences only began to increase substantially at the same time that the minimum sentence legislation could be expected to have an

impact. The legislation had a visible impact on sentences for sexual offences, by compelling the courts to impose more severe sentences than had previously been the case.

Whilst attention was focussed on the minimum sentences legislation, it appeared that the increase in the jurisdiction of the Magistrates' Courts played a far more important role in contributing to the rapid growth in the prison population from 1998 onwards. In late 1998 the jurisdiction of the District Courts was increased from one to three years imprisonment, and that of the Regional Courts from ten to 15 years imprisonment. From precisely that time, the sentence categories which include the three and 15 year sentences increased markedly. The more significant of the two is the >10-15 year sentence category. This category is the most substantial contributor to the sentenced prisoner population. It is also expected that this sentence category will be the major contributor to the growing prison population for the years to come.

Prisoners sentenced in terms of the minimum sentences legislation (the majority of prisoners serving more than 10 years) may be considered for parole only after they have served a minimum of four fifths of their sentence, while prisoners serving life sentences are obliged to serve at least 25 years. This increased the non-parole period for these two categories significantly from one-third and 20 years respectively.

Prisoners serving longer sentences make up an increasing proportion of the prisoner population. Mathematical projections show that the longer sentences are driving up the total prisoner population rapidly. These projections suggest that if current trends are maintained, the growth in the number of long-term prisoners will increase the prison population to over 226 000 by 2015. Half of these will be prisoners serving sentences of between 10 and 15 years, and nearly 90% will be serving sentences of longer than 7 years.

The implications of this changing nature of the prison population for prison management are serious. More prisoners are classified as maximum

security prisoners, and are thus restricted in terms of their work opportunities as well as their daily lives. This has negative implications for facility provision and also for rehabilitation and development possibilities.

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1. Introduction¹

That South African prisons are experiencing serious and growing overcrowding problem is well-known to anyone with an interest in the criminal justice sector. Particularly since 2000 the widening gap between available prison space and the total number of prisoners has been well publicised, particularly by Judge Fagan during his tenure as Inspecting Judge of Prisons.

Simply put, the increase in total prisoner numbers has been alarming, rising from 116 846 in January 1995 to 187 036 by the end of 2004, an increase of 60%. In mid-2005, under increasing pressure, the problem was ameliorated by the release of 31 865 prisoners under the special remissions programme which brought the total down to 157 402 by December of that year. Yet, these remissions did little to address the systemic causes of overcrowding, and it remains to be seen whether the remissions have any long-term impact, or whether numbers return to their previous highs within a relatively short period, as they have done in the past following remissions and amnesties.

The size and growth of the prison population has been determined by a number of different factors since 1995. From 1995 to 1999, there was a rapid increase (of around 160%) in the number of unsentenced prisoners, increasing the total prison population significantly. However, after roughly five years, the number of unsentenced prisoners began to stabilise, and since April 2000 decrease slightly.

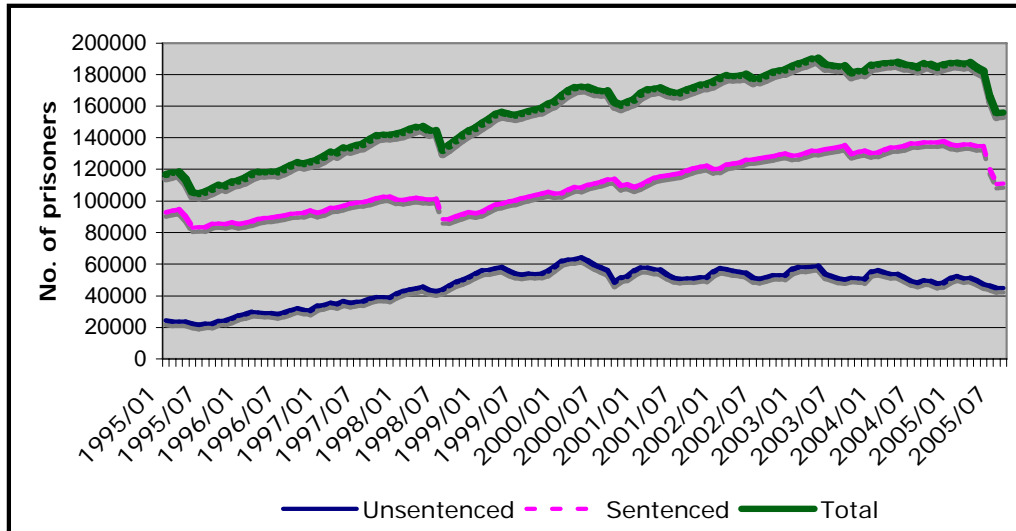
Yet the total prison population has continued to increase, due to a substantial increase in the number of sentenced prisoners. The Judicial Inspectorate and others have little doubt that the principal driver of this

¹ This research was conducted with the co-operation of the Department of Correctional Services. Many thanks to Mr Joseph Lethoba of Information Management at the DCS, and IT consultants Barry Lamprecht and Johan Koen for their assistance. Thank you also to Judge Hannes Fagan and Gideon Morris for discussions on the issue of sentencing and overcrowding.

increase is the minimum sentences provisions contained in the Criminal Law Amendment Act of 1997.²

Chart 1 shows the trends in total numbers of unsentenced, sentenced and total prisoners in custody from 1995 to 2005. The chart clearly shows that while it was an increase in the number of unsentenced prisoners which drove up the prison population in the second half of the 1990s, it is sentenced prisoners which have played this role since 2000. Recent concern has focussed on the sentence categories of longer than seven years, and particularly on the impact of the minimum sentence legislation.³

Chart 1 Total prisoners in custody 1995-2005



² Judicial Inspectorate *Annual Report 2004/5* pages 23-26; Judicial Inspectorate *Annual Report 2005/6* page 22; Kriel, J 'Emerging trends among the South African inmate population and persons subject to Community Corrections' in *Acta Criminologica* 18 (2) 2005, pages 107-108; Steinberg J 'Prison overcrowding and the constitutional right to adequate accommodation in South Africa' (2005), Paper commissioned by the Centre for the Study of Violence and Reconciliation; Ehlers, L and Sloth-Nielsen J 'A Pyrrhic victory? Mandatory and minimum sentences in South Africa', ISS Paper 111, July 2005; Terreblanche S 'Sentencing: Changes and effect since 1994', Paper presented at Consolidating Transformation Conference, Gordon's Bay, February 2005; Van Zyl Smit D 'Swimming against the tide - Controlling the size of the prison population in South Africa' in Dixon B and Van der Spuy E *Justice Gained* (2005) UCT Press, Cape Town.

³ See, for example, the Judicial Inspectorate's *Annual Report 2004/5* pages 23-26; Judicial Inspectorate *Annual Report 2005/6*.

This paper examines the link between sentencing practice and the size of the prison population. In particular, it examines the role played by the minimum sentences legislation as a driver of the total prison population. In addition, it examines the nature of the impact of these changes, in order to gain an understanding of how larger trends affect the situation at individual prison level, and not merely at the more abstract level of averages and percentages.

2. Prison Overcrowding in South Africa

Methodology

The bulk of the data consulted for this study comes from the Management Information System (MIS) of the Department of Correctional Services (DCS). This is a database that collates data from each of about 240 prisons in the country (including the two private prisons). Once collected, the data are audited and made available on the MIS in batches every three months. A new system that has been piloted, and is currently expanding to encompass all centres, will eventuate in real-time data being available on the MIS.

There are two different ways that data are presented in the MIS:

1. Prisoner totals, for example the total number of prisoners admitted or released during a particular month, or the total number of prisoners in custody on a particular day, and
2. Average daily prisoner populations, in which the monthly total of prisoners as counted at lock-up time each day is divided by the number of days in that month.

Most of the data can also be drawn for annual, quarterly or monthly periods. The data used for most variables in this study was the average daily

prisoner population over an 11-year period, drawn on a monthly basis, the smallest unit that can be easily analysed.

Representation of the data in this paper has been simplified for readability. A typical table showing the average daily population in discrete sentence groups, for example, would involve a matrix measuring 11 X 132 cells. Data tables of this size are impossible to digest visually. Thus, much of the data are represented in the form of charts, usually line or bar charts, in which trends over a period of 11 years can more easily be seen. Other data used is from the National Prosecuting Services (NPS).

South Africa's prison history has been punctuated by large-scale executive releases of both sentenced and unsentenced prisoners.⁴ The special remission of sentences granted to certain categories of offender during 2005 is the largest of these releases. It led to a significant reduction in one particular category of prisoners, namely short-term prisoners serving sentences for economic offences.

This sharp decline is reflected in the significantly reduced figures for December 2005. After previous special remissions numbers have returned to their previous levels relatively soon. However, one cannot assume that this will happen as quickly as in the past, or even that numbers are going to reach their previous levels at all. Greater awareness on this occasion by a wider range of role-players may well lead to strategies that do begin to make systemic changes that tend to bring numbers down. When discussing trends over an 11-year period, then, only pre-remission data have been used. On

⁴ Executive releases refer to a range of measures (amnesties, remissions and pardons) that the executive can employ to facilitate the release of prisoners. The remission of sentence is provided for in S 80 of the Correctional Services Act as a special measure to reduce prison overcrowding. S 81 of the same Act empowers the President to authorise the placement on parole of any prisoner. S 84(2)(j) of the Constitution (Act 108 of 1996) also empowers the President to pardon or relieve any offender and remit any fines, penalties or forfeitures.

other occasions, where it has been important to recognise the current post-remission figures, the 2005 data have been included.

The study uses the sentence categories as defined by the DCS MIS. These are:

- Unsentenced
- 0-6 months
- >6-12 months
- >12-<24 months
- 2-3 years
- >3-5 years
- >5-7 years
- >7-10 years
- >10-15 years
- >15-20 years
- >20 years
- Life

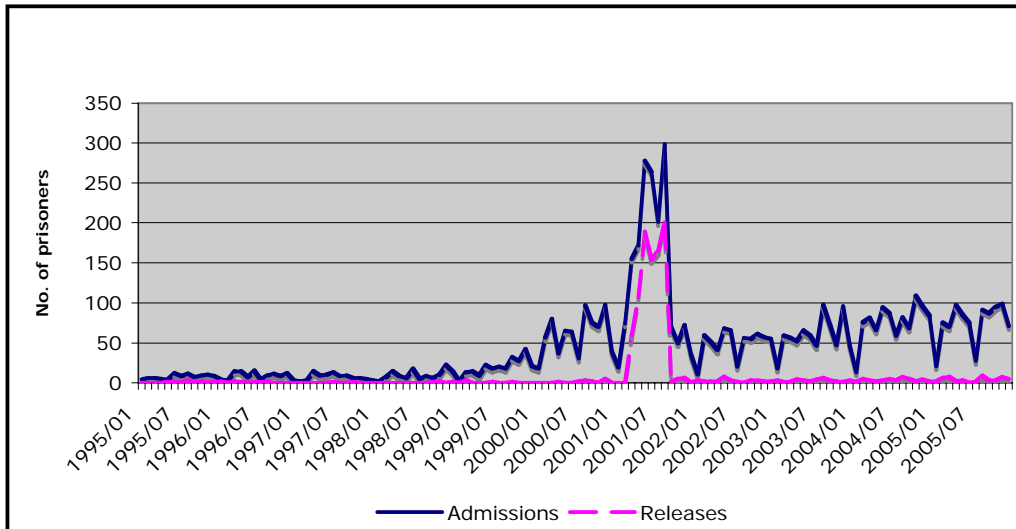
Offenders are not distributed evenly within each sentence category. For example, more offenders in the >10-15 year category are likely to have received sentences of 15 years and also 12 years than other sentences. The >7-10 year category is likely to contain more 10 year and also 8 year sentences. These patterns should be borne in mind when considering the trends within each sentence category.

Limitations

For a study of this nature admission and release data would be of primary importance and this data are available with a range of filters and also for individual prisons. However, the veracity of the data in the way that it is presented during a crucial period is in some doubt. A massive increase in admissions in the middle six months of 2001 has no obvious impact on the total prisoner numbers as it is cancelled out by a similar increase in releases. Furthermore, this increase seems to affect the longer sentences, such as life

sentences and those over 15 years. Chart 2 shows the admissions and releases for life sentences in general, merely to indicate the problems with this particular set of data.

Chart 2 - Life sentence admissions and releases 1995-2005



The senior MIS consultant could not explain this spike, and suggested that the data be averaged out. While it is possible to forecast data for 2001 admissions relatively accurately, it was decided instead to rely on the more general indicator of “average daily prison population”. This is less precise, but more reliable.

As the focus of this study is limited to the relationship between sentencing patterns and the size of the prison population, there are a number of factors that are dealt with only in passing. National population growth rates, national age profiles, increased numbers of police officers and police effectiveness, for example, which are likely to have an impact on prisoner totals and overcrowding, are not discussed in this paper.⁵

The other important limitation concerns the projections. Prisoner population projections are notoriously inaccurate, especially when increases

⁵ Some of the more general prison population drivers, which are not directly related to the criminal justice system, can be seen in Figure 1 below.

are extremely rapid, and there are multiple variables including diverse forms of executive intervention. The projections in Part 4 of the paper are thus tentative, and aim to construct a picture of where current trends are likely to lead, rather than to provide an accurate estimation of total prisoner numbers at different points in the future. The potential problems of the projections are discussed in more detail later.

South Africa and the world

South Africa has become well-known for its high use of imprisonment as a sanction for criminal behaviour. Since the special remissions of 2005, South Africa has dropped two places down the list of countries with the largest prison populations in the world.⁶ It now holds ninth spot on a list headed by the USA, China and the Russian Federation.

Perhaps more significant is South Africa's imprisonment rate, measured as the number of prisoners per 100 000 of the population. South Africa has an imprisonment rate of 335, down from over 400 during 2004.⁷ While the country now languishes in a seemingly obscure 26th spot on the International Centre for Prison Studies' (ICPS) World Prison Brief's imprisonment rate list (interestingly one position behind its close neighbour Botswana), it should be noted that a number of countries that lie above it are tiny, many of them island states. Of those countries with prison populations larger than 50 000 (less than a third of South Africa's total), South Africa lies in sixth place; before the remissions in 2005 it was fourth on this list.

While South Africa has a serious and significant overcrowding problem, the country occupies a lowly 50th place on the overcrowding list,

⁶ International Centre for Prison Studies, World Prison Brief, <http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/>, accessed on 6 July 2006. All the comparative figures below are derived from this excellent website. It must be borne in mind, though, that the data from different countries was gathered on different dates. Thus, the comparisons should be understood in terms of broad trends, rather than precise figures.

⁷ The USA heads the list with 738 prisoners per 100 000, but Texas imprisons over 1000 people per 100 000.

after reducing its occupancy levels from 165% to 137% during the course of 2005. What is also significant is that a number of other sub-Saharan countries, including Kenya (which at 343% has the most crowded prison system in the world), Zambia (330%), Malawi (214%), Uganda (211%), Tanzania (204%), Botswana (157%), and Mozambique (144%) have more severe overcrowding problems than South Africa.⁸

What is most glaring about South Africa's prison population is the rate at which it has been increasing over the past 11 years. This is well known to anyone who reads the newspapers. What is less well known is that this is a trend that is shared by a large number of other countries in both the developed and the developing world. In fact, the rate of increase is faster in a number of other countries. Mexico, Brazil and the Netherlands have experienced rates of increase of more than 100% in the 11 years since 1995. The increases in Spain and England and Wales⁹ have exceeded 50% during that period, while Australia's increase has been marginally lower at 45%.¹⁰ Reasons for these increases may vary across jurisdictions but an emphasis on law enforcement driven by political conservatism may be an important factor, especially where there is a focus on drug law enforcement. In some jurisdictions there is also an over-representation of minority groups in the prison population, reflecting increased migration and associated pressures experienced particularly in Europe.

⁸ For further discussion on Africa's overcrowding numbers, see Muntingh L 'Surveying the prisons landscape - what the numbers tell us' *Law, Democracy and Development* Vol. 9 (1) 2005.

⁹ England and Wales form one correctional system, which falls under the Home Office. Recent policy suggests that the Home Office is stepping up its "Get Tough" strategy, and plans to both increase sentences for more serious offences and build more prisons (see 'Reid launches "get tough" justice package' by Alan Travis, *Guardian* 20 July 2006, available at <http://politics.guardian.co.uk/homeaffairs/story/0,,1825758,00.html?gusrc=rss>, Accessed on 21 July 2006).

¹⁰ Some of the broader issues are not unique either. Matthews, writing about England and Wales, notes the perceived growth in punitiveness among politicians and the public, and increasing "bifurcation", by stressing simultaneously the need for the super-max option and increased use of community-based options, among others. Such debates would not be out of place in South Africa. (Matthews R 'Rethinking penal policy: towards a systems approach' page 223 quoted in Matthews and Young, *The New Politics of Crime and Punishment*, Willan Publishing, 2003).

These figures make the increases of 35% in the USA and 34% in South Africa (post-remission) seem modest, although both these countries are starting from a large base.

Clearly, South Africa's prison population trends are not unique. Increasing punitiveness, whether in relation to the sentenced or unsentenced prison populations, is evident in many different parts of the world.

Overcrowding

While comparisons can be made between the overcrowding rates in different countries, these are often imprecise. The nature of overcrowding has as much to do with the physical design and construction of prison buildings as it does with societal culture. In the South African case, the majority of prisons (including the large urban ones) were designed and built during the apartheid years. Most South African prisoners are detained in large communal cells (similar to the mining compounds in which migrant labourers lived), which are relatively easy to "overcrowd". By using the third spatial dimension, instead of just the two dimensional floor area, and providing triple bunks instead of single beds, it is possible to triple the number of prisoners and still provide a bed for each. Placing three prisoners in a cell designed for one has a similar effect.¹¹ Both of these responses to the increasing number of prisoners are not uncommon.

Some of the post-1994 prisons are more difficult to overcrowd because of their architecture. The privately managed prisons (Mangaung in the Free State and Kutama Sinthumule in Limpopo) are contractually precluded from exceeding their capacity at all.¹²

¹¹ In South African prisons the practice has been to have either one or three prisoners in a single cell, and never two. In England and Wales, in contrast, one of the responses to the increasing pressure on numbers has been to "double up" in cells. Strangely, perhaps, given the determination to keep prisoner pairs out of single cells, some of the newer prisons, and the private prisons, have been designed with double cells.

¹² Conversation with Mr Wessel van Niekerk, Head of Mangaung Prison, March 2005.

It is not the intention to dwell on the issue of measuring overcrowding. Steinberg does this well enough in his study on overcrowding and constitutional rights.¹³ The DCS uses a static measurement of 3.344 m² per prisoner.¹⁴ Because these numbers were so often unrealistic, given the weight of prisoner totals, (particularly before the special remissions), prison managements often worked on the basis of 175% overcrowding as an effective standard.¹⁵ This happened to the degree that unit managers have on occasion substituted this inflated figure for the original when asked for the capacity of a communal cell (i.e. 31 in a cell intended for 18).¹⁶

It is important to bear in mind, though, that the average national overcrowding figure is, as it says, an average. Some prisoners experience substantially worse conditions than the average, and some not as bad. Some do not live in overcrowded conditions at all, such as the nearly 6000 prisoners in the private prisons. Logically, some prisons must be operating substantially above the overcrowding average and in these prisons, some units or cells will be higher than the prison's average. Overcrowding is lived or experienced in the cell; any unit of measurement above that can only provide an average.

Overcrowding also needs to be understood more broadly than in the bland language of square metres per prisoner. Overcrowding has an

¹³ Steinberg 2005. See also Muntingh op cit pages 24-26.

¹⁴ Internationally there is no norm for what constitutes overcrowding but the European Committee for the Prevention of Torture (CPT), in terms of its objective to prevent torture, has set down a minimum which is worth taking note of. It does not state what overcrowding is, but does provide a quantitative measure of what would constitute torture, inhuman or degrading treatment, as a measurement of floor space. (International Centre for Prisons Studies *Dealing with prison overcrowding*, Guidance Note 4, King's College, London, 2004, 2 – 3.) It regards 4.5m² per prisoner as a "very small" space, 6m² per prisoner as rather small, and a cell of 8-10m² per prisoner as satisfactory. The CPT further describes overcrowding as:

Cramped and unhygienic accommodation; a constant lack of privacy; reduced out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health care services; increased tension and hence more violence between prisoners and between prisoners and staff. The list is far from exhaustive. (CPT The CPT Standards: Substantive sections of the CPT's General Reports, (2004) 21, Council of Europe.)

