

CHAPTER ONE

GENERAL ORIENTATION

1.1 INTRODUCTION

The World Prison Brief *Walmsley (2001:2)*, reveals that over 8,7 million people are held in penal institutions throughout the world, either as pre-trial detainees or having been convicted and sentenced. In view of the fact that there are just over 6.1 billion people in the world, this implies that the world prison population rate is approximately 140 per 100 000 citizens. Half of these are in the United States, Russia and China. There is vast variation of prison populations from place to place, region to region, country to country, and continent to continent. The magnitude of the South African prison population is being questioned and criticized more and more by informed and well-meaning persons and countries. The lack of sufficient alternatives to imprisonment manifests itself in overpopulation of prisons with all its negative implications.

Prison overcrowding and the resulting financial and human rights problems related to this phenomenon, remain one of the paramount concerns, and has been expressed by developed and developing countries. In order to comprehend the magnitude of the problem, it is imperative firstly to have an appreciation of the number of prisoners incarcerated worldwide.

In many parts of the world, for example, America, Russia and South Africa, the prison population has escalated during the 1990s. There has been over 20% growth in most of the European states and in the United States of America a growth between 60 and 85%. Elsewhere, the growth has been, for example, over 33 % in South Africa, 50% in Australia, 38% in New Zealand and 10% in Japan. Generally the trend during the 1990s, at least in many of the developed countries, has been a rise in prison populations, often with a 40% growth over the decade (*Walmsley: 2001:3*).

South Africa's prisons are severely overcrowded. Between 1996 and June 2001 the overall number of prisoners in South African prisons increased by 34%. The number of sentenced prisoners increased by 27%, and the number of those held awaiting trial increased by 54%. In December 1996 South African prisons had the capacity to accommodate 96329 prisoners, but were holding 125752 inmates. During that year the level of overpopulation was 31%. By May 2000, prison capacity had increased to 100384 prisoners, but actual prisoner numbers had also increased to 171880 inmates, amounting to 71% overcrowding (*Department of Correctional Services 31May 2000*).

According to the (*Annual Report by the Judicial Inspectorate of Prisons 2002:7*), there are far too many prisoners in prisons. There were 175 290 prisoners as at 31 December 2001, which means that 4 persons out of every 1000 South Africans are in prison. On the 30 April 2003 there was a total of 190180 prisoners in prisons with a capacity to hold 111241 prisoners. This resulted in a 788939 overpopulation. In comparison with the United Kingdom's

ratio of 1,25 per 1000 (and two-thirds of the world's countries at below 1,50 per 1000), there has to be a concerted effort to reduce the number of prisoners in penal institutions in South Africa.

Despite the efforts by the government to increase occupancy levels of prisons, it cannot keep up with the fast increasing number of inmates. The increase in the number of sentenced prisoners is directly related to the rise in levels of crime since 1994. Despite the building of new prisons and renovations of existing prisons, overcrowding continues to place a heavy burden on prison infrastructure and the capacity of prison managers.

The greatest challenge posed to prison capacity is that of awaiting-trial prisoners. The increase in the number of awaiting-trial prisoners is due to the pace in which cases are processed by the police and courts, as well as the inability of many alleged offenders to pay bail, even the smallest amounts.

According to *Judge Fagan (Annual Report of the Judicial Inspectorate of Prisons 2002:8)*, 20 692 prisoners could not afford to pay bail. "They sit idly without receiving instruction or attending courses, wasting their lives." The resultant financial cost to the state is tremendous. At R94, 16 per day per prisoner (2002 figures), those 20 692 prisoners are costing almost R 2 million per day to be held behind bars. The social cost of incarceration of these awaiting trial prisoners, who according to the law are presumed to be innocent, and of whom only about 35% will be convicted, in the "universities of crime", is inestimable.

1.2 THE SUBPROBLEMS ASSOCIATED WITH PRISON OVERCROWDING

Overcrowding results in the artificial control of the prison population through the unduly early release of sentenced offenders. Overcrowding undermines internal social control, creates high potential for conflict and can negatively influence the relationship between staff and inmates. This can very easily lead to cases where lives are at risk through violent retaliation by frustrated inmates.

There is a ripple effect due to overcrowding. It leads to longer periods of imprisonment in cells and courtyards; less time for leisure activities and recreation; lower levels of participation in programmes; and increased stress levels as a consequence of higher social and spatial density.

Another major challenge facing the Department of Correctional Services is the control of communicable diseases and viruses, particularly HIV/AIDS and Tuberculosis (TB). The problem of overcrowding facilitates the easy spread of communicable diseases among inmates. South Africa's prisons have become a breeding ground for HIV, and prisoners now represent one of the hardest-hit segments of a country plagued by the disease. The number of HIV/AIDS related deaths is partly due to overcrowding of the prisoners, but is also a reflection of the pandemic outside prison postulates (*Annual Report Judicial Inspectorate of Prisons 2002:19*).

The conditions in the overcrowded prisons are not conducive to longevity of those that are HIV positive. Various factors, for example, lack of fresh air, lack of exercise and high stress levels are relevant factors that contribute to this. South African prisoners, crammed into cells, share mattresses, tattoo needles and dirty razors (*Marquez 2002:1*). Other sexually transmitted diseases, which feed the spread of HIV, are rampant. Due to prisoners' weaker immune systems, they are more contagious and less resistant to the virus.

1.3 CHOICE OF SUBJECT MATTER

The considerations, which influenced the choice of the subject matter, are the necessity and desirability of choice, the availability of data and the involvement of the writer.

a) Necessity and Desirability of Choice

South Africa's prisons are massively overcrowded, 190180 people are crammed into prisons built to hold 111241 (*Department of Correctional Services 30 April 2003*). Although the rising prison population in South Africa is of great concern, it is certainly not just a South African problem, but an international phenomenon. In countries of the developed world, such as the United Kingdom and the United States, prison populations are increasing each year. The United States has the highest prison population rate in the world - just over 700 per 100000 of the national population, or five times the overall world rate (*Walmsley: 2001:2*). The increasing demand for prison

accommodation, on the one hand to provide for the abnormal growth and on the other hand to eliminate backlogs, has placed enormous pressure on the treasury in addition to the current budget of the Department. The situation can only be kept within manageable limits by obtaining approval for government intervention to slow down the growth rate in the prison population. Overcrowding is the major problem facing the Department of Correctional Services.