¹⁵ Interview with Mr Albert Fritz, National Manager: Inspections, Judicial Inspectorate, Cape Town, 12 March 2006.

¹⁶ This happened while Inspectors from the Judicial Inspectorate were conducting Prison Profile visits (interview with Albert Fritz, 12 March 2006).

important qualitative character determined by broader spatial issues. Different approaches to space utilisation will impact differently on a prisoner's lived experience of overcrowding. Thus, communal spaces outside the cell in the few newer prisons (built after 1996) can alleviate some of the worst effects of overcrowding in a cell during the hours of lock-up. Unfortunately, the vast majority of South African prisons were designed only for the purpose of housing prisoners, and many of them (Pollsmoor Maximum Admission Centre is a good example) consist of nothing more than cells and corridors.

On the other hand, the unit management at the unsentenced children's section of Pollsmoor Medium A (known as B5) has devoted a few communal cells to social and developmental activity, at the expense of a slightly larger number of boys in the communal cells. In addition, the boys eat in a makeshift dining hall erected in a corridor at each mealtime, rather than in their cells. This has the paradoxical effect of easing the experience of overcrowding as the prisoners live their lives in different spaces in the prison, rather than only in their own cell and the exercise yard.

Finally, along with this spatial dimension is a temporal one. Especially in those prisons that do provide space outside the cell, the amount of time spent outside of the cells per day ameliorate the negative effects of overcrowding on prisoners.¹⁷

Understandably, the DCS is particularly concerned about overcrowding. The 2005 White Paper states:

The Department regards overcrowding as its most important challenge. Overcrowding does not only have significantly negative implications on the ability of the Department to deliver in terms of its new core business, but Constitutional

¹⁷ See Muntingh 2005 pages 25-26.

provisions also oblige the Government to act urgently on the matter.¹⁸

It has often been noted (in fact, it has become a cliché) that the DCS is at the receiving end of the criminal justice system. In reality, its role is more complex than this, because the prison is not the “black box” it is sometimes made out to be: it interrelates with the community and the vast majority of prisoners do not remain in prison (though increasingly large numbers do, as we will see later). They return to their lives – sometimes to later return to prison and sometimes not – taking their experience of prison with them. It is only in a very narrow technical sense that prisons occupy this place at the end of a limited linear criminal justice model.

It does remain true that the prison system is obliged to take the prisoners – both sentenced and unsentenced – that are sent to them by the courts. On the other hand, prison authorities are not completely helpless. The Commissioner of Correctional Services is given clear legislated powers to release certain categories of prisoners on parole and to convert certain prison sentences into correctional supervision. The Commissioner may also, in the case of certain offences, approach the sentencing court to convert the prison sentence into one of correctional supervision in certain instances. The conversion of prison sentences into non-custodial sentences, by either the Commissioner or a court, is described in more detail in Section 3.

More recent initiatives by the DCS to address the overcrowding problem have included inter-departmental co-operation at national cluster level, the establishment of an Overcrowding Task Team, and the active participation in other initiatives such as overcrowding conferences.¹⁹ As recently as July 2006, the Deputy Minister of Correctional Services confirmed on national television that the overcrowding problem was largely caused by the minimum sentences legislation, and said that the Correctional Services

¹⁸ Department of Correctional Services *White Paper on Corrections in South Africa*, 2005 page 17.

¹⁹ Conference on Strategies to Combat Overcrowded Prisons, Pretoria September 2006.

Ministry was discussing the possibility of re-evaluating the legislation with the Justice Ministry.²⁰

Overview of South Africa's Prisoner Population

South Africa has approximately 240 prisons in operation at any one time. These represent a considerable variety in terms of location, size, age and character. The prisons are organised into Management Areas, and also fall under six different regions: four regions are the same as the old provinces, while the other two are made up of the five remaining provinces.

The prison population is, however, made up of a complex of categories and sub-categories, the most important being determined by sentence length. Different sentence categories are of different sizes, and are increasing (or decreasing in some cases) at different rates. These two variables – size and rate of increase – determine the significance of each in determining the size of the total prison population. A summary of these characteristics is provided in Table 1.

Table 1 Totals and percentage increases in the different sentence categories

Sentence Category	Average for January of each year			% increase		
	1995	2000	2005	1995-2000	2000-2005	1995-2005
Unsentenced	24265	61563	52313	154	-15	116
0 - 6 Months	5831	5717	5674	-2	-1	-3
>6 - 12 Months	6374	6598	5416	4	-18	-15
>12 - <24 Months	3765	6156	5763	64	-6	53
2 - 3 Years	12854	13846	17816	8	29	39

²⁰ Deputy Minister Loretta Jacobus, on *Interface*, SABC 3, 2 July 2006.

>3 - 5 Years	21066	16162	16731	-23	4	-21
>5 - 7 Years	15068	13882	12137	-8	-13	-19
>7 - 10 Years	12193	18418	21233	51	15	74
>10 - 15 Years	6168	10442	23139	69	122	275
>15 - 20 Years	2660	4603	10586	73	130	298
>20 Years	1885	4919	9197	161	87	388
Life Sentence	443	1086	5745	145	429	1197
Other Sentences ²¹	4274	3031	1706	-29	-44	-60
Total Sentenced	92581	104860	135143	13	29	46
Total Prisoners	116846	166423	187456	42	13	60

The percentage increases in Table 1 compare the total numbers in the month of January in 1995, 2000, and 2005. The numbers for the rest of 2005 have been omitted as the special remissions (which started in June 2005) has skewed them. If the immediate post-remission figures were used, the already enormous differences between the longer and the shorter sentences would have been even greater. The special remissions excluded prisoners convicted of aggressive and sexual crimes and thus had a concentrated effect on the shorter sentence categories (predominantly offenders convicted of economic crimes), and almost none on the longer sentence categories.

Table 1 also shows the percentage increases over the two five-year periods, as well as over the ten-year period as a whole. The “Unsentenced” group, although not strictly a sentence category, has been included so that relative trends can be seen. The table shows very clearly that the total number of unsentenced prisoners, the major driver of increasing prison numbers in the 1990s, declined significantly between 2000 and 2005. Nevertheless, the number of unsentenced prisoners has still more than doubled since 1995.

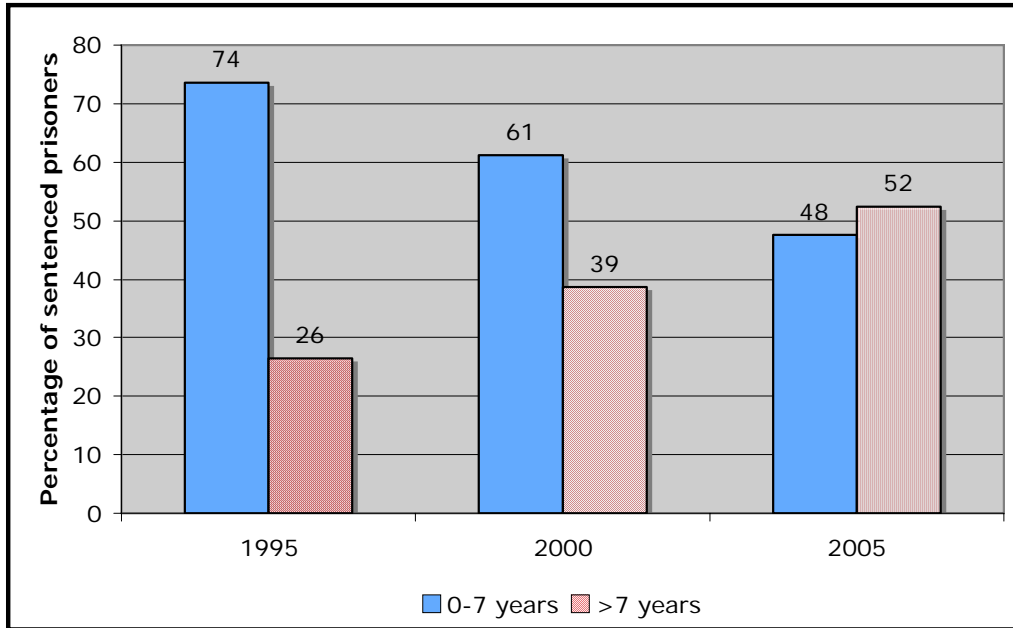
²¹ Over 80% of the category “Other Sentences” consists of indeterminate sentences for “habitual criminals”. Others include death sentences, day parole, periodic imprisonment, “Other mental instability” and prevention of crime.

It is also clear that it is the longer sentence categories that are increasing the most. In fact, the general tendency seems to be: the longer the sentence, the greater the rate of increase. It must be taken into account that the longer the sentence category, the smaller the total number of prisoners is in that sentence category and a small numerical increase can represent large proportional increases.

It is probable that what the table represents is an increase in the general sentencing tariffs. Offenders who are now being given life sentences, for example, had previously received shorter sentences. Thus, it is also likely that those prisoners who would previously have received sentences of less than seven years are now receiving longer sentences, rather than receiving non-custodial sentences.

It is not only the total prisoner numbers that are important. An increasing proportion of the sentenced prison population is composed of long-term prisoners, and this has had serious implications for prison management (see Chart 3). This is discussed further in Section 2 below.

Chart 3 Sentenced Prisoners: percentages serving more than 7 years

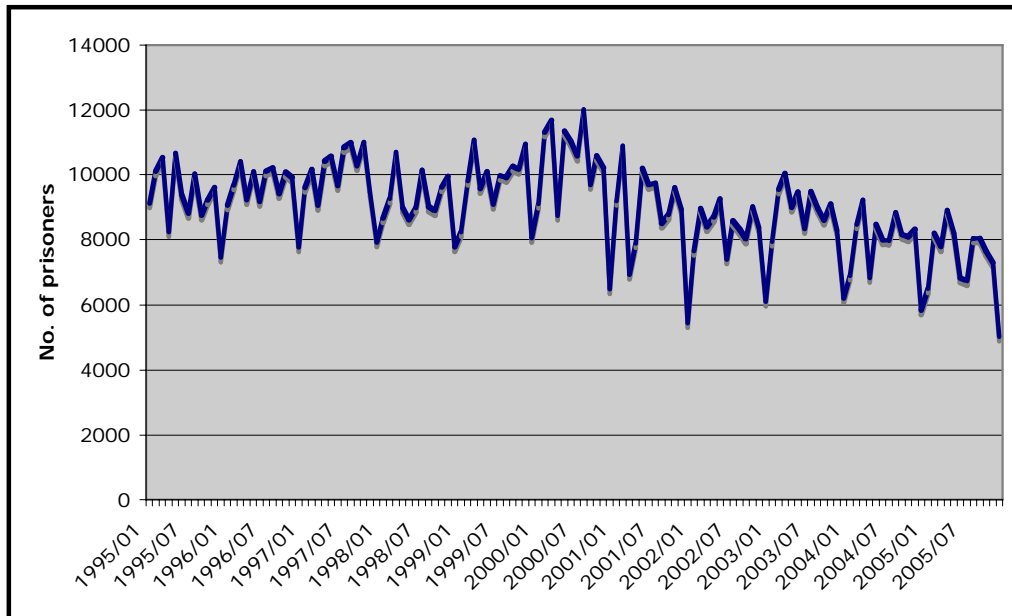


Another effect of longer sentences is that increasing numbers of prisoners who have been admitted to prison in the past five years will not be released until they have completed even longer portions of their sentence. In addition, increased sentence lengths will be exacerbated further by Section 73(6)(b)(v) of the Correctional Services Act, which prescribes that prisoners sentenced in terms of the minimum sentences legislation²² may not be released on parole until they have completed 80% of their sentence, or 25 years, whichever is the shorter, although a shorter period of two thirds of the sentence may be stipulated by the sentencing court.²³

²² Criminal Law Amendment Act No 105 of 1997.

²³ Correctional Services Act No 111 of 1998 S 73(5)(b)(5).

Chart 4 Admissions of sentenced prisoners 1995-2005



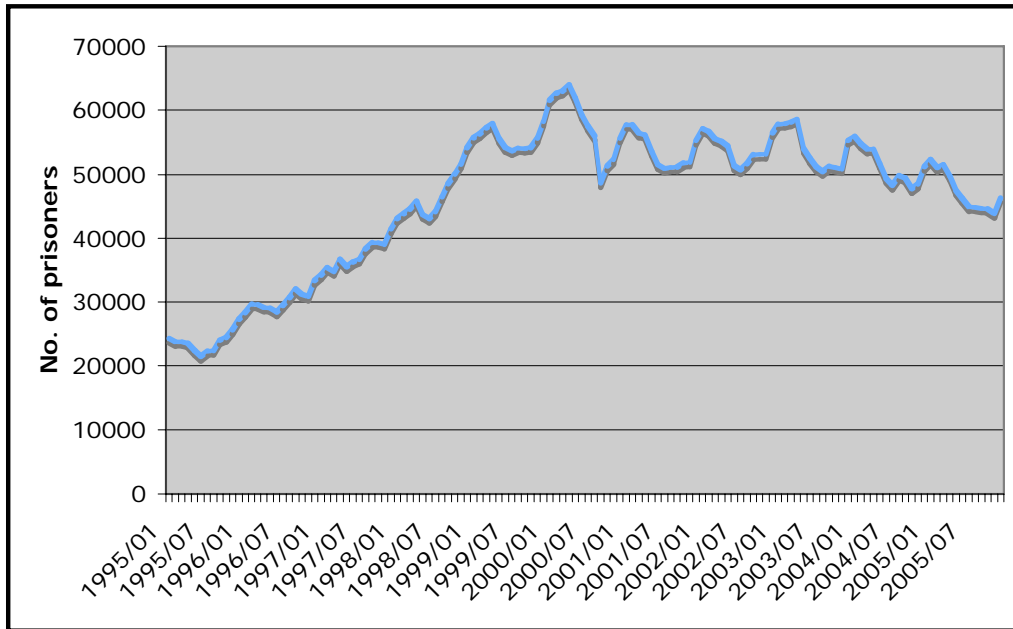
The reduction in the number of short-term prisoners is unlikely to be substantial enough to compensate for the increasing number of long-term prisoners. This is indicated by the Admissions data for all sentenced prisoners. Even allowing for the problem with the 2001 data (see Chart 2 and the discussion on page 9), it can be seen clearly from Chart 4 that the total number of admissions of sentenced prisoners is decreasing. Hence, the apparent paradox of a rapidly increasing prison population at the same time as a decreasing number of admissions. In short, the prison population profile is reflecting the impact of growing numbers of sentenced prisoners remaining in prison for longer periods than has been the norm up to the mid-1990s..

Unsentenced Prisoners

It is not the brief of this paper to examine trends in the number of unsentenced prisoners. Nevertheless, as it was the increase in the number of unsentenced prisoners that drove the prison population explosion in the 1990s, a brief discussion will be useful. Chart 5 shows both the dramatic increase up to 2000 and the slower decline thereafter. The undulating line,

which can be seen more clearly in the post-2000 period, is an indication of the annual trends, in which the total numbers of unsentenced prisoners increase during the December-January court recess.²⁴

Chart 5 - Unsented prisoners 1995-2005



By the end of 2005 there were more than 46 000 unsentenced prisoners, down from a high of nearly 64 000 in April 2000. The special remission had no impact on this total, as the remissions only applied to sentenced prisoners. This suggests that some meaningful progress has been made in dealing with the large number of unsentenced prisoners. The total, however, represents an increase of over 90% between 1995 and 2005. By the end of 2004, there were still more than 20 000 unsentenced prisoners who had been in custody for

²⁴ There is also reason to believe that more social fabric crimes (e.g. rape, domestic violence and inter-personal violence) are committed as well as violent crime during the November and December and that this contributes to the cyclical increase in the unsentenced population. It has also been remarked upon by magistrates that there is an increase in child maintenance cases over the same period as well as an increase in domestic violence cases.

more than three months, over 5 000 of whom had been there for more than a year.²⁵

The Judicial Inspectorate, in its Annual Report of 2005/06, suggests that a further reduction of almost 50% to 24 000 is a realistic short-term goal.²⁶ This is about the same as the average during 1995. There is little doubt that even if it were possible to get halfway to this target, overcrowding would be drastically reduced.

3. Prison Population Drivers

On the face of it, three major factors act to increase the prison population:

- An increase in the number of people sent to prison;
- An increase in sentence lengths; and
- Prisoners spending longer periods of time in prison (for reasons other than sentence lengths).

While logically true, the actual mechanisms are of course more complex than this. Figure 1 illustrates some of the key drivers of the size of the prison population, identifying three groups of drivers: those that impact on the number of sentenced prisoners, those that influence the number of unsentenced prisoners and the more general factors that impact on both. This paper will focus on the specific factors that impact on trends related to the size of the sentenced prisoner population.

In the preceding it was demonstrated that the sentenced prison population has, post-2000, become the main driver of the rise in the prison population. This paper therefore investigates the relationship between

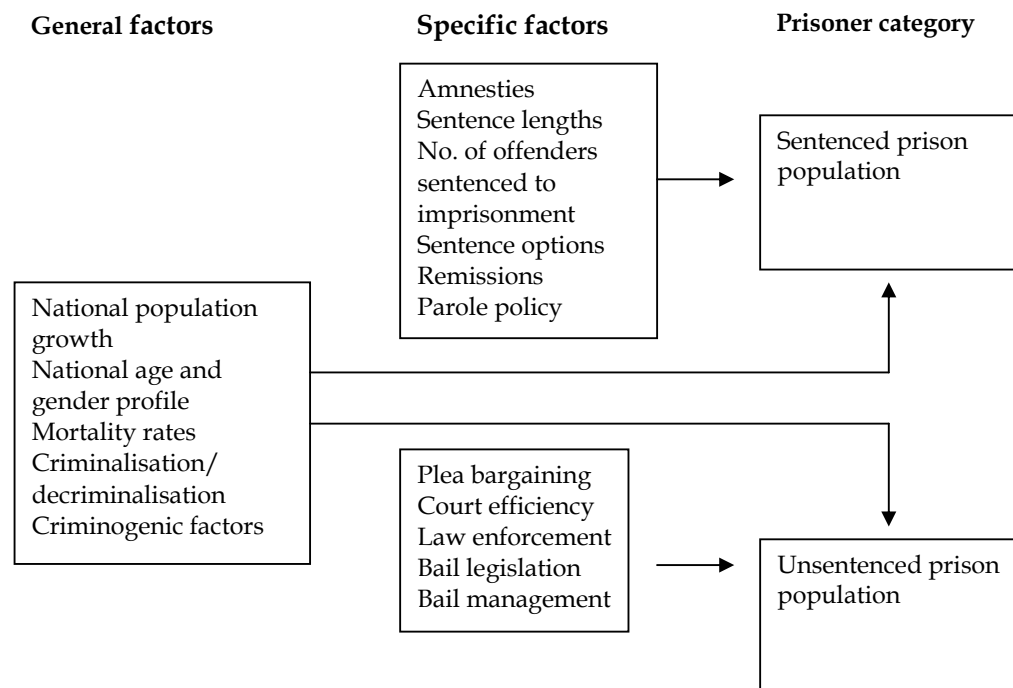
²⁵ Muntingh 2005 page 35.

²⁶ Judicial Inspectorate *Annual Report 2005/06* page 15.

sentencing and the size of the prison population. For this analysis sentencing, inclusive of sentence management, refer to the following variables:

- the range of available sentence options within the ambit of custodial options;
- the number of offenders being sentenced to imprisonment;
- the length of sentences being imposed by the courts;
- the parole policy and the implementation thereof, and
- the use of executive decisions to facilitate releases of sentenced prisoners in the form of remissions and amnesties.

Figure 1 Prison Population Drivers



Legislative changes and their effects

Two key legislative changes, which were to have a major impact on sentencing in South Africa, were introduced in the late 1990s. The first was the Magistrates Court Amendment Act²⁷ that extended the sentencing jurisdiction of the Magistrates Courts at both district and regional levels. In the case of the District Courts, the maximum penalty that they may impose was increased from twelve months to three years imprisonment, while the jurisdiction of the Regional Courts was increased from 10 years to 15 years imprisonment.

The second was the Criminal Law Amendment Act that provided for mandatory minimum sentences for specific offences and came into force in May 1998. There is a common perception that it is the minimum sentences legislation that is chiefly responsible for the increase in the prison population.

Preceding the introduction of the minimum sentences, there had been numerous calls from civil society for more severe punishment for violent crimes. The increase in violent crime through the 1990s was the central driving force behind this call for stiffer sentencing. The South African Law Reform Commission (SALRC) issue paper on mandatory minimum sentences recognised this in 1997:

The public renewed claims for sentences which give expression to the desire for retribution and that concern for the offenders must give way to concern for the protection of the public. There is also general dissatisfaction with the leniency of sentences imposed by the courts for serious crimes.²⁸

The legislation provides for mandatory minimum sentences (mostly from 15 years to life) for murder, rape and other aggressive offences, and also selected serious economic and narcotics offences. The imposition of a life sentence is mandatory, for example, in the cases of multiple rapes, gang rape,

²⁷ Magistrates Amendment Act No. 66 of 1998

²⁸ South African Law Commission, Issue Paper 11, page 10 par 1.2.

or rape with aggravating circumstances, or for a third rape offence. A tabular summary of the minimum sentences is provided in Appendix 1.

The minimum sentences legislation has a number of features to ensure that the intended severity of the prescribed sentences is not undermined by sentencing officers or the executive. No part of the sentence can be suspended.²⁹ Nor can the time spent in prison awaiting-trial be deducted from the prescribed sentence.³⁰

Judicial officers may impose a lesser sentence than the prescribed minimum only if they find “substantial and compelling circumstances” which justify a departure from the mandatory sentence.³¹ These circumstances must be entered into the court record. The undefined nature of what constitutes “substantial and compelling circumstances” has provided some leeway for sentencing officers, and there has been significant case law in this regard.³²

The minimum sentences legislation also provides for the referral of certain cases from the Regional Court to the High Court for sentencing.³³ An offence for which the minimum sentence is higher than the Regional Court’s jurisdiction can still be tried in that court, but upon conviction, be sent to the High Court for sentencing, on the basis of the Regional Court’s trial records.

Ironically, at the time that the legislation was being considered in Parliament, another SALRC report on sentencing was underway. As Sloth-Nielsen points out, the Portfolio Committee on Justice and Constitutional Development did not wait for the report to be released:

...before the closing date for comment was reached the legislation was almost finalised in Parliament and there is no doubt that the South African Law Reform Commission was

²⁹ Criminal Law Amendment Act No. 105 of 1997 S 51 (5).

³⁰ Criminal Law Amendment Act No. 105 of 1997 S 51 (4).

³¹ Criminal Law Amendment Act No. 105 of 1997 S 51 (3)(a).

³² See Ehlers and Sloth-Nielsen 2005 pages 12-13.

³³ Criminal Law Amendment Act No. 105 of 1997 S 52.

by-passed by the Portfolio Committee in its haste to give effect to the new tougher sentencing laws.³⁴

The report, titled *Sentencing A New Sentencing Framework*, was published in 2000.³⁵ Draft legislation (the Sentencing Framework Bill) appended to the Report, which envisaged the formation of a Sentencing Council, was however never tabled in Parliament.

Originally, the minimum sentences legislation was only intended to be in operation for two years as an “emergency measure” to be renewed biennially. The legislation has been duly renewed every two years; the last time in April 2005.

There was opposition to the legislation when it was first placed before Parliament, but as Van Zyl Smit pointed out, this was never on the grounds of the potential impact of the new sentencing practices on prison overcrowding:

What was not even raised in Parliament, nor for that matter by any of those who commented to Parliament on the draft legislation before it, was the impact that the legislation would have on prisoner numbers. Nor was it ever considered whether the prison system would be able to house prisoners for the additional periods that the legislation would require.³⁶

Not surprisingly, opposition came from within the judiciary itself, due to the perceived interference with judicial independence.³⁷ Regardless of this, political parties unanimously supported the legislation.

But the legislation created difficulties for the prosecution services too, not least due to the separation of the trial and the sentencing phases of the process. When cases are tried in the Regional Courts and referred to the High

³⁴ Prof Julia Sloth-Nielsen speaking at the *Conference on Strategies to Combat Overcrowded Prisons*, Pretoria, 14 September 2005.

³⁵ *Sentencing: A New Sentencing Framework*, South African Law Commission Project 82, Discussion Paper 91, 2000.

³⁶ Van Zyl Smit 2004 pages 239-240.

³⁷ This opposition is dealt with in greater detail in Ehlers and Sloth-Nielsen 2005.

Court for sentencing, some of the issues raised later within the Department of Justice were that:

- there is too much duplication, when cases are tried in the Regional Court and sent to the High Court for sentencing;
- the interpretation of the meaning of “substantial and compelling circumstances” differs vastly;
- the dual process leads to secondary trauma for victims (many of them women or children) as they are often obliged to testify twice;
- Legal Aid attorneys who appeared in the original Regional Court case are unable to appear in the High Court, necessitating the briefing of Counsel;
- the time spent awaiting-trial in custody is increased substantially; and
- convictions are sometimes set aside, due to the sentencing judge disagreeing with the trial magistrate on issues of fact.³⁸

As will be shown below, this legislation made a substantial contribution to changing the nature of South Africa’s sentenced prison population. But while the impact of the legislation on prisoner numbers is likely to be felt for decades to come its effects were not immediate. For the first two years of its operation, there was no impact at all.

The time lag from the date of implementation of the minimum sentences legislation to the admission into prisons of substantially increased numbers of offenders sentenced under this legislation was likely to be significant. The offence would have to be committed after 1 May 1998, to be followed by detection and arrest, formal charges in court, trial preparation and trial. This period would more likely be longer if the charge was more serious and fell under the ambit of the minimum sentences legislation. There would in all likelihood be another period before sentence, which would be

³⁸ Department of Justice memo: ‘Minimum sentences: Problems and possible solutions’ 2005.

substantially longer if the original trial was in the Regional Court, and the offender was to be sentenced in the High Court (for sentences of longer than fifteen years). It is thus not unreasonable to expect an eighteen-month to two-year delay for the impact of the legislation to be noticeable in a changed sentence profile of prisoners. In fact, data from the NPS suggests that in 2004 the average time between commission of an offence and sentence was about 30 months.³⁹ It is therefore assumed that the number of offenders sentenced in terms of the minimum sentences legislation should have begun to increase substantially 18 to 24 months after the 1 May 1998, thus in early 2000.

The point of impact is masked by the fact that the minimum sentences legislation is aimed at particular (if large) categories of offenders. The early increase in numbers of long-term prisoners is hidden within the general sentences of the broad mass of prisoners. When the sentences of the individual categories of prisoners are examined, it is apparent that the significant increase in prisoners serving long sentences occurs both earlier and more decisively. This can be seen in the discussion below on offence categories.⁴⁰

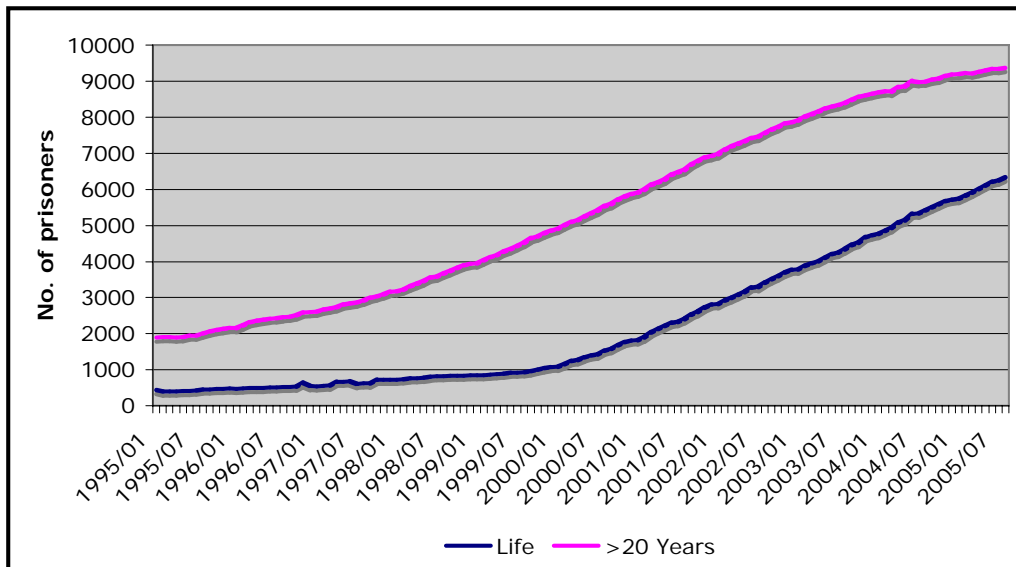
From 2000 onwards the combination of the Magistrates Court Amendment Act and the minimum sentences legislation had a consolidation effect on trends that started pre-1998. This was the case for all longer sentences, above 10 years. In fact, the longer the sentence, the more pronounced was the impact. This is demonstrated in Charts 6 and 7 which show dramatic increases in the number of prisoners serving life sentences and sentences of greater than 10 years.⁴¹

³⁹ National Prosecution Service 'National Performance Overview 2002-2005'; National Prosecution Service'; 'National Annual Progress Sheet Apr 05 to Mar 06'; both Excel Spreadsheets, unpublished, no date.

⁴⁰ See section on offence categories page 33 below.

⁴¹ It is important to bear in mind that prisoner numbers are not spread evenly within these sentence categories. Offenders are not likely to be sentenced in minute detail when they receive long sentences: an offender is unlikely to receive a 21 year sentence. He is more likely to receive a 22 or 25 year sentence. The same is true for the greater than 10 to 15 year sentence. A large proportion of offenders in this category are likely to have received 12 or 15 year

Chart 6 - Prisoners serving sentences of life and >20 years 1995-2005



It is clear from the detailed tables on which this chart is based, that it is in early 2000 that the number of prisoners serving life sentences began to increase dramatically. It is also apparent that the longer than 20-year category did not have as sharp an increase at that time. The increases look similar in the >10- 20 year sentences (see Chart 7). Here the greatest increase in the >15- 20 year sentence category occurred in mid 2000, similar to the case of the life sentence category. The >10-15 year category shows a far sharper increase that takes place in May 1999. There are two probable reasons for the increase in this latter category. The first is the extension of the sentencing jurisdiction of the Regional Courts to a maximum of 15 years from the end of 1998. Second, a fifteen year sentence is mandatory for first offenders convicted of “less severe” instances of murder, and robbery when aggravating circumstances are involved, or the taking of a motor vehicle (vehicle hijacking)(see Appendix 1). Given the increase in these types of offences in the 1990s⁴², it is

sentences. Interview with Senior Magistrate Helen Alman, Wynberg Magistrates Courts 9 May 2006.

⁴² For detailed data see http://www.issafrica.org/index.php?link_id=24&slink_id=2797&link_type=12&slink_type=12&tmpl_id=3. See also Masuka S “Prevention is better

probable that these offenders make up a significant proportion of the increasing numbers in this sentence category.

The >10-15 year sentence category is the key driver of the rise in the sentenced prison population. While the percentage increase in the number of prisoners serving life sentences seems perhaps more impressive, the sheer bulk of total numbers in the >10-15 year category had a much greater impact on total prisoner numbers. The 285% increase over 11 years has pushed this category's total from 6 168 to 23 740 - an additional 17 572 prisoners. This is more than double the contribution of any other sentence category. The majority of these sentences are imposed by the Regional Courts, and made possible by the increase in the Regional Courts' jurisdiction from 10 to 15 years.

Chart 7 Prisoners serving sentences of >10-20 years 1995-2005

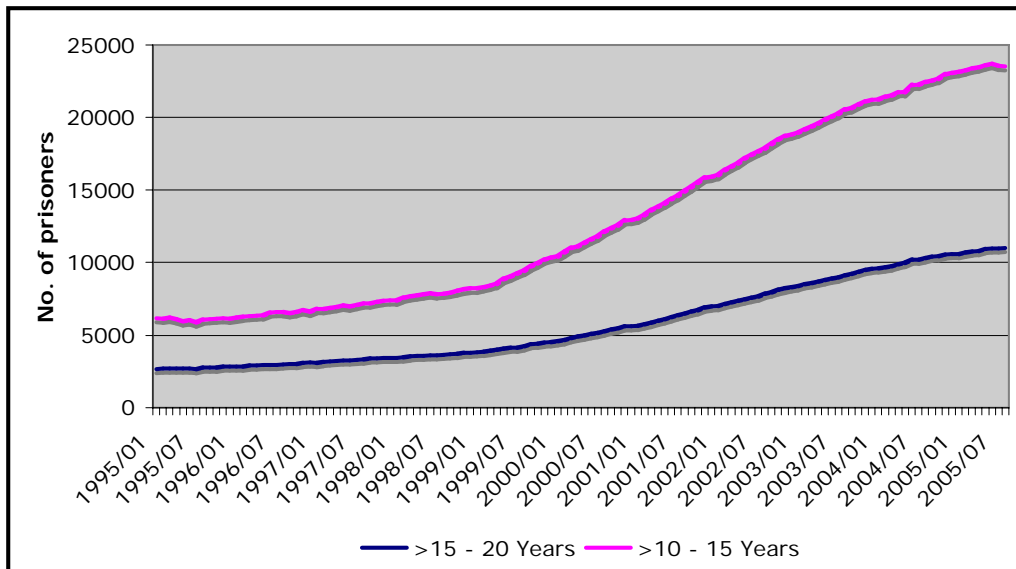
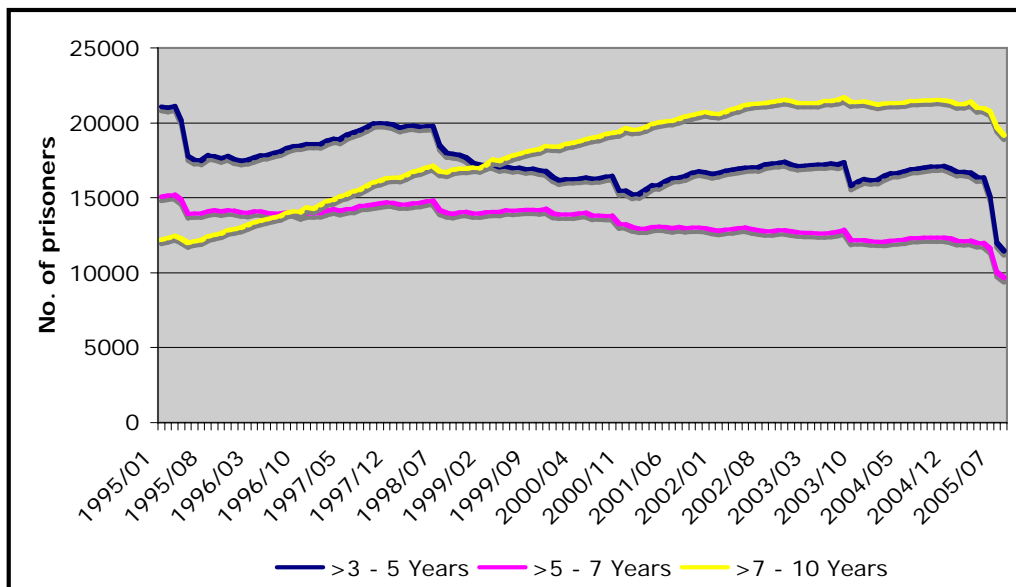


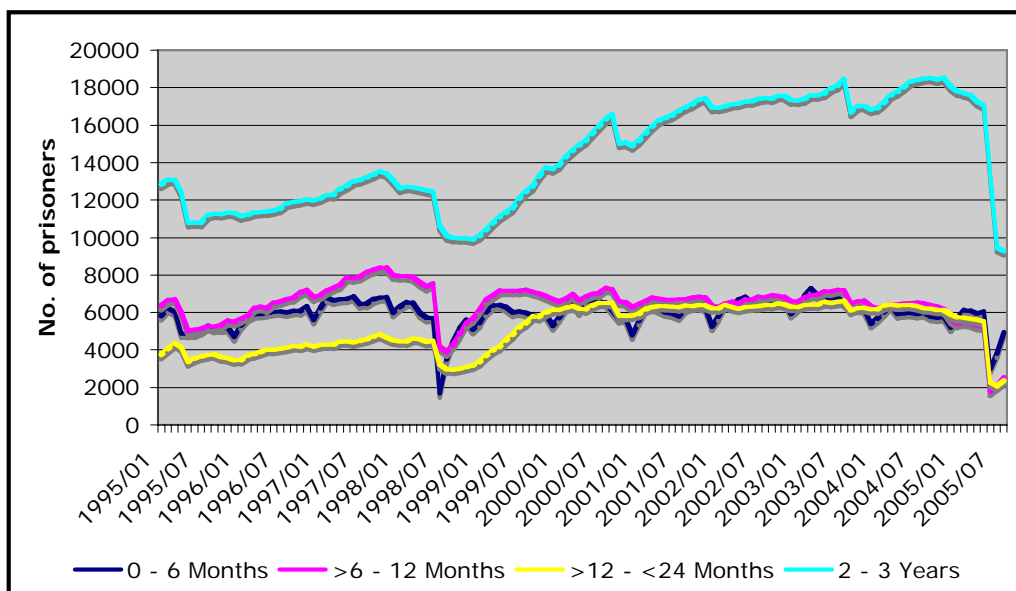
Chart 8 indicates clearly that the numbers of prisoners in sentence categories above seven years have increased significantly since 1995. On the other hand, offenders serving prison sentences of three to seven years have been decreasing in terms of real numbers and proportional share.

Chart 8 Number of prisoners serving sentences of >3-10 years



Charts 8 and 9 demonstrate that on several occasions prisoner numbers in sentence categories of ten years and less have been decreased by executive remissions: the sharp decreases are clearly visible in 1998 and 2005, the most comprehensive of these remissions. In fact, the shorter the sentence, the greater the impact of executive remissions on that sentence category. Both these observations are confirmed in Chart 9, which graphically shows the trends in the total number of prisoners serving shorter sentences.

Chart 9 Number of prisoners serving sentences of 3 years and less



The one sentence category that seems to contradict the general trend is the 2-3 year category. This sentence category showed a decrease during 1998, and a massive increase starting at the beginning of 1999 and continuing until January 2001.

There seems little doubt that the 1999 increase is due to the increase in the sentencing jurisdiction from one to three years of the District Courts in October 1998. The 1998 decrease seen in all sentence categories in Chart 8 was due to a special remission at the time of then President Mandela's 80th birthday.

From the late 1990s to 2005, it is more specifically the increase in the general sentencing tariff that has played the major role in increasing the size of the prison population. In general, the number of prisoners serving long sentences has increased, while those serving shorter sentences have decreased. The turnover of prisoners is thus slowing down, and this is increasing total numbers. Regardless of the fact that fewer offenders are being sentenced to imprisonment, they are staying there for longer.