In South Africa, conditions in prisons vary markedly. Attrition and steady destruction of prison buildings is but one consequence. Prisoners spend most of their time in these conditions. Idleness is another problem; this leads to frustration, fights and attempts to escape. HIV infection thrives in environments of poverty, rapid urbanisation, violence and destabilisation, and prisons are melting pots for people from such circumstances (*Oppler 1998 : 5 -6*). An issue of great concern is that many of these prisoners who have contracted HIV in prison will return to the community.

Considering the physical and mental environment that an inmate has to cope with and taking into consideration the lack of reformation and reintegration that the Department of Correctional Services offers, and the fact that prisons serve as 'schools for crime', it is not surprising that the rate of recidivism is so high in South Africa.

There are various factors that contribute to the crisis in South African prisons (some of which will be dealt with in this thesis). Solutions, or more importantly

alternate measures to alleviate the overcrowding in prisons, need to be researched. Despite the fact that many may blame the Department of Correctional Services for the severe overcrowding, it is evident that this is a problem arising from the whole criminal justice system. The recently instituted laws on tougher sentencing and bail have a significant effect on the problem of overcrowding.

Thus the researcher is of the opinion that a penological perspective on the overcrowding of prisons is not only justified but would satisfy a dire need for scientific knowledge in an area that challenges the criminal justice system.

b) Availability of Data

Data on this topic is available in the White Paper (Department of Justice and Correctional Services), textbooks, criminology journals, commissions of enquiry, newspaper articles, official documentation, Government Department Annual reports, decisions of the Supreme Court and academic studies like dissertations and theses. Current statistics and information can be acquired via the search engines on the Internet.

It is important that the researcher should keep the reader constantly aware of the manner in which the literature, which is discussed, relates to the research. It is imperative to point out exactly “what” that relationship is (*Leedy 1991:93*).

Ary et al (1985:369), contends that the literature review achieves the following purposes, that is:

- It demonstrates that the researcher of the study has mastered the available literature;
- Demonstrates similarities between the proposed study and past research findings of similar studies;
- Demonstrates differences;
- Discusses 'how' the proposed investigation will contribute to the knowledge of the penology profession;
- Supports and interacts with the conceptual work; and
- Demonstrates the reasons for selecting a particular method.

A literature review is therefore done with a vision to acquaint the researcher with the existing state of knowledge.

c) Reliability of Data

The researcher is aware that one of the major pitfalls of the documentary method is that secondary sources are indirect forms of information and there is no guarantee of their reliability (*Van der Walt 1977:215*). Secondary sources have been restricted to a minimum. An important aspect of the preparation for research consists in the use of literature. A literature review is done to familiarize the researcher with the past as well as the current state of knowledge.

1.4 OBJECTIVES OF THE RESEARCH PROJECT

It is an accepted fact that the main objectives behind penological investigation generally are, amongst others, knowledge of an insight into the punishment phenomenon with a view to the application of such acquired knowledge. The major objectives of this research project can be tabulated as follows:

- Acquisition of scientific knowledge obtained through collation and systemization to form a meaningful whole within the confines of the predetermined parameters;
- Viewing of the subject within a penological perspective;
- Contributing towards overcoming the problem by proposing possible solutions thereof.

1.5 METHOD AND TECHNIQUE

As a result of the nature of the topic and availability of sources, the choice of data collection technique will be limited to literature. The writer will be mindful of the limitations of a documentary study and the fact that sources must be checked and evaluated and secondary sources must be treated with caution. Its reliability and significance must also be evaluated: with this in mind, only the works of writers of sound repute would be used. A documentary study may involve a wide range of documentation including reports, articles in periodicals, books, diaries and various unpublished sources. A term given by

Johnson (1981:18), for documentary study as “content analysis”, in terms of which method:

“The literature is searched for content pertaining to the subject.”

Mouton and Marais (1990:77) is of the opinion that archival or documentary sources refer to:

“The extensive collections of records, documents, library collections or mass media material that have been amassed. It would clearly also include well-known material such as census data, life statistics, ecological and demographic data, personal documents like diaries, autobiographies, letters and case studies.”

Within the framework of the *modus operandi*, the major documentary sources utilized by the researcher are statutory enactments, Annual reports by the Department of Correctional Services, Annual Reports by the Judicial Inspectorate of Prisons, reports of Commissions and Working Groups and judgements of the Supreme Court.

1.6 DELIMITATION

The intention of this dissertation is to examine the problem of overcrowding within the South African prison system, as well as those of foreign countries

such as, England and the United States of America. The following aspects will be researched and discussed in detail:

Chapter 1 A general orientation, introduction and definition of concepts.

Chapter 2 A historical overview on the development of prisons overseas and in South Africa will be given. The use of imprisonment for the confinement of offenders and the American influence will also be explored.

Chapter 3 Provides a background to prisons and prison conditions in South Africa. South African prison populations and a comparison with international trends will be looked at. Internationally, as well as in South Africa there has been an increase in the prison population. Overpopulation has a negative impact on the humane detention of and service delivery of prisoners, the effects on prisoners and related counterparts is examined.

Chapter 4 Problems associated with imprisonment will be provided, various problems, for example, security, drugs and violence, HIV and prison gangs will be researched. Major challenges and the human rights of prisoners are analysed. The gross overcrowding in South African prisons does not support the promotion and protection of the basic human rights of prisoners. The special categories of prisoners in prisons are also researched.

Chapter 5 Alternate measures to incarceration to alleviate overcrowding will be researched. Community-based sanctions; supervision policy practice moving to a service and a restorative justice perspective, private prisons, unit management and bail application is explored.

Chapter 6 In order to address the problem of overcrowding in South African prisons, various initiatives have been implemented. Improvements and transformation of these initiatives needs exploration. The use of Technology in Community Corrections, that is, Electronic Monitoring will be examined.

Chapter 7 Conclusion and recommendations, summary of key issues will be discussed, suggestions on areas that should be prioritised if overcrowding in prisons has to be alleviated. Recommendations will be postulated.

1.7 EXPLANATION OF KEY CONCEPTS

1.7.1 Definition of Corrections

As a component of the criminal justice system, corrections interact with, and are affected by both law enforcement and the courts. *Stinchcomb and Fox (1999:8)* postulates that:

“Corrections are easily stereotyped by its most visible physical structures, custodial institutions. The first thoughts of the word ‘corrections’ is of a forbidding-looking grey fortress surrounded by thick concrete walls with rifles protruding from guard towers, where expressionless inmates move in dull routines under constant supervision of uniformed officers”

According to *Fox (1985:1)* corrections is the part of society’s agencies of social control that attempts to rehabilitate or neutralize the deviant behaviour of adult criminals and juvenile delinquents. It functions with social and legal authority after the criminal court has held an adult to be guilty of a violation of law.