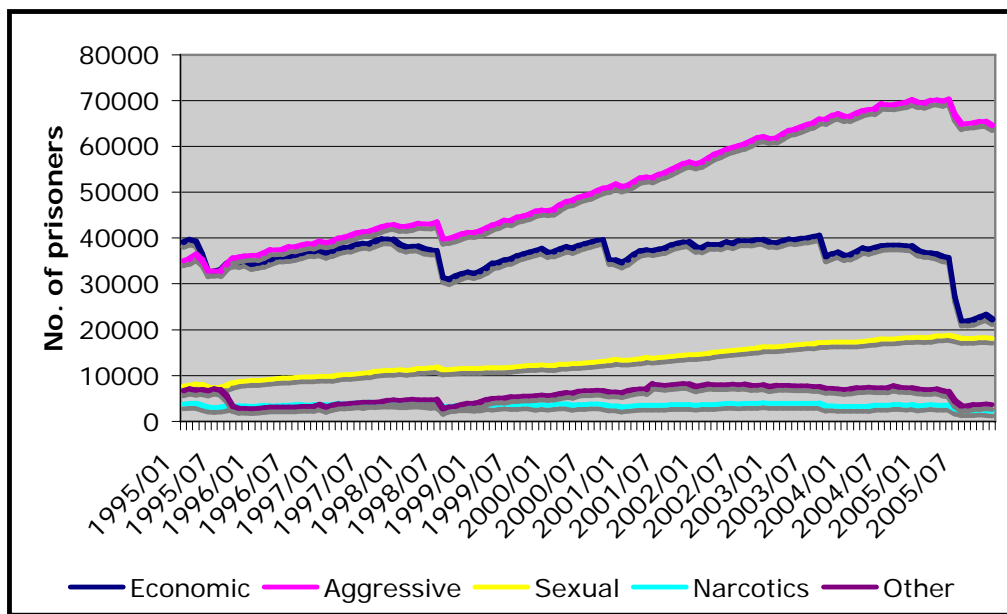
The increasing size of the sentenced prison population is not caused by the minimum sentences legislation at this stage. The increase in the number of prisoners serving longer sentences preceded the promulgation of the minimum sentences legislation and thus also its delayed impact from 2000 onwards. It is possible that this increase was facilitated and consolidated by the minimum sentences legislation and the increase in sentence jurisdiction, but the initial impetus came from elsewhere. A combination of public and political pressure on the courts to increase the severity of sentences, and the increase in the jurisdiction of the Magistrates' Courts provided this impetus. The increase in the number of prisoners serving 2-3 year sentences due to the increased jurisdiction of the District Courts is clearly visible in the data. It is however the >10-15 year sentence category that made a greater contribution than any other category to the rise in the prison population.

Offence Categories

Greater clarity can be gained with regard to sentence trends by examining offence categories. The DCS MIS provides for four general categories only and a fifth for "other" offences. One of the four is "narcotics", which is very small and specialised, leaving the larger categories of economic, aggressive and sexual offences. In analysing trends, we are therefore dealing in generalities: aggressive crimes will include, for example, armed robbery, murder and assault. On the other hand, comparisons are made easier as the categories have remained constant since 1995.

Nonetheless, in examining broad trends, the data are particularly useful, especially in so far as the minimum sentences legislation is directed primarily at aggressive and sexual offences (see Chart 10). In this section attention is paid to the changes that occurred in sentencing trends as they can be seen in the different offence categories. As legislative changes were aimed at particular offences, some noteworthy trends emerge from the data.

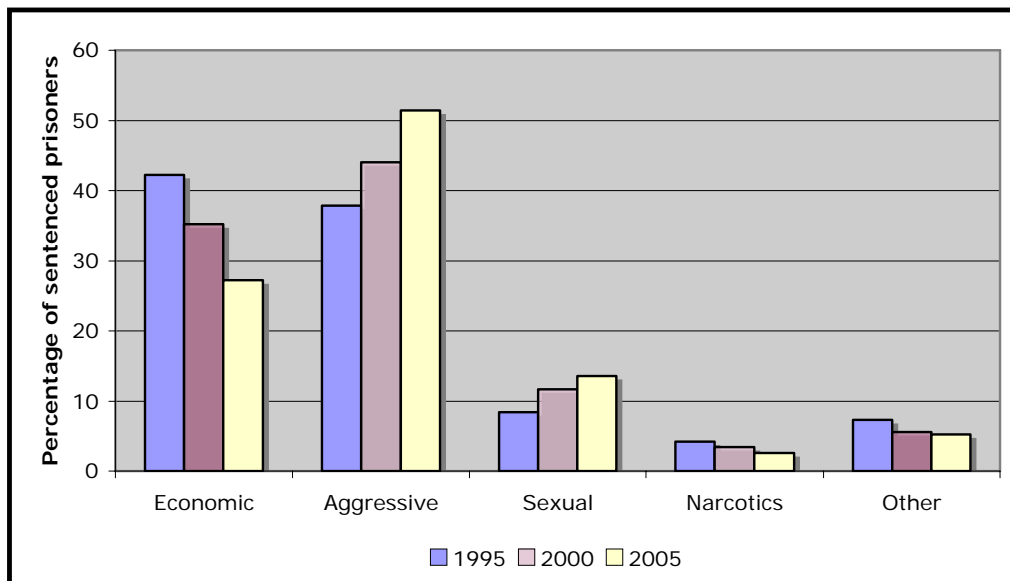
Chart 10 Crime Categories of Sentenced Prisoners 1995-2005



The total number of offenders serving sentences for economic offences, the largest category in 1995, is reducing in absolute share, while both aggressive and sex offenders are increasing both proportionally and in real numbers. It is clear that the totals of both aggressive and sex offenders are increasing rapidly. The number of sex offenders and other aggressive offenders are increasing at more or less the same rate. Indeed, if sex offenders are considered to be a sub-category of aggressive offenders (as perhaps they should be), their combined share of the total sentenced population increased from 46% in 1995 to 65% in early 2005. This can be seen in Chart 11. By December 2005, this combined share had increased to 75%. This was at least

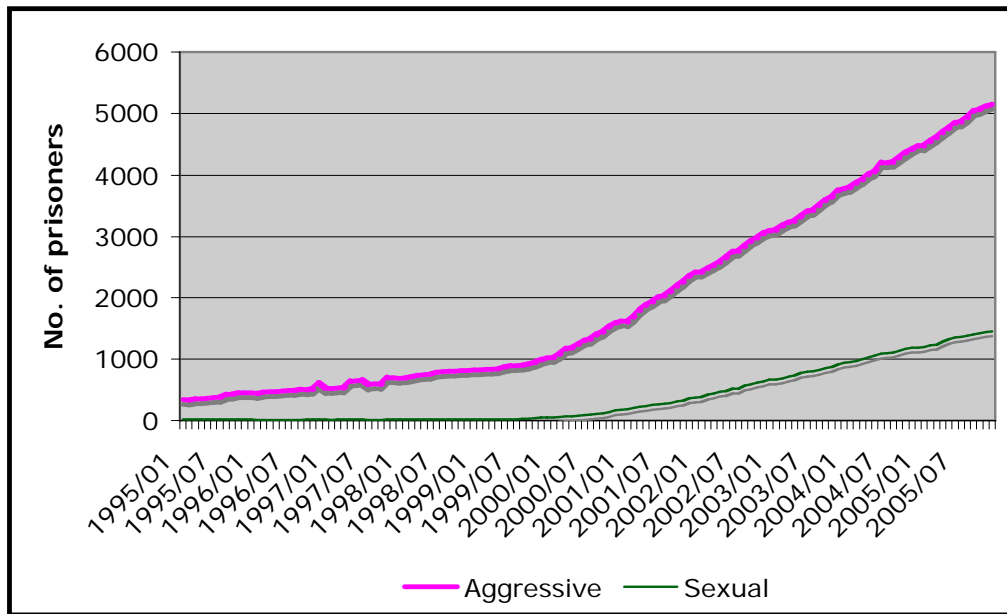
partly as a result of the special remissions of 2005 that resulted in the release of non-violent offenders, thus reducing their relative proportion.

Chart 11 Percentage shares of crime categories



The number of offenders serving sentences of imprisonment for aggressive and sexual offences have, as can be expected, a significant impact on the numbers in the longer sentence categories. Chart 12, which represents the crime categories of offenders serving life sentences, reflects only those two crime categories; the others are negligible and have thus been excluded.

**Chart 12 Aggressive and sex offenders serving life sentences
1995-2005**



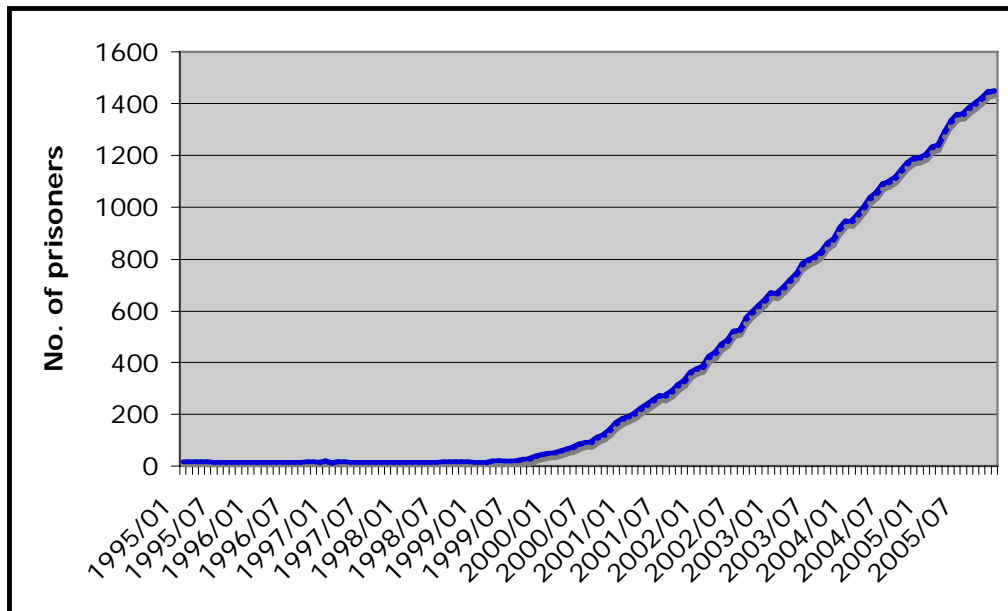
The significant increase in the number of sex offenders sentenced to life imprisonment began in August 1999. This is 15 months after the introduction of the minimum sentences. It is likely that the impact would begin to be seen around this time, and it is thus more than likely that there is a causal relationship. The rise in the numbers of aggressive offenders serving life sentences began its increase only a couple of months later.

However, unlike the sentences for sexual offences, the number of prisoners serving life sentences for aggressive offences increased slowly from 1995 onwards. While the tariff for serious aggressive offenders was increased due to public and political pressure and the courts' own prerogative, it clearly took the intervention of the legislature to significantly raise the tariff for serious sexual offences.

The timing of the increase in the number of sex offenders serving life sentences can be seen in Chart 13. This chart shows the increase in the total number of sex offenders serving life imprisonment. This total increased by

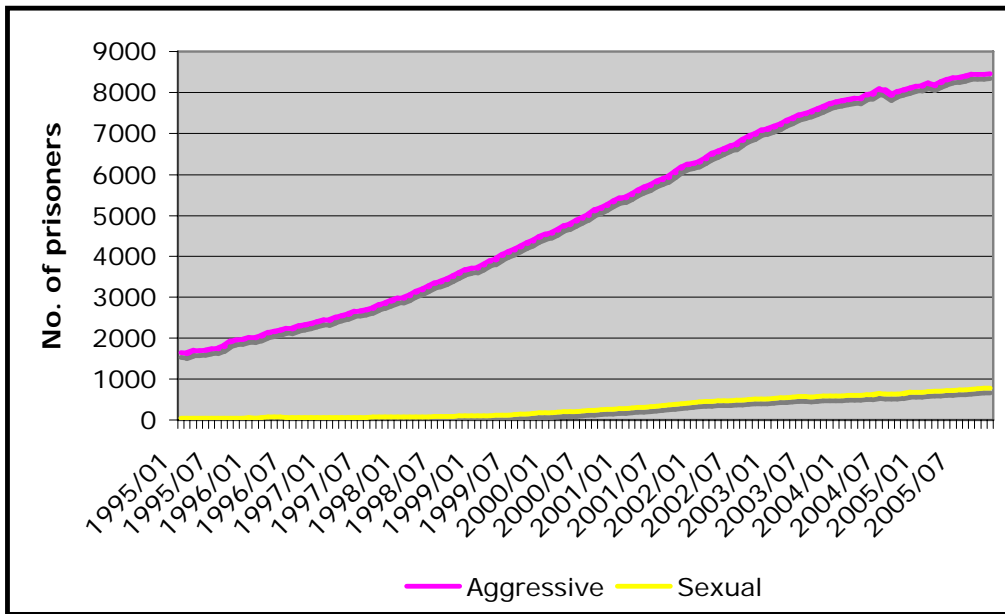
75% over the two year period from January 1997 to December 1998, and then a further 75% during 1999 alone.

Chart 13 Sex offenders serving life sentences 1995-2005



By late 1999, there were approximately 50 new aggressive offenders and nearly 10 new sex offenders each month serving life sentences. However, it is the sexual offences category that increased its share the most: from 4% in 1995 to 21% in 2005, with the bulk of that increase occurring between 2000 and 2005. Aggressive offenders, on the other hand, increased from 77% of the total number of prisoners serving life sentences in 1995 to 95% in 2000, only to fall back to its original share in early 2005. In short, the total number of sex offenders serving life imprisonment has escalated rapidly as a result of the introduction of the minimum sentences legislation.

Chart 14 Aggressive and sex offenders serving sentences of >20 years



The >20-year sentence category shows a similar trend (see Chart 14). Only aggressive and sexual offences are of significant proportions, with the lower line on the chart representing sexual offences looking insubstantial, yet belying the rapid increase in this category from 42 to 777 prisoners serving sentences >20 years for sexual offences. This is an increase of 1850% over 11 years. It can easily be seen in Chart 15, which also shows a sharp increase in August 1999; clearly a causal effect of sentencing patterns. In contrast, the relatively straight line representing aggressive offences in Chart 14 suggests (unusually) that there was no sharp increase at any stage and that this trend started well before the introduction of minimum sentences. It seems likely that these trends started independently of legislative changes, and that courts had begun to impose heavier sentences for aggressive crimes before the minimum sentences came into effect.

Chart 15 Sex offenders serving sentences of >20 years 1995-2005

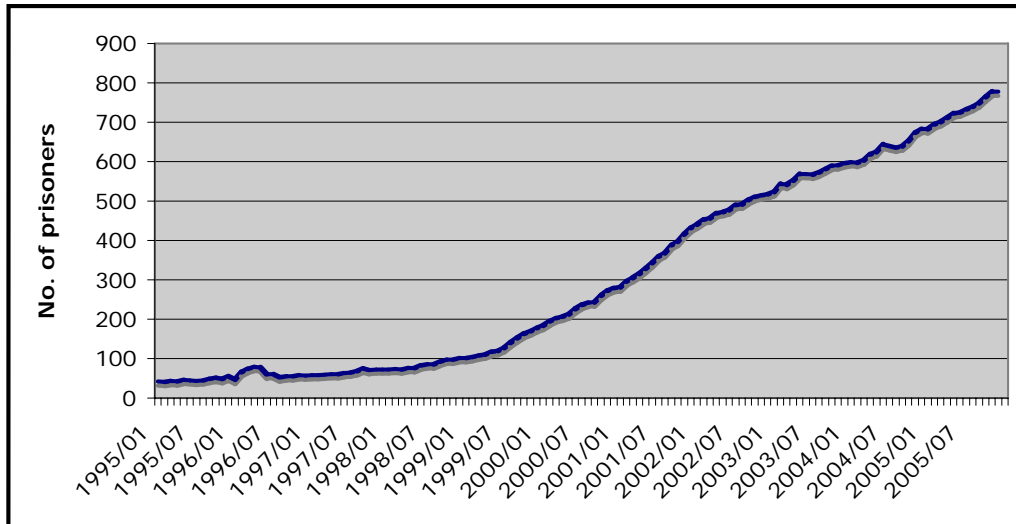
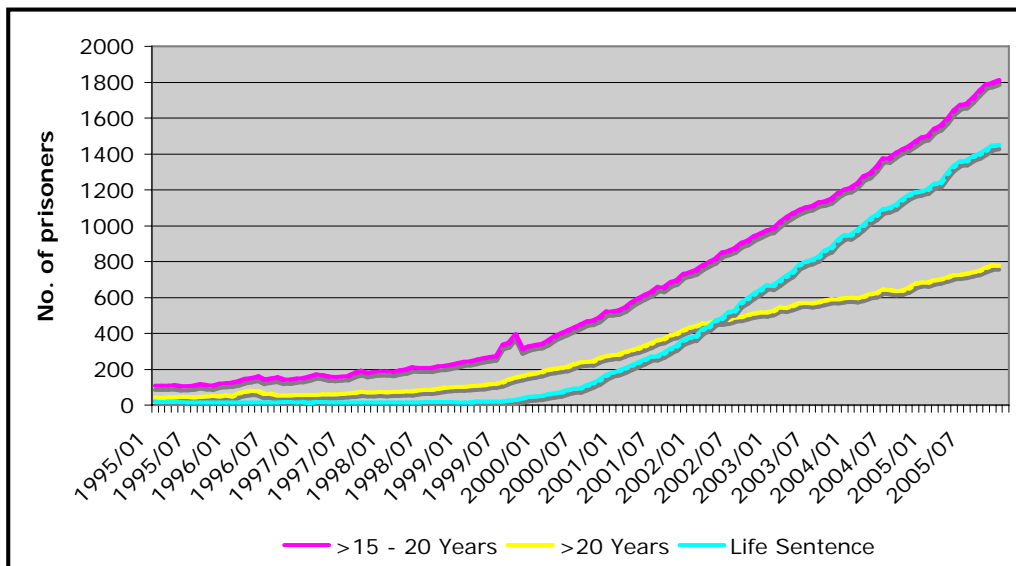


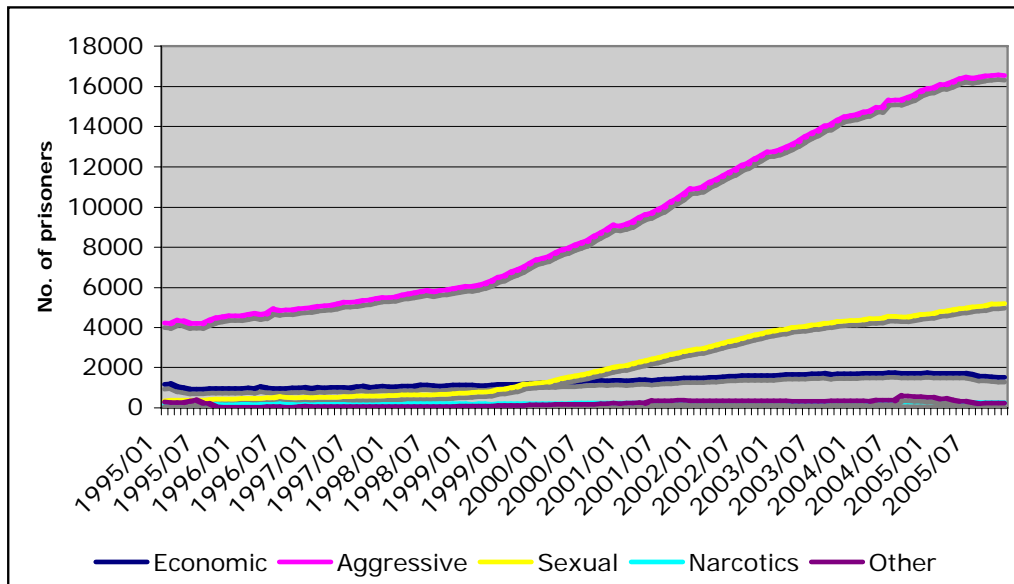
Chart 16 Sex offenders serving sentences of >15 years



The third sentence category that is the sole prerogative of the High Court is the >15-20 year sentence category. Again, aggressive and sexual crimes dominate this sentence category. The share of sexual offences here increased from 4% in 1995 to 7% in 2000, and then doubled again to 14% in

2005, while the sentence pattern for aggressive offences was similar to that of the life sentence category.