1.7.2 Definition of Imprisonment

Terblanche (1999:239) contends that imprisonment can currently be defined as the admission into a prison, and confinement of an offender in a prison for the duration determined by the court (or, in some instances, by statute). Imprisonment is the stalwart of the South African penal system. *Neser (1993:27)* maintains that:

“Imprisonment in South Africa means the admission, locking up and detention of a person to a particular place. The individual sentenced to imprisonment is taken to a prison on a warrant from the presiding official, where he is admitted, locked up and detained for the duration of his sentence.”

The imposition of 'ordinary' imprisonment is one of the most general forms of punishment in South Africa and is imposed within the court's discretion. The Correctional Services Act 8 of 1959 defines 'prison' *inter alia* as "every place used as a police cell."

1.7.3 Definition of Prison

According to *Hornby (1974:664)*, prison refers to an institution whereby all wrongdoers awaiting-trial and all those found guilty are kept and locked up against their will for a specific period from a month up to life imprisonment as determined by the court of law.

1.7.4 Definition of Prisoner

A prisoner refers to a person imprisoned for a crime committed who is awaiting trial or who has been tried in a court of law and found guilty, sentenced for a specific period or for life. It is a word used to refer to both genders (males and females, young and adult of all race groups) whether they are South African or of foreign origin (*Sykes 1982:818*).

1.7.5 Definition of Punishment

Terblanche (1999:3) describes punishment in terms of the infliction of penalty, or to inflict suffering on a transgressor. Although punishment is used in its ordinary sense, it has a particularly important role to play in a legal sense:

“If there were no crime, there could be no legal punishment.

The crime is the whole reason for the punishment. At the same time punishment is the factor, which distinguishes criminal law from other spheres of the law. Crime, criminal law and punishment are, therefore, inextricably interlinked.”

Du Toit (Neser 1993:18) defines the concept punishment as:

“...the disadvantageous action imposed on the convicted guilty person by a court of law after a trial and conviction of an offence and which is carried out by the state without the offender having any control over it.”

1.7.6 Definition of Human Rights

Human Rights have been defined as ‘generally accepted principles of fairness and justice’ or ‘moral rights that belong equally to all people simply because they are human beings’. This means that human rights belong to all people and those human rights, which deal with fairness, justice and equality, have to be protected and promoted, including those rights of prisoners (*Oliver and McQuoid-Mason 1998:2*).

1.7.7 The Concept Overcrowding

Stinchcomb and Fox (1999:228) contends that the consequence of housing too many people in too little space means that:

“Inmates are double-bunked in small cells designed for one or forced to sleep on mattresses in unheated prison gyms, day rooms, hallways, or basements. Others sleep in makeshift trailers, tents, or converted ferries. Space that had once been devoted to work, study, and recreational programs are being turned into dormitories.”

Harding (Neser 1993:271) distinguishes three forms of capacity in terms of which occupancy rates can be expressed (also discussed in chapter three of this thesis):

Estimated capacity-the number of beds or prisoners *de facto* authorised by correctional administrators to be assigned to a prison.

Operational capacity- the number of beds or prisoners, which can be accommodated consistent with the maintenance of programmes and services.

Design capacity- this forms part of the architectural planning of an institution. In South Africa, a prison's maximum occupancy rate is expressed in terms of a certified (calculated) detention capacity. Prison over-population thus comes about when the number of prisoners in a particular prison can no longer be coped with in the infrastructure.

1.8 RESUMÉ

Historically, confinement of an individual in a small cell behind a large wall segregated from the rest of society for the purported benefit of society was rationalized and condoned because it satisfied a public retributive urge, compelled conformity to “social norms”, deterred other potential law violators, and allowed preventative imprisonment of dangerous persons. The philosophical trend then turned away from each of these rationales, and thoughtful and humane scholars, administrators, and clinicians justified incarcerating facilities solely on their rehabilitative potential. While rehabilitation remains a meritorious goal, the impartial observer would have to be disillusioned, if not totally dissatisfied, with the ineffectiveness of institutionalization in this area.

Overcrowding of prisons can be examined from two angles; firstly overcrowding of convicted prisoners and secondly, overcrowding of unconvicted or awaiting-trial prisoners. In South Africa the problem of both convicted and awaiting-trial burdens the prison system with overcrowding.

There is no doubt that overcrowding is the main challenge facing South Africa’s prison system. An interdepartmental strategy, involving more stakeholders than merely the Department of Correctional Services is needed urgently. The use of alternative mechanisms to reduce the overcrowding of South African prisons needs to be researched. Imprisonment as a sanction remains a reality, which cannot be wished away. All transgressors who pose a real threat to the community and who do not qualify for community-based

sentences, for some reason or another, should still be dealt with within the prison context. Community-based sentences do however ensure that a significant number of offenders can be dealt with in a more balanced manner. This approach goes a long way to satisfy the need to limit the growth in the prison population and to provide a more affordable system, which will be to the benefit of everybody in South Africa.

CHAPTER TWO

THE DEVELOPMENT OF PRISONS

2.1. INTRODUCTION

President Nelson Mandela commented during his time of incarceration:

"Prison not only robs you of your freedom, it attempts to take away your identity. It is by definition a purely authoritarian state that tolerates no independence and individuality. As a freedom fighter and as a man, one must fight against the prison's attempt to rob one of these qualities." (*ISS Correcting Corrections Monograph No 29 1998:1*).

The prison systems of most countries, for example, the United States of America, England, Russia and South Africa, are subject to many problems, especially overcrowding. Owing to the recognition by some legal systems that prisoners have rights that can be enforced by the courts, some improvements have resulted, but the appalling conditions in many prisons because of overcrowding are still prevalent.

Historically, the distinguishing feature of the development of South African prisons was its similarity to the mine compound. Such compounds housed mine workers, of whom many were convicts supplied by the prison system. Even today these remnants of the past are discernible in the large communal cells filled with rows of metal bunk beds in which prisoners are housed (*ISS Correcting Corrections monograph No. 29 1998:1*).