Chart 17 Crime categories of prisoners serving sentences of >10 - 15 years, 1995-2005

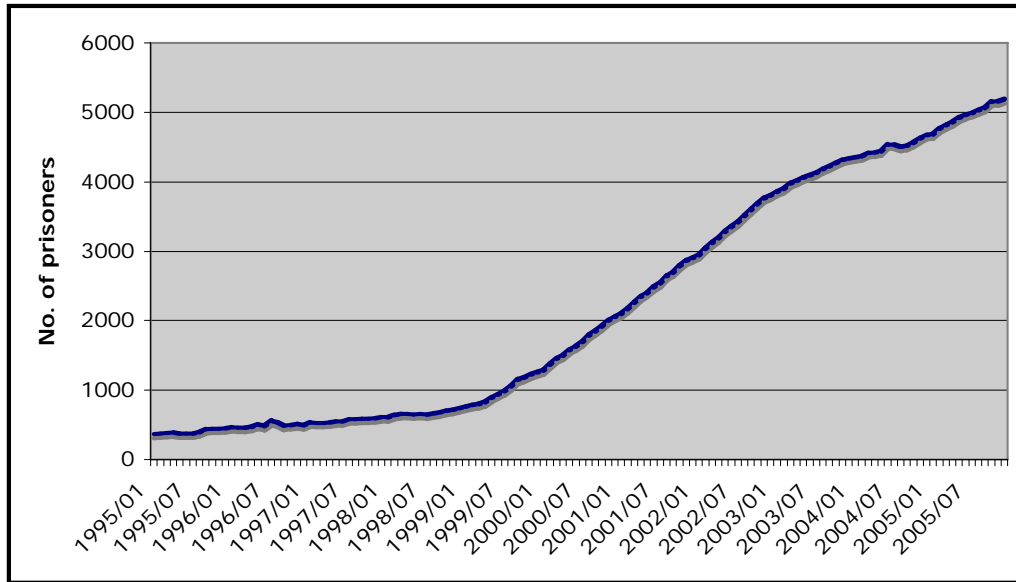


The >10-15 year sentence category (seen in Chart 17) is important because it includes the longest sentence that can be imposed by a Regional Court. The trend of prisoners sentenced for aggressive crimes held steady, while that of sex offenders increased dramatically again, from 6% in 1995 to 20% in 2005, at the expense of economic offenders, which fell from 19% to 7%. It is important to note, though, that despite this decline in share, the total number of prisoners serving sentences of >10-15 years for economic offences nevertheless increased substantially from 1161 to 1514. Again, the major increase for both aggressive and sex offenders came in the second quarter of 1999.

The scale of Chart 14 has the effect of visually diminishing the increase in the growth in the total number of sex offenders. Chart 18 shows how rapidly sex offenders in this sentence category began to grow from early 1999 onwards. This suggests a combination of factors: first, the increase in

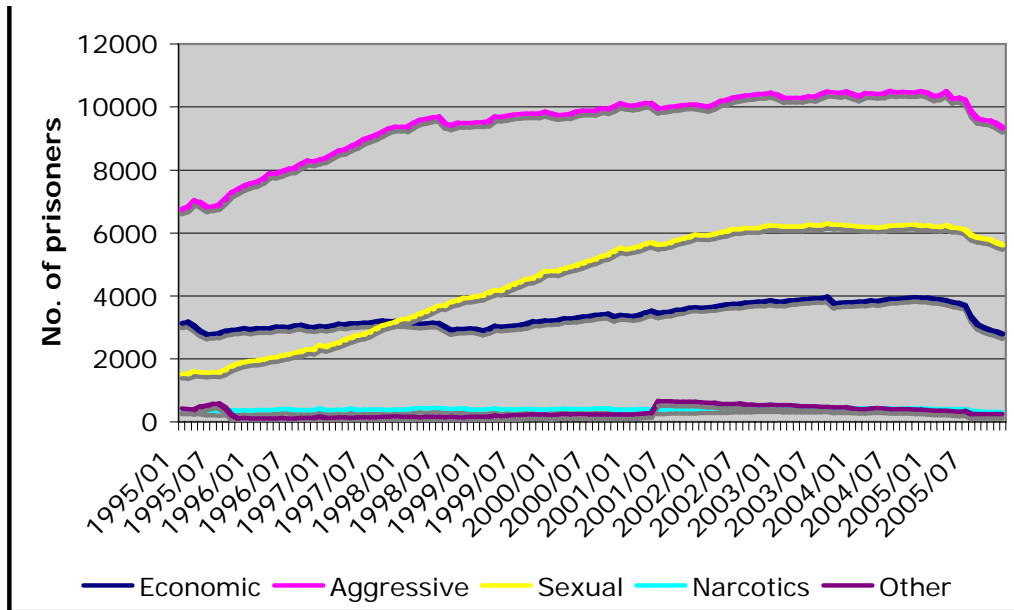
jurisdiction of the Regional Court, and second, the effect of the minimum sentences legislation.

Chart 18 Sexual offenders serving sentences of >10-15 years



The >7-10 year sentence category shows (see Chart 19) a different profile from those discussed above. More sex and aggressive offenders began to be sentenced in this category from 1995 onwards, seemingly as the result of a general sentencing tariff increase, and prior to the minimum sentences legislation. In 2001, in the case of sex offenders, and a bit earlier for other aggressive offenders, the numbers started to stabilise. Presumably, the tariff for these offences increased with the introduction of the minimum sentences legislation, and offenders previously sentenced to terms of 7-10 years were now receiving longer sentences, presumably in the 10-15 year category.

Chart 19 Crime categories of prisoners serving sentences of >7-10 years 1995-2005



Based on the data it can be concluded that the increases in sentence lengths had already started, although in a less pronounced shape, prior to the introduction of the minimum sentences legislation. The minimum sentences legislation acted to accelerate a trend that had already begun. The pattern for sexual offences, however, was different. The increased sentencing tariff for rape, particularly in the High Court, was almost entirely due to the minimum sentences legislation. Significant numbers of sex offenders only started appearing in the long sentence categories after 1999, and this can only be ascribed to the minimum sentences legislation.

There is little doubt that there had been a general raising of the sentencing tariffs for aggressive offences since the mid-1990s. This is confirmed by interviews done with a number of judges by Redpath and O'Donovan.⁴³ That the increase in the number of prisoners serving determinate sentences of more than 20 years (i.e. excluding life sentences) began before the promulgation of the minimum sentences legislation suggests

⁴³ Redpath and O'Donovan (forthcoming).

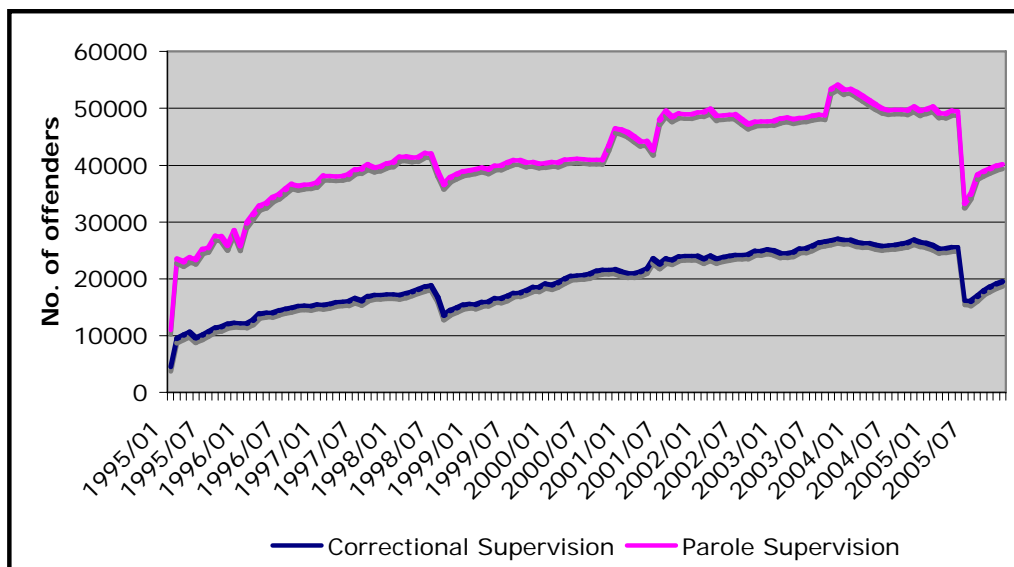
that sentencing officers were responding to public expectations and pressures and increasing sentence lengths, but not resorting to using life sentences extensively during this period. The minimum sentences legislation therefore served to replace, at least in part, determinate sentences of 20 years and longer, with life sentences.

Non-Custodial Options

Since the late 1980s, the courts have had at their disposal various non-custodial sentencing options. The different non-custodial options as they are made available by amendments to the Criminal Procedure Act⁴⁴ are presented in Appendix 2.

The use of correctional supervision as a sentencing option has increased over time, as shown in Chart 20.

Chart 20 Daily average community corrections cases 1995-2005



⁴⁴ Skelton A *Alternative Sentencing Review* CSPRI Research Paper Series No. 6, 2004, pages 8-9.

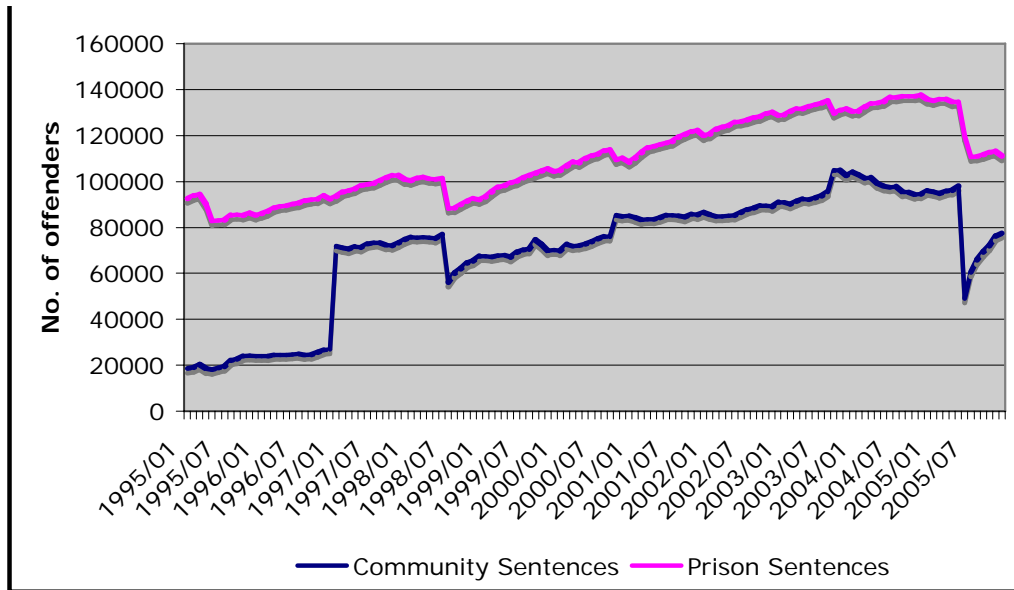
The dips in the chart in mid-1998, late 2000 and mid-2005, which can be seen in the trends of both correctional and parole supervision above, do not necessarily signify a reduced use of the options. The reason for these reductions in numbers is the executive remissions that impacted not only on the totals of those in prison, but also those serving sentences in the community. This will be discussed in the section on parole below.

Despite the increase in the total number of offenders undergoing community corrections, the rate of increase has been nearly identical to the rate of increase of the sentenced prison population. This can be seen in Chart 21. Community corrections, in terms of numbers at least, is becoming neither more nor less important.

From mid-2001 the number of persons placed on community corrections remained by and large stable until the 2005 remissions. The number of people under community corrections was nearly the same by mid-2005 as it was in mid-2001. In essence, the number of candidates for conversion⁴⁵ may have shown a steady decline since 2001 despite there being more sentenced prisoners in prison.

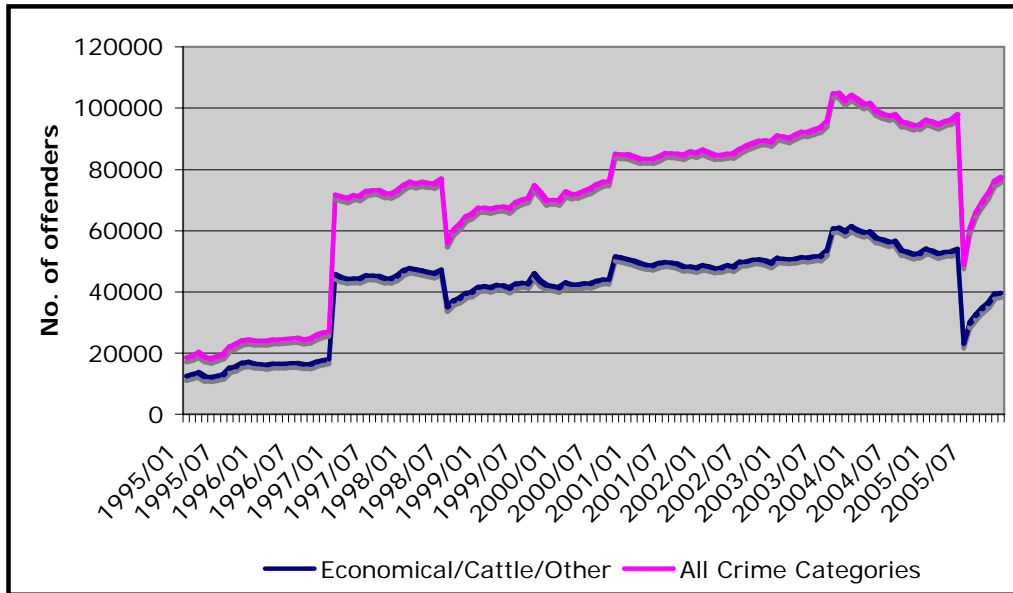
⁴⁵ Conversion of a prison sentence to community corrections can be made in respect of Ss 276(1)(i), 276A(3) and 287(4)(a) of the Criminal Procedure Act

Chart 21 Offenders undergoing court imposed correctional supervision, 1995-2005



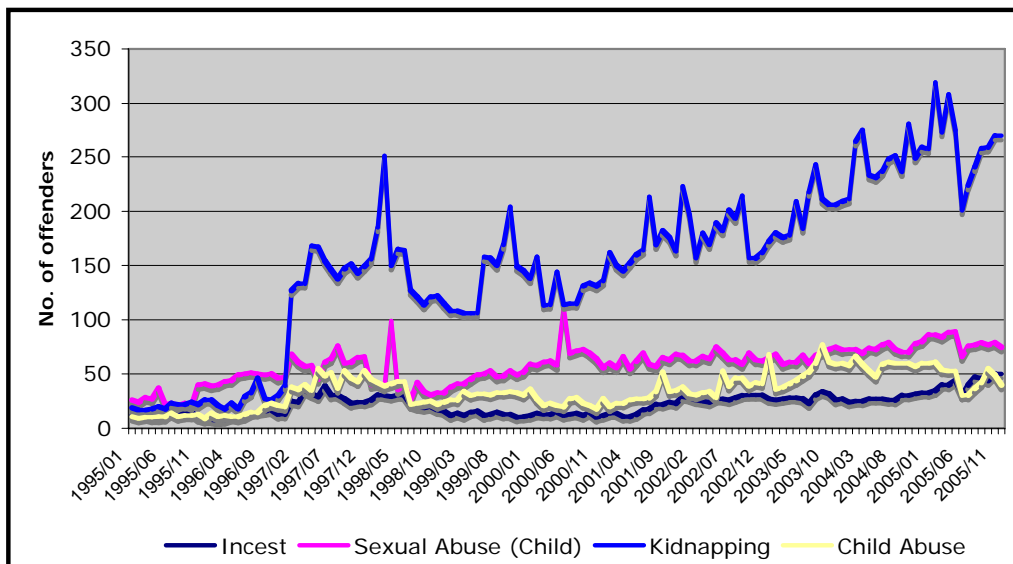
Community corrections is used for a range of offences and the legislation does not place any restriction in this regard, save for those restrictions imposed by the minimum sentences legislation. The most common offence category is economic offences as indicated in Chart 22. However, a closer examination of the graph indicates that the two lines (representing economic offences and all other offences) are diverging slightly, suggesting that community corrections sentences and conversions from custodial to non-custodial sentences are increasingly being used for offences other than economic ones.

Chart 22 Community corrections: economic offences versus total offences



Charts 22 and 23, depicting the offence categories of offenders sentenced to community corrections, have been divided into two for practical reasons: first, there are too many categories to easily read them in one, and second, the total offenders within the different categories fit more easily into two scales.

Chart 23 Offenders under community corrections (excluding economic and other major offences) 1995-2005



Community corrections, as a sentencing option, has seemingly not been used as extensively as it could have been. Even if community sanctions were being used as alternatives to short sentences only, their extended use would no doubt have a noticeable but limited impact on prison population totals and overcrowding.

Parole

The other component of DCS community corrections is parole. This is not strictly sentencing, but rather sentence management. Parole legislation, policy and administration can have a significant impact on sentence lengths, and thus prisoner numbers and overcrowding by releasing prisoners in a timely manner. Increasingly, sentencing legislation deals with parole administration in an aggressive and punitive manner by specifying longer non-parole periods and also requiring that offenders sentenced to life imprisonment be returned to the sentencing court for a decision on parole.⁴⁶

In 1993 the previous release mechanism of remission and parole was replaced by a system of credits, which Steinberg refers to as “confusing and convoluted”.⁴⁷ The credit system, after causing much distress and even activism on the part of sentenced prisoners, was in its turn succeeded by a less flexible parole system.

The 1998 Correctional Services Act established a new parole system, with Correctional Supervision and Parole Boards (CSPBs) replacing the old parole boards. The Act also established a Correctional Supervision and Parole Review Board (CSPRB), made up of members of the National Council on Corrections which can review decisions by the CSPB.⁴⁸ Each CSPB is chaired by an independent chairperson, and includes DCS officials and two members of the community. Provision is also made for participation by members of the

⁴⁶ S 73(5)(ii) of the Correctional Services Act. The practicalities of this are, however, unclear.

⁴⁷ Steinberg 2005 page 5.

⁴⁸ Correctional Services Act No. 111 of 1998 S 74-77.

South African Police Services (SAPS) and the Department of Justice. The new CSPBs became operational in early 2005 in all 52 management areas, while the CSPRB was launched in April 2006.

The principle that underlies parole is that, although a prisoner is obliged to complete his or her entire sentence, the CSPB can decide to allow a portion of the sentence to be served in the community under supervision. A prisoner serving a determinate sentence must serve half of that sentence before the CSPB can consider his or her release on parole.⁴⁹ However, if sentenced under the minimum sentences legislation, the prisoner must serve four fifths of the sentence in prison. Prisoners sentenced to life imprisonment before 1997 must serve 20 years before they can be released on parole, on recommendation of the National Council on Correctional Services. If sentenced to life imprisonment after October 2004, they have to serve 25 years before a decision to release them can be made by the court.⁵⁰

A court may stipulate a “non-parole” period, as a portion of a sentence that must be served before consideration for parole. This period may not be greater than two thirds of the sentence if the sentence is longer than two years.⁵¹ The DCS MIS does not have the empirical data to assess how extensively these provisions are used. It is accepted that these provisions may be used to increase the prison term to be served, without an increase in the sentence length, and that there is the possibility that it may not be used consistently and based on objective criteria, such as identified risk.

Chart 24 illustrates how the total number of parole releases has declined substantially since 1995. It must be borne in mind that every executive release (represented by the spikes in the chart) will include a number of offenders who would have been eligible for release in due course, which would reduce parole releases in the subsequent months. On the other

⁴⁹ Correctional Services Act No. 111 of 1998 S 73(6)(a)

⁵⁰ See note 46.

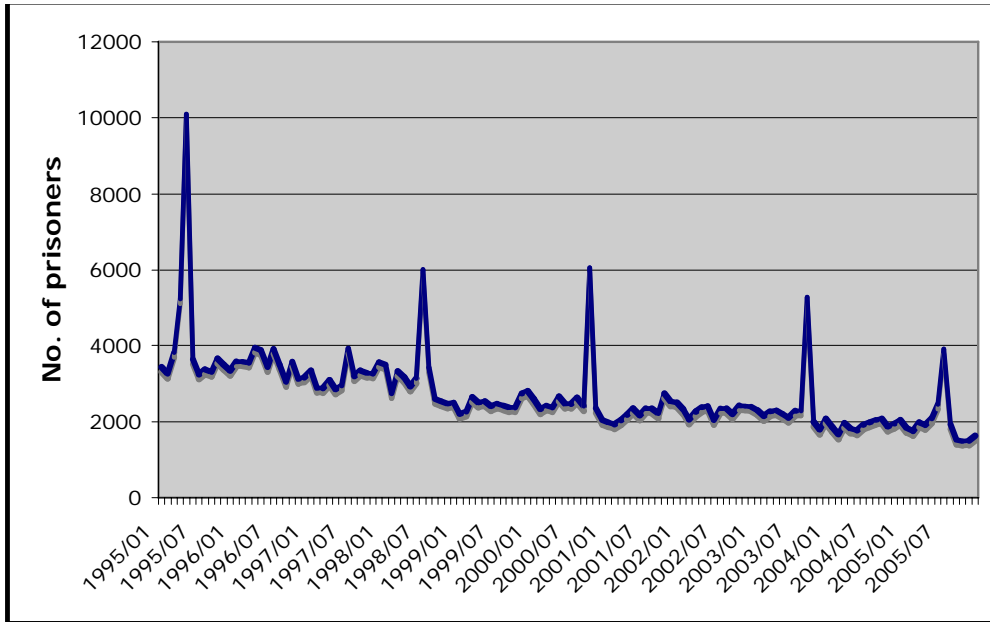
⁵¹ Criminal Procedure Act S 276 B.

hand, the mass releases would generally also bring forward the parole dates of other offenders not yet released. Everybody who qualifies can benefit: some immediately by being released and others by having their CSPB hearing brought forward. Either way, given the large increase in the sentenced prison population, a reduction in the number of paroled offenders is not to be expected. There are two reasons for this trend. One is that prisoners are not eligible for release due to substantially increased sentence lengths. The second reason is that the DCS is not acting efficiently in ensuring releases on parole as soon as possible after eligibility. There are recorded cases to support this assertion.⁵²

The prison authorities can have significant influence over the size of the prison population if it has at its disposal an efficient parole system. The data presented in Chart 25 suggest a measure of efficiency, namely the number of releases on, as opposed to after, the approved date.

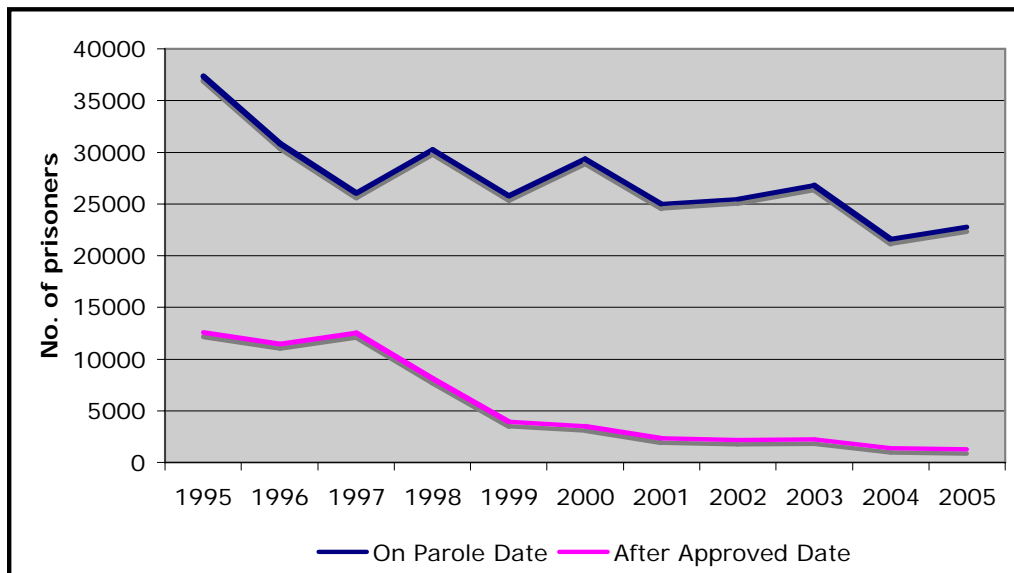
⁵² See for example, Sloth-Nielsen J 'Parole pandemonium' in *CSPRI Newsletter No. 14* November 2005.

Chart 24 Total monthly parole releases 1995-2005



The decrease in the number of monthly parole releases can perhaps be more easily seen in Chart 25 depicting annual releases. However, it is too early to assess the efficiency of the new CSPBs, as they only became operational in early 2005. The 2005 special remissions also created unusual circumstances, which makes an assessment using numerical data impossible.

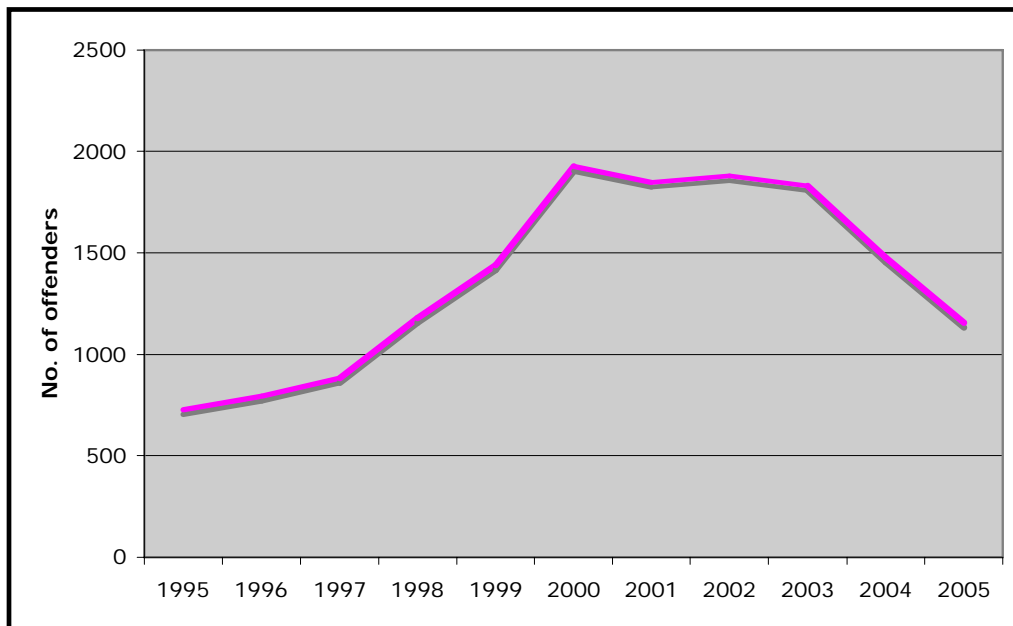
Chart 25 Total annual parole releases 1995-2005



Conversions to Community Corrections

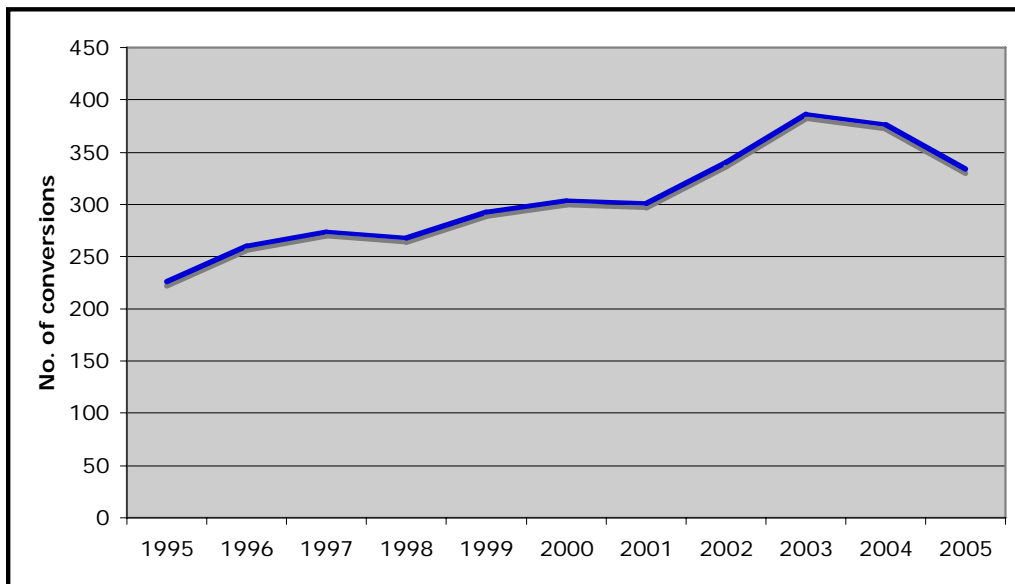
In addition to community corrections sentences and parole, the Criminal Procedure Act provides for the conversion of prison sentences to correctional supervision. Of the four most used provisions, the two most popular are those in which the discretion is left entirely to the Commissioner of Correctional Services. Section 287 (4)(a) can be used when an offender cannot pay a fine for which the alternative is a prison sentence of five years or less. This section is used extensively, although it can be seen from Chart 26 its use has been declining since 2003. The totals for 2005 are inconclusive however, as they would naturally decrease due to the special remissions.

Chart 26 Average monthly conversions in terms of Section 287(4)(a)



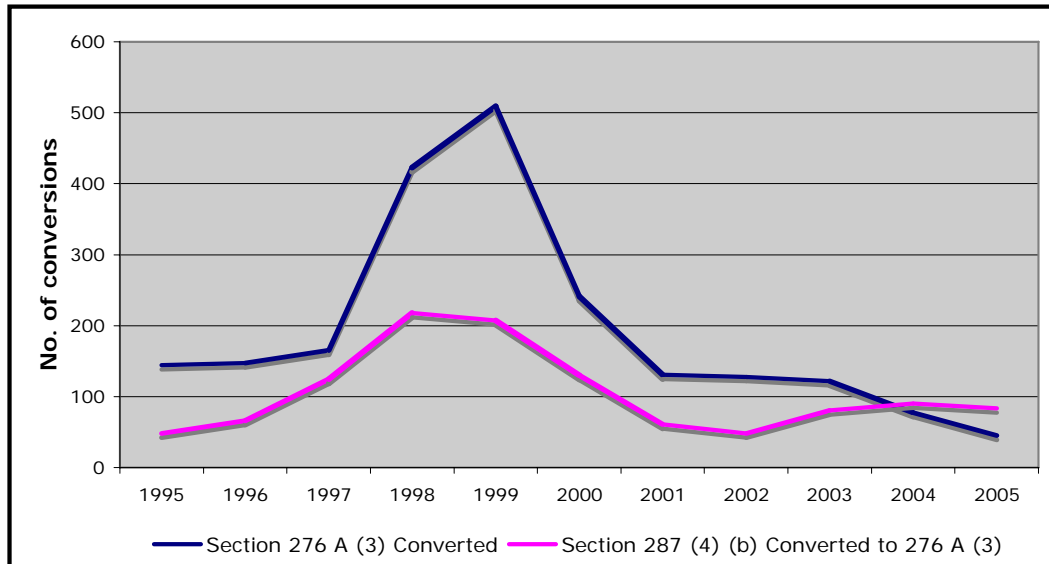
Section 276(1)(i) provides for the conversion of prison sentences of five years and less to correctional supervision at the discretion of the Commissioner. Conversions in terms of this section are shown in Chart 27.

Chart 27 Average monthly conversions in terms of Section 276 (1)(i)



The other two conversion possibilities are Sections 276A(3) and 287(4)(b), in which the conversion is made by the court *a quo*. In respect of S 276A(3) the Commissioner can apply to have a sentence of less than five years (or the sentence of an offender who has less than five years still to serve) converted to correctional supervision. Section 287(4)(b) allows an offender who is serving a sentence of 5 years or less as an alternative to a fine to have his or her sentence converted to correctional supervision by the court *a quo*.

Chart 28 Total annual conversions: 276A(3) and 287(4)(b)



Both these provisions are used substantially less than Sections 276(1)(i) and 287(4)(a). On average there have been 16 Section 276A(3) and nine Section 287(4)(b) conversions per month since 1995. These are numerically insignificant and have thus had no impact on the prison population.

The conversion of prison sentences to correctional supervision is potentially an important mechanism for managing the size of the prison population. Equally obvious is that conversions have thus far been very limited in their scope as it is only prisoners serving shorter sentences who are eligible, restricting the number of possible conversions.

Special Remissions

One of the immediately effective ways of reducing the size of the prison population is using executive remissions, usually reserved for specific categories of prisoners, such as non-violent offenders. The strategy is not new. In conditions of severe overcrowding (180%) in 1971, about 13 000 sentenced

prisoners were given between three and six months amnesty. A further 28 000 sentenced prisoners were released in 1981, and in total, nearly 88 000 more between then and the first democratic elections in 1994. Between 1994 and the end of 2000, a further estimated 49 000 prisoners were released, including 8 000 unsentenced prisoners who had been granted bail of less than R 1000, and there were also amnesties for certain politically motivated violent offences.⁵³

In 2005, a special remission of sentence was granted to prisoners who were serving sentences for non-violent offences. This eventuated in the release of nearly 32 000 sentenced offenders, reducing the total prisoner population from an all-time high of 187 000 to a more manageable 155 000.

While the immediate effect that the special remissions have on prison population totals cannot be gainsaid, it should be noted that there are a number of objections that have been raised to this method of prison population management. As mentioned earlier, this approach does not address the systemic causes of prison overcrowding. The result is that the prison population inevitably return to its previous level. Another problem, it is often argued, is that the executive remissions subvert the prison sentence and the intentions of the court, and this tactic is therefore not popular with sentencing officers.

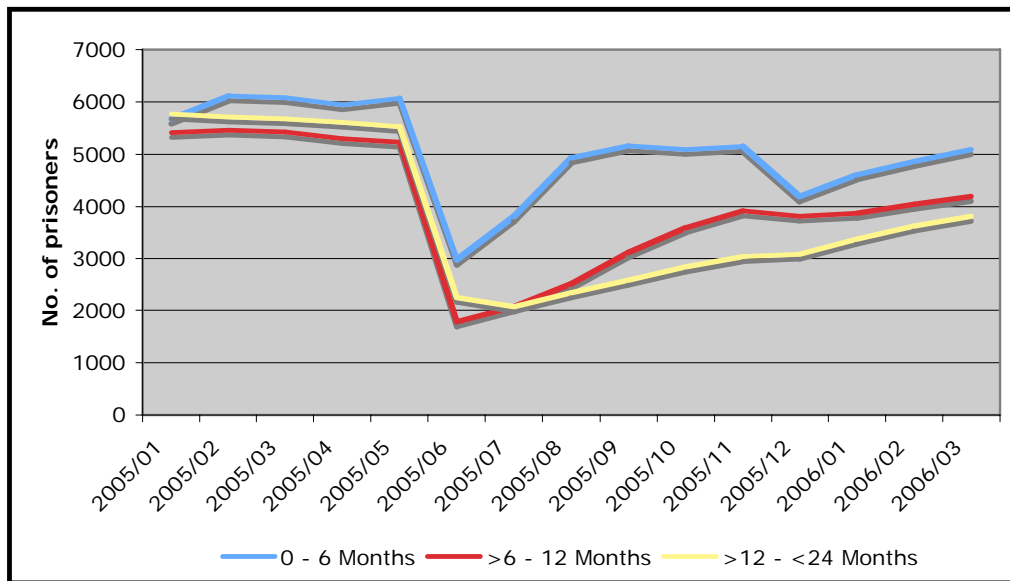
Finally, when much larger numbers of prisoners than normal are being released, there are often errors, and some prisoners are incorrectly released. The media highlight any such errors, and there is invariably a public outcry. On the other hand, during the 2005 remissions, the DCS ensured with far greater diligence than previously that the release process was co-ordinated nationally, and those eligible for release were required to undergo pre-release programmes. As a result, errors characterising previous special remissions were greatly reduced.

⁵³ Unpublished list from Judicial Inspectorate of Prisons, no date.

Executive remissions tend to have a short term impact, and thus do not provide a solution to the systemic problems causing prison overcrowding. They also target short term prisoners, a category that is not the source of the overcrowding problem - as this research is showing.

It is too early to be clear about trends in the post-remission period but some observations can be made. Not surprisingly, the longer sentence categories (greater than 10 years) have not been affected at all, and continue their seemingly inexorable rise. By March 2006 there were 565 more prisoners serving sentences of >10 years than there were in December 2005, 188 of whom are serving life sentences, and 161 serving sentences of >10-15 years. The middle categories (2-10 years) declined during the remissions (the shorter the sentence, the more dramatic the decline) and have not yet begun to increase noticeably, with the exception of the 2-3 year category, which shows some signs of an increase from February 2006. In the case of the short sentences, all have begun the return to their previous levels, although they have not yet reached them. Chart 29 suggests that they are likely to reach their pre-remission levels towards the end of 2006; a period of less than a year and a half.

Chart 29 Prisoners serving sentences of less than 2 years 2005-March 2006



4. The Impact on Prisons

In the preceding we have dealt mainly with the larger picture: how prisoner numbers have increased massively within a physical environment that has increased its capacity only marginally. The growing numbers have serious direct implications firstly for prisoners who have to spend longer periods confined in increasingly overcrowded prison conditions, increasing pressure on resources and infrastructure, and also exacerbating the risks associated with security, safety and health. The implications of this have been dealt with to some degree but are probably still not fully understood or appreciated.⁵⁴ Steinberg, for example argues that:

. . . insofar as a swelling prison population leads to overcrowding, and insofar as overcrowding results in

⁵⁴ Muntingh L 2005 pages 24-26 and Steinberg J 2005 page 7.

deteriorating prison conditions, it is probable that young inmates released from prison are far more likely to re-offend than they would have been if they had served their sentences in more humane prison conditions.⁵⁵

The second affected group is prison staff and management. The former have to contend with trying and stressful working conditions on a daily basis, while the latter are severely constrained in trying to develop and ensure implementation of policy in overcrowded prisons. This tends to create structurally dysfunctional institutions, which would be difficult enough to manage even in conditions of zero overcrowding.

There are also different forms of overcrowding. The challenges presented by the increase in numbers of unsentenced prisoners during the 1990s, for example, are different from those posed during the current crisis which results largely from increased numbers of long-term prisoners. This section examines some of the differential impacts at prison level, and some unintended consequences due to the character of the current overcrowding crisis.

Security Classification

The increasing number of prisoners serving long sentences has further serious unintended consequences as an increasing proportion of offenders are classified as maximum-security prisoners, due to the length of their sentences. As the Judicial Inspectorate's Annual Report for 2005/6 explains, the security classification system used by the DCS is designed to evaluate the security risk of sentenced prisoners.⁵⁶ The criteria used are the nature of the offence, the number of previous convictions, escapes and sentence length. On the basis of these criteria, prisoners score points that determine their security classification. In this process, sentence length carries a heavy weighting. This

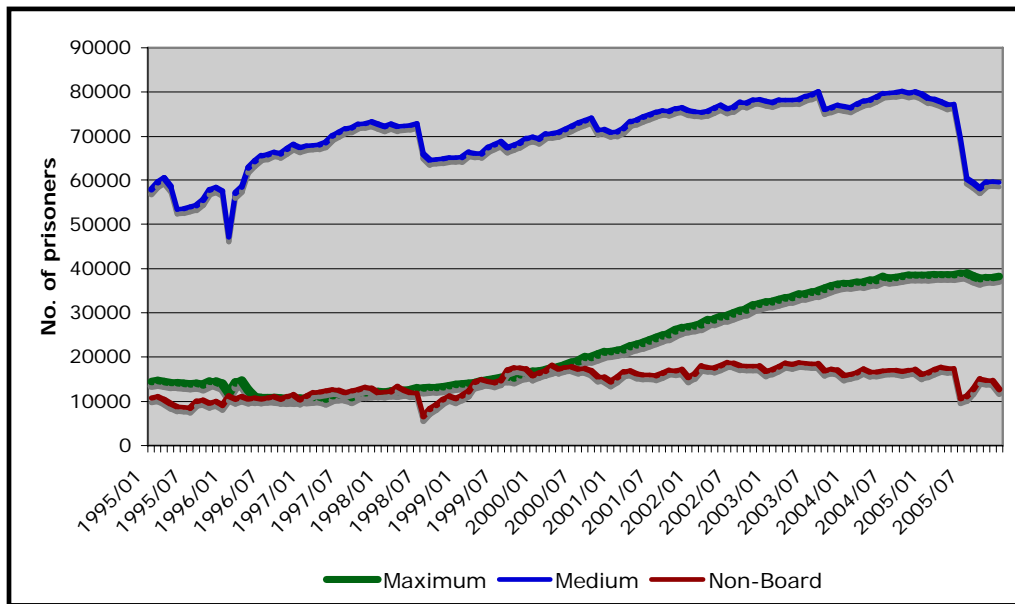
⁵⁵ Steinberg 2005 page 7.

⁵⁶ Judicial Inspectorate *Annual Report, 2005/6* page 25.

is understandable, as an offender serving a longer sentence is likely to be a higher security risk than one who is serving a shorter one.