It is currently assumed that institutional confinement has always been employed as the usual method of dealing with offenders throughout history. This has been assumed, almost universally, because presently offenders are confined within penal institutions, such as, prisons, reformatories, reform schools and jails. However, the use of institutions for the extended confinement of offenders, as the prevailing method of punishment, is a relatively current innovation and was primarily a product of American influences.

Until the latter years of the nineteenth century, the accustomed method of dealing with convicted offenders was to impose fines or to mete out to them some more or less brutal form of corporal punishment, such as execution, flogging, mutilation, branding and public humiliation in the stocks (*The Origins of Prison* [n.d.:1]) Those confined in a public institution for any considerable length of time were mainly those imprisoned for debt or accused persons awaiting trial. The use of the prison as an institution for the detention of offenders for the period of their sentence is approximately two hundred and fifty years old.

The suffering and torment of living conditions to which inmates are subjected in overflowing prisons cannot be measured in numbers and graphs. The consequences of housing too many people in too little space means that inmates are doubled-bunked in small cells designed for one, or forced to sleep on mattresses in unheated prison gyms, day rooms, hallways, or

basements. Others sleep in makeshift trailers, tents, or converted ferries. Space that had once been devoted to work, study, and recreational programmes is being turned into dormitories (*DiMascio 1997:4*).

Due to the conditions (mentioned above) as a result of overcrowding, it is not unexpected to find that prisoners have fewer opportunities, from training to visits, rehabilitation programmes, limited facilities and most importantly restricted 'space'. More importantly there are calamitous health and safety hazards associated with cramming more inmates into less space.

In this chapter a review of the origin and development of prisons overseas and in South Africa will be given. A historical look into the Department of Correctional Services in South Africa and the change in direction of the penal system during the past century will also be reviewed. An assessment of the overcrowding of penitentiaries over the decades together with the problems experienced will be explored.

2.2 THE ORIGIN OF THE PRISON

The idea of imprisonment as a form of punishment is relatively recent. From the reign of Edward1 of Britain (1239-1307 AD) imprisonment was a common punishment (*Terblanche 1999:543*). The rise of prisons as an agency for punishing convicted offenders was a slow and gradual process, which extended over several centuries, from crude beginnings in the sixteenth century (*Holdsworth 1938:567-568*). A distinguishable feature of the earliest prisons is the lack of a systematic policy concerning imprisonment of

convicted criminals. *Merton in Cilliers (1998:1)* states that, “we shape our buildings and afterwards our buildings shape us.” For decades, a large variety of buildings were used as prisons, for example, cellars beneath public buildings. These buildings as a rule were not fit for habitation. People that the community wanted to get rid of were imprisoned in these ‘prisons’. *Madge in Cilliers (1998:3)* states that:

“...Felons, debtors, petty offenders and sometimes the insane with little attempt to separate them by sex or age or by any criterion, except perhaps by the capacity to pay for preferential treatment. No regard was paid to sanitary or moral welfare. There was no separation whatsoever, and the herding of men and women together into dayrooms made promiscuity inevitable. The sale of liquor by the warders guaranteed licentious behaviour, and goal fever was practically endemic.”

The author is of the opinion that not much has changed over the decades. If anything, the situation has worsened in terms of the conditions in prison because of the overcrowding, as will be discussed in chapters three and four of this thesis. In keeping with Merton’s words that buildings shape us to fit in with the specific design, the situation presently in South Africa is that prisons were built to accommodate criminals, to ‘satisfy’ the objectives of punishment, namely, retribution, rehabilitation, deterrence and protection of society; but this is far from being achieved. Therefore in protecting people in society, society must do what is required to discourage those who break its laws and punish those who do so in a suitable manner. *Cilliers (1998:2)* postulates that

housing offenders in a building that is not designed with the purpose for which it will be used in mind, will achieve little or no success. One can hardly expect a prisoner to react positively to the latest and most enlightened rehabilitation if a depressing environment surrounds this program. Again the author will elaborate further on this in chapter five of this thesis.

There were various penalties in Europe and America, which included fines, banishment, and public humiliation in the stocks, flogging, branding, mutilation and death on the gallows. Local jails were found throughout the colonies. Sometimes they were a part of the courthouse building; at other times they were a separate structure, similar in architecture and organization to a typical house. Prisoners were usually mixed together, “often crowded together in a single room, regardless of their age, gender, or offence. Contagious disease especially ‘gaol fever’, frequently spread through inmate populations” (*Bowditch 1998:3-4*).

The question arises as to whether anything has changed over the decades with regards to overcrowding? The author postulates that nothing much has changed-the situation presently at the Westville Medium B Prison is that 50 to 60 offenders are crammed together in cells meant for 30. In view of the statistics presented by the Department of Correctional Services: May 2003, the approved accommodation as opposed to the prisoner population and occupancy level for most prisons in South Africa is not in keeping with the Constitutional Rights of the offender. The spread of disease is rife. Conditions

are poor and often the young are mixed with the older more hardened criminals.

Some of the most important ideas and practices, which led to the establishment of prisons, were associated with the American Quakers, but there were also early European strivings in this direction. The Quakers were shocked by the brutal corporal punishments of that time, especially the shedding of blood, and their revulsion led to the substitution of imprisonment for corporal punishment in those American colonial areas which the Quakers dominated for a considerable period, West Jersey and Pennsylvania. The Philadelphia Society For Alleviating the Miseries of Public Prisons was formed in 1787. They petitioned the legislature for changes in law and in the treatment of offenders, which eventually led to the first penitentiary at Walnut Street Jail, Philadelphia. The ideas inspiring humanitarian reforms were in accordance with Quaker theology, which held that "the light of God" lives in everyone (*Bowditch 1998:5*).

The treatment of criminals improved greatly in the United States after 1776, especially in Pennsylvania under the guidance of the Quakers (*Reid 1981:28*). It was here that prisoners had the opportunity to meditate upon their sins and repent, while being given moral instruction by a group of friendly visitors. Presently in South Africa, with its appalling conditions because of overcrowding, the offender may have time to repent and feel remorse for the crime committed because he has to serve a dual punishment. Firstly he is imprisoned for the offence, and secondly he is subjected to inhumane

conditions, which, hopefully, to some extent, may make him regret his criminal activities. The philosophy of the Quakers on the humane principles regarding the handling of offenders, filled with the penal objectives of rehabilitation and deterrence, are therefore being implemented to the present day.

Grunhut in Cilliers and Naser (1992:163) believes that prisons were established as a result of the occurrence of various circumstances. The conversion of prisons into penal institutions resulted from the following:

“ Places of detention had long been in existence, but these were intended mainly as centres where persons awaiting trial could be kept in custody while confessions were wrung from them, or else as penal institutions for political prisoners, or for the imprisonment of debtors and persons sentenced by the ecclesiastical courts.”

2.2.1 The Panopticon Plan of Jeremy Bentham

Jeremy Bentham, systematized the ideas of utilitarian thinkers and extended those principles to the design of a model prison, which he called the “panopticon”. Bentham’s design was based on the idea that it would be economic and effective if all cells in a prison were visible from one single point. “Morals reformed, health preserved, industry invigorated, instruction diffused, public burdens lightened, economy seated, as it were, upon a rock,

the Gordian knot of the Poor Laws not cut, untied-all by a simple idea in architecture" (*Grunhut 1948:51-52*).

Although the interior of the cells was constantly visible to the guard, the guards were hidden from the prisoners' view. Since no convict could know when he was being watched, Bentham justified that the prisoner would feel obliged to conform at all times to the rules of the prison. Although few prisons adopted Bentham's design, his writings on the use of architecture to enhance discipline and enable vigilant watchfulness captured the imagination of the era (*Bowditch 1998:5*).

As discussed above, for example, 50 to 60 offenders are crammed into cells meant for 30, because of the present overcrowding and the low prison official ratio compared to the inmate population, the author feels that the idea of Bentham's 'panopticon' prison affording the visibility of the prisoners by the officials may succeed in deterring the prisoners from committing crimes. Crimes within the prison, for example sodomy, assaults and drugs, would decrease, and the transmission of HIV/AIDS and many other diseases could be curtailed. It would decrease the burden of the staff trying to control and keep watch over the overcrowded prison population. Obviously the economic factors with regards to the erection of such prisons would have to be considered.

According to *Taft and England in Cilliers and Neser (1992:163)*:

“Imprisonment as the conventional punishment or treatment of major criminals is largely a development of the nineteenth century and later. Commitment to institutions for detention while awaiting trial, for torture and the extortion of confessions, as punishment for political offences or for prisoners of war, to secure the payment of debts or fines, or as part of ecclesiastical penitential treatment or safekeeping is to be found in primitive, ancient and medieval times.”

Thus, before the development of prisons, early punishments were often cruel and used torture. In the history of criminal justice, as fear over crime grew, the concern with community protection reached a crescendo by 1996 worldwide, leading to rates of imprisonment previously unheralded. Prison populations quickly reached breaking point, although few realized that the use of prisons, as places where convicted offenders serve time as punishment for breaking the law, is a relatively new development in the handling of offenders (*Schmallegger*1997:432). On the other hand *Ulpian in Grunhut* (1948:11) believes that prisons ought to be used for detention only, but not for punishment.

Various reasons were given for the rise of the penitentiary system in the United States of America and the author will examine the development of this system.

2.2.3 THE DEVELOPMENT OF THE AMERICAN PRISON SYSTEM

2.2.3.1 INTRODUCTION

Adhering to strict Puritan religious beliefs, the first American colonists likewise employed extremely severe punishments for criminal offences. Mutilation, branding, stocks, and pillories were all commonly used. Before the American Revolution, the first U.S. prison, Newgate, was established in an abandoned copper mine, where conditions were abysmal (*Stinchcomb and Fox 1999:119*).

During this period the debate about penal reform and prison architecture raged on for many years in the United States of America. The main protagonists in this debate were the proponents of the so-called Pennsylvania system and the proponents of the so-called Auburn System.

2.3.2 The Pennsylvania System

In the early days in North America the English penal system was rigidly followed. In 1682 William Penn made provision for imprisonment with hard labour, although these earliest prisons were no different from the old houses of correction. After Penn's death there was a return to the old severity and this prevailed until the late eighteenth century. Pennsylvania took the lead in the movement of prison reform.

2.3.3 Walnut Street Jail

The true origin of the American prison system was the Walnut Street Jail, which served as a model for other institutions of its kind for the next forty years. According to *Cilliers and Naser (1992:166-167)*:

“Despite its success in the early years of its existence, conditions in the Walnut Street Jail deteriorated rapidly, chiefly as a result of overcrowding, which made discipline difficult to maintain and gave rise to corruption and immorality.”

In 1773 the prison building in Walnut Street was radically changed and it was no longer necessary for prisoners to work outside the institution. For the first time in penological record the use of imprisonment through solitary confinement as the usual method of combating crime, was permanently established. This section quickly became famous, attracting visitors from not only the other American states, but also from France and England (*Cilliers 1998:11*).

Unlike the workhouses, prisons, and jails already in existence, the Walnut Street Jail, was used exclusively for the correction of convicted felons. In stark contrast to Newgate, it was the first institution designed for reform, that is, to make penitent (hence the term ‘penitentiary’) (*Stinchcomb and Fox 1999:100*).

Thus the Walnut Street Jail was regarded as the "...birthplace of the prison system, in its present meaning, not only in the United States but throughout the world" (*Reid 1994:603*).

Despite its success in the early years of its existence, conditions in the Walnut Street Jail deteriorated rapidly, chiefly as a result of overcrowding, which made discipline difficult to maintain and gave rise to corruption and immorality. The situation in the eighteenth century can be compared to the present situation of overcrowding in South African prisons. Overcrowding gives rise to corruption and various adverse conditions, which will be, discussed in detail in the chapters three and four of this thesis.

Therefore the Walnut Street Jail eventually failed because of politics, finances, lack of personnel, and overcrowding but it gained recognition throughout the world. It was called the "birthplace of the prison system, in its present meaning, not only in the United States but throughout the world" (*Menninger 1968:222*).

2.3.4 Cherry Hill

Due to the failure of the Walnut Street Goal, a new building known as Cherry Hill came into use in 1829 and it advocated the complete isolation of prisoners by day as well as by night. Population pressures-an aspect that prisons would experience throughout their history-were heavy from the start (*Bowditch 1998:9*).

Everything possible was done to ensure that complete solitary confinement was applied, and to prevent prisoners from talking to each other. The only relief from the isolation of the prisoner was a visit from one of the virtuous citizens of the community who occupied themselves with the reform of criminals. The system was a failure; it actually destroyed itself, since the rapidly increasing prison population made isolation impossible.