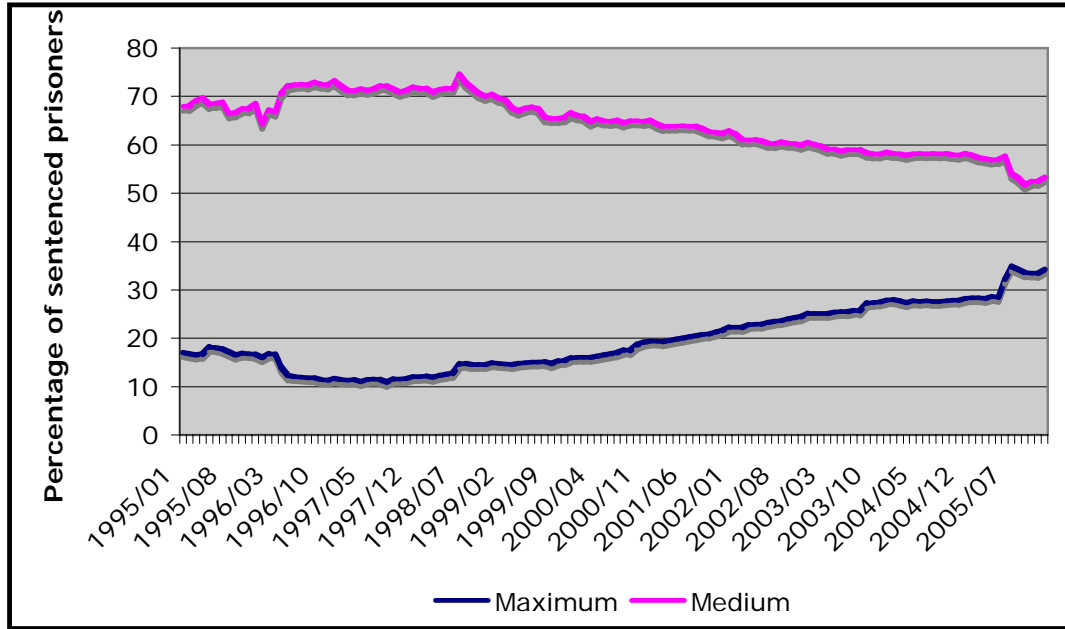
The result has been a sharp increase in the number of maximum-security prisoners, from 14 229 in 1995 to 38 663 in 2005 (see Chart 30). However, for the first five years, until 2000, the increase merely kept pace with the total number of sentenced offenders: in fact, until 1997, the total number of maximum security prisoners declined, as did this category as a proportion of total sentenced prisoners (11% for 1997). An increase from 1998 saw maximum security prisoners as a category increase its proportion by 2-3% each year, and by 2005, 30% of all sentenced prisoners were in this category (see Chart 31).⁵⁷

Chart 30 Major security classifications 1995-2005



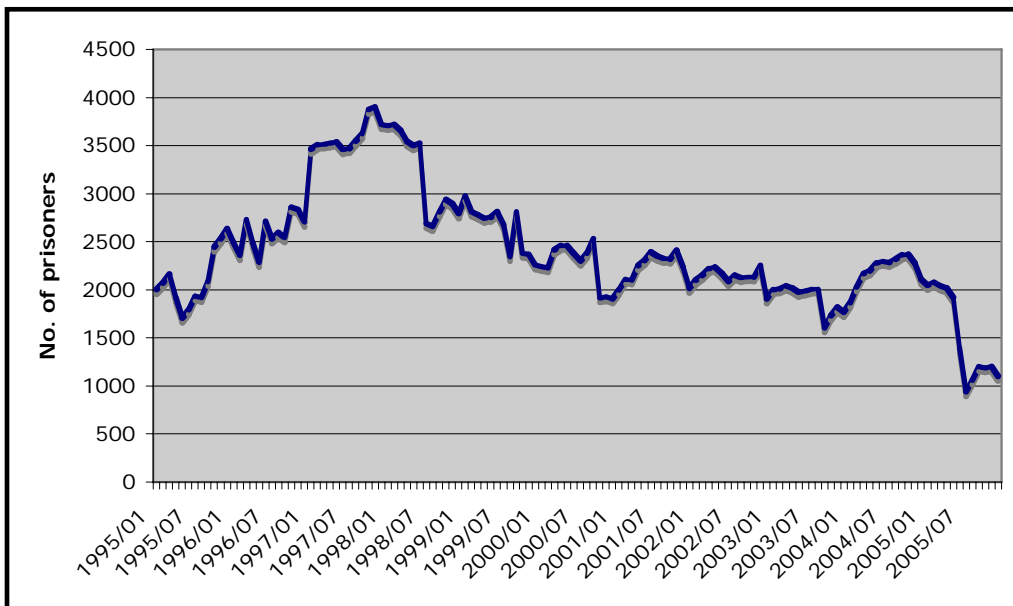
⁵⁷ Non-Board prisoners are those with short sentences who may be released on parole at the discretion of the Commissioner of Correctional Services without having to appear before a Correctional Supervision and Parole Board.

Chart 31 Percentage share of major security classifications



In contrast, the total number of minimum-security prisoners never rose higher than 3 900 (in November 1997), less than 4% of the total prisoner population. Chart 32 shows the dramatic decline in the number of minimum security prisoners.

Chart 32 Minimum security risk prisoners 1995-2005



The early increase in the number of maximum-security prisoners precedes the introduction and impact of the minimum sentences legislation. This increase coincides more precisely with the increase in sentencing jurisdiction of the Magistrates' Courts (the 15 year maximum of the Regional Court being most pertinent here). Given the complexity of the DCS "formula" to determine the security classification, it is argued that the increased sentencing jurisdiction of the Magistrates' Courts, the growing punitiveness of sentencing, and the initial impact of minimum sentences legislation may have combined to lead to this early increase in the proportion of maximum security prisoners.

It is not only the security implications for facility provision that are of concern here. The Annual Report of the Judicial Inspectorate suggests that there are also a number of human rights consequences, and that there is also a major impact on prison management as a whole:

Maximum security prisoners are not allowed to perform work outside the prisons, they have less access to rehabilitation programmes and recreation facilities. Their contact with their families is generally limited to non-contact visits once or twice a month. This causes such prisoners to be alienated from their families and their support structures, which are needed to secure their integration into the community upon release.⁵⁸

Of course, these changes in the patterns of security classification will impact on some prisons more than others. For example, while Barberton Medium B Prison is hardly affected, the classification of prisoners in Barberton Maximum Prison has changed considerably. Maximum security prisoners made up just 52% of the total population in 1995, but by 2005, the 180% increase in total numbers of this category had increased their proportion to 92%.

Some maximum security prisons, on the other hand, were not affected. Helderstroom Maximum Prison, for example, experienced a slight decrease in

⁵⁸ Judicial Inspectorate *Annual Report, 2005/6* page 25.

the percentage of maximum security prisoners, as the 1995 proportion was already 98%. Similarly, the proportion of maximum security prisoners at St Alban's Maximum Prison increased from 94% to 100%.

Steinberg quotes a recent Yale study which suggests that those who serve their sentences in more restrictive conditions are more likely to re-offend after their release: "Chen and Shapiro concluded that 'moving a prisoner from minimum to low security roughly doubles his probability of re-arrest within three years following release' ".⁵⁹

There is therefore a changing need in the type of accommodation required. It is also acknowledged that supply could not keep up with demand and that many maximum security prisoners are housed in medium security prisons.⁶⁰ As a consequence of this the DCS has embarked on a capital works programme to improve security by installing CCTV and electrified security fences at the medium security prisons.⁶¹

Impact of overcrowding at prison level

The average numbers that are so often used to convey the degree of overcrowding are unable to describe the nature of the impact at prison level, and in particular, the experiences of prisoners. Overcrowding is, after all, most acutely experienced by those who live under those conditions.

The total number and proportion of prisoners living in prisons that are overcrowded have increased substantially since 1995. It is only the special remissions of 2005 that have brought some respite. Chart 33 shows that even though the proportion of prisoners living in conditions of between 100% and

⁵⁹ Steinberg 2005 page 7

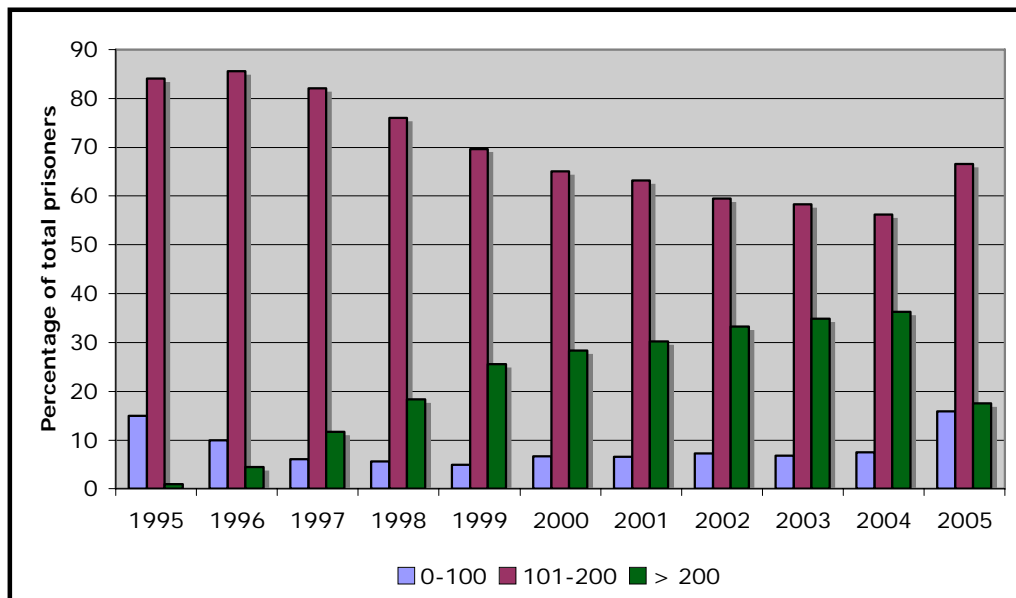
⁶⁰ Interview with Mr Albert Fritz, National Manager: Inspections, Judicial Inspectorate, Cape Town, 12 March 2006.

⁶¹ Parliamentary Monitoring Group - Minutes of the Portfolio Committee on Correctional Services meetings of 29 March 2006 and 2 May 2006.

200% occupancy⁶² slowly decreased from 1996 to 2004 (a trend ended by the remission), this decrease has been at the expense of the proportion of prisoners living in conditions of occupancy rates more than 200%: those detained in prisons which have more than twice as many prisoners than they were intended for increased from just 1% in 1995 to 36% in 2004.

Of equally great concern is the proportion of prisoners detained in institutions in which there are three times as many prisoners than capacity allows. There were no prisoners in this category until 1997, but by 2004 as many as 5% of all prisoners (a total of over 9000) were held such facilities. The special remissions reduced this number only slightly, to just less than 8 500. This is because it is largely both long-term prisoners and unsentenced prisoners who experience these conditions. Neither of these categories benefited from the remissions.

Chart 33 Prisoners living in different overcrowding conditions



⁶² An occupancy rate of 100% refers to an institution that is operating at its intended capacity. An occupancy rate of 200% means that there are double the number of prisoners than originally intended (400 in a prison intended for 200 prisoners). In Chart 33, the category 0-100 refers to the number of prisoners living in institutions in which there is no overcrowding.

However, even these prison-level numbers and percentages are sometimes too general to provide an understanding of prison level overcrowding. Within each prison, prisoners in different sections, units or even cells experience overcrowding differently. This is most apparent in the shared single cells. For years, policy has not allowed the sharing of a single cell by only two prisoners. This means that if there is to be more than one prisoner in a single cell, it has to be shared by at least three prisoners.

Overcrowding is seldom evenly distributed between different parts of a prison. Pollsmoor Prison was one of the first management areas for which a prison profile was constructed by the Judicial Inspectorate of Prisons during 2005.⁶³ The Pollmoor Maximum Prison (the Admission Centre) provides a good illustration of the character of overcrowding at prison level. The prison holds both unsentenced and sentenced prisoners, and there are vastly differing experiences in respect of detention conditions. The prison has capacity for 1 619 prisoners and has remained consistently over-full since 1995. During 1995 the occupation rate was 186%, making it the fourth most overcrowded prison in the country. By 2000, the occupation rate was down to 160% (while it dropped to 112th place in the country), but in 2004 it was up to 212% again, with a total of almost 4000 prisoners. Again, the 2005 remission has decreased the occupancy rate to an average of 166% in 2005.⁶⁴

On 5 June 2005, there were 3 979 prisoners in the prison, giving an occupation rate of 246%. A section of the Profile constructed by the Judicial Inspectorate provides details of the numbers in each cell, and it is possible to assess the spread of overcrowding.

There are 85 communal cells in the prison, each with a capacity of 18. Four of these communal cells had an occupancy rate of more than 300% (a total of 244 prisoners). A further 23 cells (accommodating 1 141 prisoners in

⁶³ The Prison Profiles produced by the Judicial Inspectorate are a collection of key data that describe the characteristics of each prison.

⁶⁴ Note that as the total figures are averages, the occupation rate would have been substantially higher in the first half of the year, and substantially lower during the second.

total) had occupation rates of over 250%, and 30 cells between 200-250%. The most overcrowded cell had an occupancy rate of 383%, representing 69 prisoners in an 18- person cell. This cell is in B Section, which is for sentenced prisoners.⁶⁵ The average cell (calculated as the median of the communal cells) accommodated 40 prisoners (or 222% occupancy).

While it is often the cramped and crowded communal cell that captures the imagination when one thinks of prison overcrowding, prisoners in the shared single cells experience the worst of it. There were 311 occupied single cells in the Pollsmoor Maximum prison, shared by 898 prisoners, at an average of 2.9 prisoners per cell (289% occupation rate).

5. Projections

Projecting prison populations is a risky endeavour fraught with difficulties. To project with confidence, one has to integrate a vast array of variables, including many that have no immediate link to the criminal justice system, such as birth and mortality rates and rates of economic growth. It has been tried before, usually with less than accurate results. Using data from 1995 to 2003, Kriel predicted that during the 2005/2006 financial year, the daily average prison population would be very nearly 210 000. Of course, due to the remissions, it is about 50 000 less than this, but even if the remissions had not been granted, the population is not likely to have been much more than 195 000.⁶⁶ Muntingh came far closer to this figure. He predicted a total of 197 000 prisoners by the end of 2005.⁶⁷

⁶⁵ At least one of the other cells in this category is a “court cell”, in which prisoners only spend one or two nights after being admitted to the prison from the courts.

⁶⁶ Kriel J ‘Emerging trends among the South African inmate population and persons subject to Community Corrections’ in *Acta Criminologica* 18 (2) 2005

⁶⁷ Muntingh L ‘Why something urgently needs to be done about the problem’ at Conference on Strategies to Combat Overcrowded Prisons, Pretoria, September 2005.

The DCS projected the population to be 200 000 by 2003, over 230 000 by 2005 and very nearly 250 000 by 2006.⁶⁸ These figures are, of course, even less accurate.⁶⁹

Part of the difficulty is that, aside from the external variables, the prison population is made up of a number of categories, sub-categories, and even smaller units. The category of life sentences, for example, can be broken down into different offence categories,⁷⁰ then age groups, or region, and so on. The size of each of these sub-categories increases at different rates, and is affected differently by a range of variables.⁷¹ It is the sum of the increases of individual categories that determines the total increase. Trying to forecast a prison population by projecting only the total prison population is sure to end up with an inaccurate and less defensible conclusion.

Despite these difficulties, it is important to attempt some basic forecasting. This forecast will be based on the assumptions that

- all external variables stay constant; and
- the total number of unsentenced prisoners and the sentence categories of up to seven years remain constant.⁷²

Thus only sentences longer than seven years will be forecasted as these sentences are normally not the subject of remissions. These categories thus tend to reflect more consistent and predictable trends and not the frequent fluctuations of the shorter sentence categories. The long sentence categories

⁶⁸ Van Zyl Smit 2004: 245-246.

⁶⁹ The DCS is now working with National Treasury to construct a complex model that will be able to predict prisoner population numbers more accurately.

⁷⁰ This should preferably also be a more detailed breakdown than the four categories the DCS currently uses on the MIS.

⁷¹ For example, see Charts 14 and 16 for how the category of prisoners serving life sentences for sexual offences is increasing more rapidly than those serving such sentences for other aggressive offences.

⁷² For example, using the method described, the projected total prisoners for the 2-3 year sentence category for January 2005 is 11 644 if forecast from December 1998 and 16 745 if forecast from December 1997. This enormous difference is due to a large drop in numbers during 1998 as a result of a remission on then President Mandela's birthday. The actual total for this sentence category in January 2005 is 17 816.

are more important for planning purposes as their impact on available capacity is constant but also less flexible with respect to managing overcrowding. Underlying this forecasting is the conclusion that since 2000 and at least for the next decade, it will be the sentenced prison population that will be the main driver of the prison population.

The following projections are based on an examination of trends of the sentences longer than seven years over an eleven-year period. The basic MS Excel Forecast function is used.⁷³

Testing for Accuracy

To test the accuracy of the forecasts, it is useful to conduct some testing by using the Forecast function to project the totals in each of the long sentence categories for December 2005 (the real total for which we already know), from three different points in time:

- Using data from 1995 to 2002 (a forecast of three years using historical data of eight years),
- Using data from 1995 to 2003 (a two-year forecast using a base of nine years), and
- Using data from 1995 to 2004, a short forecast of only a year using base data of 10 years.

As can be expected, Table 5 shows that the larger the base period, and the shorter the forecast period, the closer the projected total is to the actual total.

⁷³ Kriel 2005 explains in detail how the function works on pages 101-102.

Table 2 Estimating accuracy by projecting known totals

	Actual Total Dec 2005	ESTIMATE FOR DEC 2005			DIFFERENCE BETWEEN ACTUAL TOTAL AND PROJECTION			ADJUSTMENT NECESSARY		
		From 1995 to end 2002	From 1995 to end 2003	From 1995 to end 2004	From 1995 to end 2002	From 1995 to end 2003	From 1995 to end 2004	From 1995 to end 2002	From 1995 to end 2003	From 1995 to end 2004
>7-10 years	18298	25818	25099	24252	-7520	-6801	-5954	-41	-37	-33
>10-15 years	23740	21279	22798	23637	2461	942	103	10	4	0
>15-20 years	11122	9251	9997	10528	1871	1125	594	17	10	5
>20 years	9486	9854	10077	10100	-368	-591	-614	-4	-6	-6
Life	6615	3916	4597	5174	2699	2018	1441	41	31	22

What is important, though, is that - except in the case of the >20 year category in all projections and the >10-15 year category in the final projection - the forecast substantially underestimates the actual total at the end of 2005, and (again excluding the >20 year category) the longer the sentence, the greater the underestimation. This can be contrasted with the Kriel and DCS projections, in which the projected totals were much higher than the actual totals.

Projecting Long Sentences

If the longer sentences are projected to December 2010, using historical data of the 11 years from January 1995 to December 2005 and projecting a

further five years from that, the argument is on stronger ground. It can be assumed that the vast majority of prisoners sentenced to more than 10 years after October 2004 will not be eligible for parole until 2012, and even after this time, those eligible will form a tiny minority. This is due to the provision in the Correctional Services Act that obliges prisoners sentenced under the minimum sentences legislation to serve at least four fifths of their sentence.⁷⁴ The forecast for these sentences yields the following results:

Table 3 Adjusted projections of sentence totals - 7 years and longer

	2005/12	2006/12	2007/12	2008/12	2009/12	2010/12	2015/12
>7 - 10 Years	18298	16090	16687	17284	17881	18478	21462
>10 - 15 Years	23740	25946	27895	29845	31794	33743	43489
>15 - 20 Years	11122	12292	13218	14144	15070	15996	20627
>20 Years	9486	10078	10834	11590	12347	13103	16884
Life Sentence	6615	7553	8275	8997	9719	10441	14050
Total	69261	71958	76909	81859	86810	91760	116513
Prisoner increase from 2005	0	2697	7648	12598	17549	22499	47252
Estimated prison capacity	114000	114000	114000	114000	120000	123000	132000
% of capacity used by sentences >7 years	61	63	67	72	72	75	88

Table 3 shows, in the first column, the actual total in each of the sentence categories as at the end of 2005, and in the subsequent columns, the forecast totals for the years 2006-2010, and for 2015. The table shows only sentences greater than seven years and it can be seen that we can expect 22 500 more long term prisoners by 2010, and 47 000 more by 2015. About half of these are in the >10-15 year category, one that is increased not only by High Court sentences, but also by those in the Regional Courts.

⁷⁴ S 73 (6)(b)(v)

The totals provided by the forecast have been adjusted according to the accuracy figures estimated in the final column of Table 2. For example, the forecast total for the 7-10 year sentence category has been readjusted to 33% less, and that of the life sentence category to 22% more than the projected totals.

It is thus predicted in Table 3, assuming 9 000 new prison places by 2010 and a further 9 000 by 2015, that the proportion of prison places taken up by prisoners serving sentences of longer than 7 years will increase from 61% currently to 75% in 2010 and 88% in 2015. In 1995, this sentence category took up only 26% of the available capacity, and in 2000, the corresponding figure was 45% (see Chart 36).

Chart 34 Projected percentage of total national capacity used by prisoners serving sentences of longer than 7 years

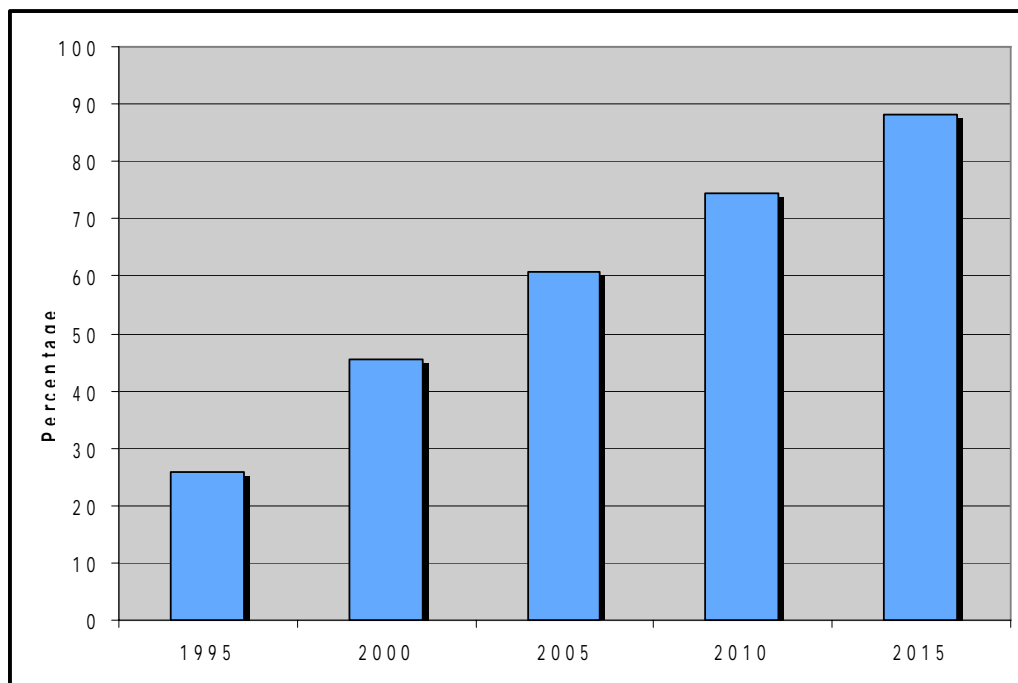


Table 4 shows the projections for the entire prison population.⁷⁵ These projections assume that totals of unsentenced prisoners and all sentence categories of 7 years and less remain the same. The three columns on the left show the projection, if it is assumed that these totals are frozen from December 2005, after the special remissions. The three columns on the right show the projection based on the assumption that these sentence categories return to their pre-remission levels and then hold stable.

The difference is substantial, and reflects the total number of prisoners released during the special remissions. It would be extremely optimistic to expect that, in the absence of systemic solutions involving the entire criminal justice system, the total number of these short-term prisoners will not increase again, as they have done after previous executive releases.

⁷⁵ The total number of unsentenced prisoners has been kept stable at their lowest level for both scenarios. In the first three columns, the total number of prisoners serving sentences of seven years and less are held stable as at their December 2005 level. In the three right-most columns, the total number of prisoners serving sentences of seven years and less are held stable at their January 2005 level, on the assumption that these numbers will soon return to their previous levels.

Table 4 Projection of the total prison population 2005 to 2015, two scenario's

	Sentences of 7 years and less stable as from December 2005			Sentences of 7 years and less stable as from January 2005 (pre-Remission figures)		
	Current	Projected Totals		Current	Projected Totals	
	Dec 2005	Dec 2010	Dec 2015	Jan 2005	Dec 2010	Decr 2015
Unsentenced	46327	46327	46327	46327	46327	46327
0 - 6 months	4189	4189	4189	5674	5674	5674
>6 - 12 months	3812	3812	3812	5416	5416	5416
>12 - < 24 months	3089	3089	3089	5763	5763	5763
2 - 3 years	9654	9654	9654	17816	17816	17816
>3 - 5 years	10675	10675	10675	16731	16731	16731
>5 - 7 years	9089	9089	9089	12137	12137	12137
>7 - 10 years	18298	18478	21462	18298	18478	21462
>10 - 15 years	23740	33743	43489	23740	33743	43489
>15 - 20 years	11122	15996	20627	11122	15996	20627
>20 years	9486	13103	16884	9486	13103	16884
Life Sentence	6615	10441	14050	6615	10441	14050
Total	156096	178595	203348	179125	201624	226377

It must be stressed again that these projections are purely mathematical. The assumption is that all social, political, legislative and other human variables remain the same. This is, of course, never the case. This is likely to have a substantial effect on prisoner totals. No claim is being made for a rigorous forecasting model here. It is not possible to model complex social reality using a simple function on basic computer software. Yet even if the projection is as much as 20% or 25% off the mark, the projected numbers give cause for concern.

The projections are dealing with mere numbers, but human agency can impact on their trajectory. The problem is that, in the case of these longer sentences, and particularly with regard to life sentences, the upward trends are reinforced by the key variable factors: the minimum sentences legislation has this tendency, as do the rigid parole regulations contained in the Correctional Services Act. For this reason, actual population size may well exceed the projections even more spectacularly in the long term.

The projections leave little doubt that without immediate and effective intervention, the prison-overcrowding crisis is destined to worsen with catastrophic consequences.

6. Conclusions

Based on extensive meta-analyses Gendreau, Goggin and Cullen, came to the rather unsurprising conclusion that imprisonment does not contribute to reducing recidivism.⁷⁶ Even when controlling for risk profiles, those offenders who were sent to prison had a higher re-offending rate than those who received a community-based sentence. Higher recidivism rates are also associated with longer prison terms. In short, this means that imprisonment *per se* increases the recidivism rate and the longer the term, the worse the impact. From a policy perspective they conclude that:

“Prisons should not be used with the expectation of reducing future criminal activity . . . therefore the primary justification for the use of prisons is incapacitation and retribution, both of which come with a ‘price’, if prisons are used injudiciously.”

In the South African context this finding has not informed decision-making and imprisonment remains a very popular sentence option with

⁷⁶ Gendreau P, Goggin C and Cullen FT (1999) The Effects of Prison Sentences on Recidivism, Public Works and Government Services, Canada.

sentencing officers and the public. Severe minimum sentences and an increasingly punitive attitude from sentencing officers have contributed to the very high imprisonment rate in this country.

It is by now clear that during the period 1995 to 2005, the baton has been passed from one prison population driver to another. No longer is the prison population growth the result of an increase in the number of unsentenced prisoners. Although the number of unsentenced prisoners is still far higher than it was in 1995, this figure has been on the decline. The major driver of the increasing prison population is the sentenced population, and more specifically, the growing proportion of long-term prisoners. The number of sentenced prisoners has also continued to increase despite a reduction in the total number of offenders admitted to serve prison sentences. This is a trend that will be more difficult to reverse than the increases in the unsentenced population or increases in short term prisoners. Executive remissions will have no impact on this category of prisoners.

The professed target of the minimum sentences legislation was offenders convicted of more serious aggressive and sexual offences (although there are some exceptions in the legislation). The legislation, effective from May 1998, did not have an immediate impact, as it only applied to offences committed after this date. The process of the commission of the offence, detection and arrest, and time spent awaiting-trial and awaiting-sentence combined to create a delay of up to two years before the impact became visible in a changed sentence profile of the prison population. Thus it was only in late 1999 and early 2000 that the share of offenders being sentenced to longer prison terms began to increase rapidly and consolidate the preceding trend dating back to pre-1998.

In most cases, the increases in numbers of prisoners in the longer sentence categories preceded this date. Although there is an indication of an increase at around this time, it is also clear that a significant increase in numbers for all these categories began earlier than 1998. The general

sentencing tariff for serious offences increased throughout the 1990s, and was provided with further impetus by the minimum sentences legislation.

There is however an important exception. It is clear that heavier penalties varied from one offence to another: increasingly severe penalties for aggressive offences were being handed down at the prerogative of the courts from the mid-1990s onwards. It took nonetheless the intervention of the legislature, for the same to be true for sexual offences. It is clear that the general sentencing tariff for sex offenders did not start to increase prior to 2000 as was the case with other violent offences. Compelling the courts to deal more consistently and more severely with sex offenders is regarded as an important and positive outcome of the minimum sentences legislation. Whether the actual tariffs imposed are proportional is however a different issue. This has had a noticeable impact on sentenced prisoner profiles.

For all offences, however, there is little doubt that the minimum sentences legislation increased the general sentencing tariffs, thus also providing for a one-way flow into the sentenced sectors of the prisons, and worsening an already serious overcrowding problem. What is more concerning is that the prescribed minimum sentences are not only mandatory but also extremely severe. Their full effect has up to now hardly been felt. It will be in years to come, from 2007 onwards, when offenders who, instead of being released, are rather being joined by increasing numbers of long-term prisoners, that the full impact of this legislation will be felt. Offenders sentenced to 15 years imprisonment in 2000 would have become eligible for parole by mid-2007 after serving half their sentence, but under the minimum sentences legislation (due to the four-fifths non-parole period), they will have to spend an additional four and half years before they can be considered for parole.

The minimum sentence legislation has had the unintended consequence of creating tariff beacons within the range of sentence lengths, which provide relative measures for sentences imposed on offenders

convicted for offences not covered by the minimum sentences legislation. A magistrate may thus argue that if the minimum sentence for fraud to the value of R500 000⁷⁷ is 15 years' imprisonment, fraud to the value of R400 000 must therefore receive a sentence of four fifths of the minimum, namely 12 years. This has contributed to the relative increase in sentence lengths. Even if the minimum sentence legislation were to be repealed immediately, it is unlikely that it would have significant impact on what have become established sentencing patterns.

As noted above, there is no evidence to suggest that longer sentences reduce crime levels, except insofar as they keep some offenders in custody, who are thus unable to commit offences in free society. These long sentences place greater strain on the resources of the criminal justice system, undermine the rehabilitative ideal, and thus make it more likely that larger groups of offenders will re-offend. A reflection on general sentencing patterns was (and still is) urgently needed. It is noteworthy that the impact that the legislation would be likely to have on prison overcrowding was not considered by Parliament, neither during the initial passage of the legislation nor at the time of the subsequent renewals.

It is also clear from the data that it is not only due to the severest of penalties imposed by the minimum sentences legislation that the numbers of certain categories are increasing. It was also because of the increase in sentence jurisdiction of the District and Regional Courts. The massive increase in the number of offenders sentenced to the maximum possible prison terms by each of these courts, clearly beginning just two months after its promulgation, leaves one in little doubt that this legislation too played a large role in increasing the general sentencing tariff, and thus the growth in the prison population.

⁷⁷ The value of R500 000 is the lowest covered by the minimum sentences legislation.

During the period under review, it is the increase of the Regional Court's jurisdiction to 15 years that has had the single largest impact on the total prison population, and is likely to continue to do so. The increase in the >10-15 year sentence category is not only relatively large in percentage terms, but more importantly, in terms of real numbers. This sentence category already provides a significantly large block of the total prison population, and this is likely to increase in importance in the future. While it is often the life sentences and their phenomenal growth that has been the focus of attention, it is the 10-15 year sentence category that is already exerting and will continue to exert the most pressure on available resources intended to provide adequate care to the prison population.

The data also show that even if minimum sentences are not in themselves responsible for the increases in the longer sentences, they nevertheless do act to increase these numbers even further after 2000. It is an important conclusion of this study that South Africa's current prison overcrowding is not the result of the minimum sentences legislation. Those who received minimum sentences would probably otherwise have been given relatively severe custodial sentences. Many of these would not yet have been eligible for parole either, even if they were not sentenced under the minimum sentences legislation. The impact of the minimum sentences on prison overcrowding is yet to come. What the minimum sentences legislation is doing in effect is that it will, from 2007 onwards, close down to the outlet valve, leaving only a trickle of releases. It is when those who would previously have been released are still in prison that the full effect of the legislation will be felt.

The projections suggest that the impact of the current sentencing patterns will be severe. The projections estimate, conservatively, that by 2015 nearly 90% of available prison space will be occupied by prisoners serving sentences of longer than 7 years. It is also estimated that the prison population will grow by a further 47 000 prisoners from 2005 to 2015; increasing from

nearly 180 000 to almost 226 000, whilst prison capacity will only increase marginally.

The complex relationships between the multiple causes of the increase in the prison population make it difficult to fashion a solution to the impending crisis. Even if the minimum sentences legislation were to be repealed immediately, it has already played its role in increasing the general sentencing tariff by creating a benchmark used by presiding officers. What is more, these factors have radically altered the composition of the prison population. The bulk of this population is increasingly long-term, maximum-security prisoners convicted of violent crimes. This has serious implications for the capacity and training of correctional staff, the nature of services to prisoners, and the physical requirements of prisons - each of these holding cost implications.

While the DCS has embraced the rehabilitative ideal in its White Paper, the current sentencing regime appears to be diametrically opposed. Attempts by the DCS to give expression to its White Paper policies are constantly undermined by the reality of the size and composition of the prison population. Increasingly it appears that the White Paper is at odds with the realities of the situation. If current trends continue, as they are likely to do, the central challenge to the DCS is to manage effectively and efficiently a large and growing maximum security prison population convicted of violent crimes detained in severely overcrowded conditions, whilst still adhering to the human rights requirements of the Constitution and the Correctional Services Act.

Finally, the second half of the sentencing equation must not be forgotten: sentences are imposed by a court, but the prison authorities have always had some leeway in the release process. However, at the same time as the sentences handed down by the courts have become longer, so the non-parole parts of those sentences have lengthened them even more, by taking away the discretion of the custodians in respect of the release process. The

four-fifths non-parole minimum set down in respect of the minimum sentences legislation is as close to the notion of “truth in sentencing” as it can get in the South African context. It almost entirely disempowers the prison authorities in respect of the release process. The effect of this, too, will be felt far more keenly in the future. There is therefore good reason to review this and return a greater measure of discretion to the executive.

Appendix 1

Offence Description	Sentence in Years		
	1st offence	2nd offence	3rd offence
Murder when i. Planned or pre-meditated; ii. The victim is a law-enforcement officer or a potential state witness; iii. The death was connected to a rape or robbery with aggravating circumstances; or iv. It was committed as part of common purpose or conspiracy.	Life		
Rape when i. Victim is raped more than once by accused or others; ii. By more than one person as part of common purpose or conspiracy; iii. The accused has been convicted of more than one rape offence and not yet sentenced; iv. The accused knows he is HIV positive; or when the victim is i. Under 16 years of age; ii. A vulnerable disabled woman; iii. Is a mentally ill woman; or iv. Involves the infliction of grievous bodily harm.	Life		
Murder in circumstances other than those above;	15	20	25
Robbery when i. There are aggravating circumstances; ii. Taking of a motor vehicle is involved;	15	20	25
Drug Offences if i. The value is greater than R50 000; ii. The value is greater than R10 000 and is part of a conspiracy or common purpose; iii. The offence is committed by law enforcement officers;	15	20	25
Any offence related to i. Dealing in or smuggling of arms and ammunition; ii. Possession of automatic or semi-automatic firearms, explosives, etc;	15	20	25
Any offence relating to exchange control, corruption, extortion, fraud, forging, uttering or theft when i. It amounts to more than R500 000; ii. It amounts to more than R10 000 if committed in common purpose or as conspiracy; or iii. If committed by a law enforcement officer when iv. It involves more than R 10 000; or v. As part of common purpose or as conspiracy.	15	20	25
Rape , other than in circumstances in Part 1 above	10	15	20
Indecent assault on a child under age of 16 , involving infliction of bodily harm;	10	15	20
Assault with GBH on a child under age of 16 ; or	10	15	20
More than 1 000 rounds of ammunition .	10	15	20
Any offence is Schedule 1 of the Criminal Procedure Act (51 of 1977) not referred to above, if the accused was armed with a firearm intended for use in the offence	5	7	10

Appendix 2

Act	Section	Applies to	Description	Requirements
1 Criminal Procedure Act	276(1)(h)	Any offence	Sentence not exceeding 3 years, entirely served at home, no period of imprisonment	Report from Correctional Officer or Parole Officer to court
2 Criminal Procedure Act	276(1)(i)	Any offence	Sentence not exceeding 5 years; Offender placed under Correctional Supervision at Commissioner's discretion	Report from Correctional Officer or Parole Officer to court
3 Criminal Procedure Act	276A(3)		If sentence less than 5 years (or less than 5 years left to serve, Commissioner can apply to have offender appear before court a quo for conversion to correctional supervision	
4 Criminal Procedure Act	287(4)(a)		Offender cannot pay fine in which alternative is sentence not exceeding 5 years; Commissioner can convert sentence to Correctional Supervision (as in 1 or 3 above)	
5 Criminal Procedure Act	287(4)(b)		Offender cannot pay fine in which alternative is sentence not exceeding 5 years; can be referred back to court a quo to set a new sentence of Correctional Supervision.	
6 Criminal Procedure Act	290		Accused under 18 placed under supervision of CO or PO for 2 years	
7 Criminal Procedure Act	296		Order person to be detained in drug treatment centre	
8 Criminal Procedure Act	297	Any offence not covered in mandatory minimum schedule	Conditional or unconditional postponement or suspension of sentence, caution or reprimand	Conditions include: Compensation, rendering benefit or service, community service, correctional supervision, submission to instruction or treatment, or to supervision or control of Parole Officer, compulsory or attendance at centre, good conduct, other matter
9 Criminal Procedure Act	300	Offence causing damage or loss of property (including money) of another person	Injured person awarded compensation for damage or loss, but may not institute civil proceedings	Application of victim or prosecutor acting on instructions of victim

Appendix 3

Average number of offenders in custody during the month of December, 1995 - 2005

SENTENCE GROUPS

	1995/12	1996/12	1997/12	1998/12	1999/12	2000/12	2001/12	2002/12	2003/12	2004/12	2005/12
Unsentenced	27320	33424	41435	54121	58231	55558	55285	56459	55232	51267	46327
0 - 6 Months	4708	5615	6004	5117	5290	4783	5267	5949	5412	5219	4189
>6 - 12 Months	5493	6819	7998	5675	6717	6272	6374	6595	6335	5628	3812
>12 - <24 Months	3456	4166	4528	3164	6136	5825	6217	6324	6160	5897	3089
2 - 3 Years	11307	11989	13058	9904	13660	14886	16937	17344	16844	18076	9654
>3 - 5 Years	17575	18592	19882	17335	16386	15227	16576	17217	16167	16924	10675
>5 - 7 Years	14114	13948	14659	13951	13947	13043	12858	12770	12113	12257	9089
>7 - 10 Years	12896	14287	16326	17004	18409	19541	20634	21449	21307	21436	18298
>10 - 15 Years	6158	6650	7407	8212	10312	12919	15913	18807	21208	23085	23740
>15 - 20 Years	2835	3111	3455	3806	4546	5628	6983	8286	9546	10582	11122
>20 Years	2153	2591	3150	3941	4863	5867	6930	7855	8654	9188	9486
Life Sentence	475	551	719	843	1070	1801	2802	3773	4738	5721	6615
Other sentences	4082	4007	3789	3205	3071	2756	2514	2286	1916	1756	1306
Total	112572	125750	142410	146278	162638	164106	175290	185114	185632	187036	157402

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