Viewed in the present context of overcrowding in South Africa, this plan would be unlikely to succeed. Firstly, various stipulations *inter alia*, the International Standard Minimum Rules (SMR) for the treatment of offenders *Oliver and McQuoid-Mason (1998:28)*, states that prisoners should be allowed contact with family and friends, by both correspondence and personal visits. It also stresses the fact that the public is entitled not only to information about corrections, but also access to prisons and to participate in the functioning of prisons and community corrections. Secondly, in South Africa theoretically this would be going against a prisoner's Constitutional Rights, which is entrenched in the Bill Of Rights. Section 35(2)(f) of the Bill Of Rights states that, 'everyone who is detained, including every sentenced prisoner, has the right-to communicate with, and be visited by, that person's (i) spouse or partner; (ii) next of kin; (iii) chosen religious counsellor; and (iv) chosen medical practitioner. Thirdly, it is generally accepted that an orderly environment is the basis on which all rehabilitation programmes in prisons are modelled. The rehabilitation of offenders is expected to prevent their future criminal behaviour and thus contribute to the decrease of the prison population by preventing recidivism.

Therefore, the rules and regulations which are embodied in the Prisons Act No 8 of 1959 (renamed Correctional Services Act No 8 of 1959 in 1991), and the Correctional Services Act 111 of 1998, have been developed and amended over the years to secure that order and discipline are maintained in prisons according to penological criteria, whilst maintaining conditions conducive to the up-liftment of the offender. Solitary confinement and individual cells, supported by a massive physical structure with impenetrable walls became comparable with the Pennsylvania system of imprisonment. Supporters heralded the Pennsylvania style as one which was both humane and provided inmates with the opportunity for rehabilitation (*Schmallegger 1997:438*).

The Pennsylvania system experienced problems from its inception, in spite of its high moral principles. Labour production was low, with a corresponding high cost of maintaining the prison. Administering the rules was furthermore extremely demanding. Prisoners communicated with each other, which will always be almost impossible to prevent. Over-population soon forced the sharing of a cell by two prisoners (*Cilliers 1998:12*).

According to *Bowditch (1998:10)*, the majority of national and international visitors approved of the prison and its radical design became the model for new prisons around the world, something of an irony given that it failed to influence prison design in the United States, where the Auburn plan dominated until the turn of the 19th century.

Cherry Hill as well as every other prison in America faced severe overcrowding. In 1867, the penitentiary had 569 inmates but only 540 cells, forcing some inmates into double cells. The circumstances worsened in the next decade, prompting a major construction project of four new cellblocks between 1877 and 1894. By 1897 there were 1200 prisoners and only 765 cells; by the turn of the 19th century, the number of prisoners increased to 1400, forcing some cells to hold as many as four or even five inmates (*Bowditch 1998:15*).

The prisoners in Cherry Hill died a spiritual death, their minds affected by the isolation and silence of the system. The prison system that did become the architectural model for the United States is known as the Auburn, or New York, system.

2.3.5 The Auburn System

During the year 1816, conditions in the Newgate Prison in New York became so bad that the construction of a new prison to relieve crowding at Newgate, began at Auburn. Under this system prisoners could leave their cells and during the day they were together in workshops, although they were not permitted to talk to each other. This prison was built with the purpose of functioning as economically and practically as possible.

A classification system was introduced under the influence of the Pennsylvania system in terms of which hardened criminals were detained in

isolation throughout the day. The second class of prisoners was allowed to work in communal workshops. Only two years after establishment of the system, authorities realised that the situation was unbearable and all prisoners who were in solitary confinement were released (*Cilliers 1998:13*).

Supporters of the Auburn System postulated that this system was cheaper and that it provided greater opportunities for vocational training and produced more revenue for the state. Despite these claims this system had weaknesses - prison administration was difficult, prisoners were exploited and they were just as unfit for releases as those detained under the Pennsylvania System. While Europeans eventually opted for the more humane treatment - oriented philosophy of the Pennsylvania system, most American states adopted the economical Auburn plan. In all the institutions that used this system, the architecture, the program, the rules, the regulations, and punishment were substantially the same. Constantly there were dimly lighted interior cells, the program of daily work, the Sunday religious service, the ugly uniforms, the monotonous diet, the 'prison smell', the ever-changing politically appointed personnel and the petty rules and cruel punishments (*Caldwell 1956:475*).

The use of imprisonment was abhorrent to the Philadelphia Society and to the Auburn prison officials. "Instead of preventing communication between offenders, we are in all ways encouraging it, not only contact and conversation, but the development of a sophisticated criminal society, with a special language, prescribed roles, legends, heroes, songs, and an active

economy extending into every aspect of prison life” (*Sommer 1976:5*). Between 1800 and 1913, “a succession of intensive and, frequently, bloody confrontations transpired in and about America’s burgeoning state prisons. A broad cross-section of American society overtly challenged the systems of penal contract and lease labour that had been synonymous with the formally prescribed punishment of ‘imprisonment at hard labor’”. These confrontations precipitated the American prison system into a spiralling crisis of legitimacy and of governance, and eventually forced the penal authorities to undertake a painstaking reconstruction of their penal institutions (*McLennan 2002:1*).

The Auburn system could hardly be identified with penal reform, and Europe was not impressed. The lower costs and higher productivity of this system, however, impressed the American prison authorities. Due to the failure of the reformatory style of prison, there was great concern over discipline and security in American prisons because of the rise of prison populations and costs; the states began to explore practical alternatives. Construction of Sing-Sing commenced in 1825 with the assistance of prison labour from Auburn. This prison with its two long cellblocks, served as the model for American prisons for almost a hundred years (*Cilliers 1998:13*).

Europe followed the Pennsylvania system slavishly, with few amendments. Only persons who were guilty of serious or dangerous crimes were kept in solitary confinement. Prisoners were compelled to wear masks if they were in each other’s company. Although both systems showed deficiencies, they nevertheless served as models for later development (*Neser 1993:65*).

Stinchcomb and Fox (1999:103) contend that along with Auburn's philosophy of congregate work, the American prisons adopted its stern discipline and degrading practices. Emphasis was placed on strict rules and obedient compliance; infractions were dealt with swiftly and harshly. Staff was relatively free to respond to misbehaviour and 'disrespect' as they saw fit. This promoted efficiency in terms of administrative operations, but it did little in terms of constructive change for the offenders. In the meantime, there were only larger more severe prisons being constructed to confine larger more subservient populations of offenders.

In comparison to the American situation of building more prisons, is this not the trend presently in South Africa-to build more prisons, although on a somewhat different architectural style, the 'new generation prisons'? The author is of the opinion that no matter how many prisons are built, it is only a temporary measure to deal with offenders, that is, by confining them to a restricted area. Existing prisons are overcrowded and new ones are expensive to build. Prisons are becoming larger; there are more of them; and there is greater violence, higher recidivism, and a rising crime rate outside prison. The persistence of brutality, the damage to inmates and their families, the lack of useful purpose, and the great amounts of time wasted behind bars all suggest that the problems are inherent in the institution. "No one has been able to run a decent prison - not the Quakers, not the Soviets, not the conservatives or liberals, and not the counties" (*Sommer 1976:8-9*).

In the late 1800's in America, due to the tremendous increase in the prison population, the consequence was overcrowding. During this period it was clear that reformation was no longer a major goal of prisons. Later reports found corruption between guards and inmates, cruel punishment of inmates, overcrowding, prisons with financial problems, and severe criticism of both the Pennsylvania and the Auburn systems. Both types of prison systems continued, long after the original goals were abandoned. As hardened criminals were placed in prison for long periods of time, prisons turned into holding operations, with wardens content if they could prevent riots and escapes (*Reid 1981:158*).

2.4 EUROPEAN TRENDS LEADING TO THE CREATION OF PRISONS

2.4.1 Introduction

In 1831 a French delegation visited the USA with the aim of making an independent evaluation of the Pennsylvania and Auburn systems. Various European visitors followed the French delegation, and by 1850 solitary confinement in terms of the Pennsylvania system was introduced to Belgium, England, Netherlands, Norway, and Sweden. In Belgium, for example, solitary confinement was carried through to exercise yards, masks for prisoners and numbers instead of names. The purpose hereof was to negate all reference to the prisoner as an individual person. On the other hand, the cell plan was also found to fit in well with the more liberal ideas of the nineteenth century penology (*Cilliers 1998:15*).

2.4.2 The Period After 1830

Eastern State Penitentiaries in America embodied Quaker ideas about the nature of man and the redemptive powers of solitary reflection and penitence. These humanitarian ideals were complicated to implement in practice. Problems with crowding, discipline, and abuses of power corrupted the system from the start (*Bowditch 1998:10*).

Likewise *Cilliers (1998:15)* asserts that not only were very few prisons constructed, but those that were, were designed according to the Auburn system if they were built in America, or the Pennsylvania system if they were constructed in Europe. The physical surroundings of the prisoners did not keep up with developments in the field of penology. *Barnes and Teeters (1959:482)* asserts that:

“If it is to have any prospect of success in practice, an enlightened program for treating convicted delinquents must have an appropriate and fitting physical setting... it is generally agreed by enlightened students of the problem that most of the rehabilitative programs worked out over the last two or three generations have failed to live up to the expectations of their sponsors. No single item has played a greater part in this failure than the fact that the physical setting of convict life has almost everywhere been in conflict with the ideals underlying the reform programs“.

In keeping with Barnes and Teeters statement above, the author is of the opinion that a number of strategies have been embarked upon to deal with the major challenge of overcrowding, (which is considered to be a world-wide phenomenon) in prisons. One of these strategies in South Africa is that the Department of Correctional Services has embarked on developing prototype designs for the construction of cost-effective 'new generation prisons'. These 'new generation prisons' offer an opportunity of carrying out the rehabilitation directive within the philosophy of Unit Management (UM). The UM concept encourages direct supervision and prisoner management. Prisoners are divided into smaller groups (about 60 persons) per unit, which increases the value of the rehabilitation efforts. Thus the author acknowledges that the physical environment plays a vital role in the implementation of programs but the overcrowding in prisons hampers development of these.

Van Zyl Smit (1992:1) maintains that:

“The primary purpose of imprisonment, from Roman times through to the end of the Middle Ages, was the detention and often the torture of prisoners awaiting trial and of debtors who had failed to meet their obligation.”

Early Roman prisons were used for sentenced prisoners as well. Since the Middle Ages imprisonment was imposed as a form of punishment. Sometimes secular monarchs would prescribe imprisonment as the correct form of punishment for a particular crime (*Van Zyl Smit 1992:1*).

The enclosure of peasant farming land in the late medieval England greatly increased the number of paupers and vagrants, and the earliest institutions, which may be regarded as forerunners of the modern prison, were crude local structures employed to confine unruly vagrants (*European Trends Leading to the creation of Prisons [n.d]:1*). The first was opened in London in 1557 and these early English institutions were known as Brideswell, a synonym for workhouses. Brideswells taught work habits, not specific skills.

Increasing prison populations have been a common feature of most industrialised societies in the era since World War II. In England in 1880 the prison population stood at 32 000; as the prisons came under central government control, there began a long period of decline, probably the result of changes in sentencing laws and practices. At the end of World War I the daily average prison population had declined to about 10 000. This remained stable during the interwar years, rising and falling slightly from one year to the next. After World War II there began a period of steady increase in the prison population that has continued unabated (*Encyclopaedia Britannica 1995:811*).

Van Zyl Smit (1992:3) affirms that before the middle of the nineteenth century the prison had established itself as the normal form of punishment for serious crimes in Europe and North America. The lax prison regimes of the eighteenth century were replaced by rigorous administrative apparatuses, which, in their endeavour to rehabilitate prisoners, regulated prison life down to the finest detail.

These developments had a significant impact on the evolution of South African prisons. The movement for a more humane body of criminal law, an aspect of the eighteenth century period of enlightenment, also encouraged the rise of prisons. The most prominent figure here was Cesare Beccaria, who published his famous *Essay on Crime and Punishments* in 1764. In this essay he argued vigorously “for the abolition of brutal criminal codes, with their multiplicity of capital crimes and barbarous corporal punishments.” He contended that they should be replaced by a system where punishment was prompt and inevitable rather than cruel and erratic.

The English reformer, John Howard, who was motivated by both Beccaria’s ideas and his own experience with the terrible conditions in British jails and prison hulks at the time, took up the battle to reform the English criminal law and to erect better jails. He published a detailed report of prison conditions throughout Europe in his *State of the Prisons* published in 1777.

Between 1776 and 1875 increased prisoner loads wreaked havoc on England’s available facilities. One of the immediate solutions to overcrowding was to use the old ‘hulks’ or unusable transport ships to confine criminal offenders. The conditions on these ‘hulks’ were worse than the jails. There was no segregation of young, old, male, female, criminals and the misdemeanants.

A history into the Netherlands has shown that a gradual, deep-seated shift in public perceptions of what was acceptable underlay the restriction of the open

display of violence and physical suffering (*Van Zyl Smit 1992:4*). Michel Foucault in his publication *Surveiller et punir*, argued that the dramatic changes should be understood in terms of developments in which the “traditional, ritual, costly, violent forms of power, fell into disuse and were superseded by a subtle, calculated technology of subjection.” A major understanding of Foucault’s was that the prison system that emerged in the nineteenth century differed substantially from the system of punishment imagined by the classical theorist. Prison as punishment was based not only on the deprivation of liberty theory but also on the corrective philosophy, and that this dual purpose ‘immediately gave it its solidity’. Foucault argued that from the commencement of the use of prison as punishment, prison reform was evident (*Reid 1981:157*).

In contrast to the traditional view, which saw the penal reforms of the late eighteenth century and early nineteenth century unequivocally as desirable forms of progress, the Foucauldian vision was pessimistic (*Van Zyl Smit 1992:5*).

McLennan (2002:1) in her paper *The Crisis of Imprisonment: Notes Towards a Critical History of Punishment* shows:

“How the history of the protests and problems of the nineteenth century prison challenges the foundational assumptions of current orthodox, Foucaultian, and Eliasian cultural accounts of punishment. A critical history of

imprisonment alters the standard periodization of United States penal history and troubles established explanations of the causes of penal change.”

McLennan also makes the case for rethinking imprisonment as: “first and foremost, a social relation whose particular legal, political, moral, practical, and aesthetic dimensions may be usefully conceptualised as the accretions of an extended, if episodic, popular conflict over the meaning and purpose of punitive incarceration.”

Even though early English prison legislation was very harsh, it increased the visibility of the penal regime by making public a set of rules relating to prisons. In the nineteenth century prisons became subject to administrative centralization and even a measure of regulation. In this regulation lay increased possibilities for the judicialization of prison life.

In the 1890's, Warden Cassidy instituted a rudimentary system of prisoner classification, distinguishing what he termed 'crime class' men from 'accidental criminals'. With those classifications he justified the use of separate confinement for only those first time offenders he considered more open to reform (*Bowditch 1998:15*). Thus as far back as the 1890 Cassidy instituted the separation of first time offenders from hardened criminals. In comparison with the present situation in South Africa, juveniles, minor offenders and hardened offenders are all housed together.

Through the decades and presently, the prison population *throughout* the world has escalated and concern over prison conditions has not diminished over the years. Correctional systems the world over face the challenges of overpopulation of existing infrastructures, varying from slight overcrowding to extensive overcrowding, which may be responsible for bringing the system on the threshold of collapse. Racial and ethnic groups that occupied the lowest positions in the region's economic structure are over-represented in the prison population, thereby allowing one to come to the conclusion that one of the contributing factors to overcrowding of prisons is due to the socio-economic background of offenders.

2.4.3 The 'Telephone Pole' Design

Whilst the steps that led to Bentham's Panopticon and Pennsylvania and Auburn systems were very closely linked to the penal policy of that time, the changes in the field of prison architecture in modern times are closely interwoven with administrative requirements (*Cilliers 1998: 17*).

The so-called telephone pole design, in which the cell houses extend crosswise from a central corridor connecting all the cell houses and other facilities, was used in France for the first time in 1898. This plan has been widely used in the construction of American prisons since the beginning of the 20th century. Many South African prisons were also constructed according to this plan (*Cilliers 1998:17*).

The stated purposes and objectives of a correctional system often dictate the use of specific types of physical facilities. The physical layout of correctional facilities influences or even necessitates specific styles of management and administration. Throughout the history of prison reform, the argument has been advanced that rehabilitation will not occur until the physical environment has been improved and changed. But new facility design and construction are not necessarily related to improved operation and management, reduction of overcrowding, fewer lawsuits, or the rehabilitation of inmates (*Atlas 1991:1*).

Although there have been many important changes with regard to the treatment of prisoners, the basic structure of prisons remains unchanged. The design of the prisons is of importance in the philosophy of corrections and prison architecture should be considered in terms of the effect the structure might have on the person being confined (also discussed in chapter six of this thesis).

Thus, currently, prison overcrowding is a global problem. In some countries the situation is worse than the United States, for example, Russia, Brazil and most Asian countries. The accommodation of more inmates in a cell than what it was designed for is prevalent not only in the United States, but also in any prison in which overcrowding is present.

2.4.4 Further Development of Prisons

It was eventually realised that the suppression of prisoners could not last indefinitely. The realisation that complete isolation from the outside world and its activities had a detrimental effect not only on discipline, but also damaged the prisoner mentally for they had nothing to strive for. *Barnes and Teeters (1959:545)* believed that a change in the treatment of the offender took place in penal institutions and stated that: "The prisoner is a human being, possessing the same normal wishes and drives as the citizen fortunate enough to be outside the walls of a prison. It is stupid to place unreasonable restrictions upon the convict that make it difficult for him to adjust to normal living upon release. It is for the benefit of society that the prison respect the normal human wishes of the inmate and return him to that society as well adjusted as is humanly possible. Denying him an expression of the basic drives that are distinctly a part of his nature cannot do this. He needs recreation, companionship, and considerable contact with the outside world."

A number of aspects mentioned in the above quotation should be highlighted with regards to the development of treatment to the prisoner in the penal system. Traditionally the offender has been treated in antiquated facilities, which created problems of hygiene because of the overcrowding. In some countries, for example, England, Russia and even in South Africa, prisons are old and in some instances unfit for habitation and human use. Contact with the outside world is very limited, as a result the prisoner finds himself 'isolated' within the penal environment. Furthermore the present divorce laws enables the dissolution of marriage very easily for spouses of prisoners and

this is another factor that leads to the isolation of the prisoner and makes reintegration upon release very difficult, thereby contributing to recidivism and thus further overcrowding of prisons.

2.5 DEVELOPMENT OF THE TREATMENT IDEAL IN PRISON

2.5.1 Introduction

Treatment as a means of correcting criminal and delinquent behaviour has moved from punitive to reform to rehabilitation. The correctional panaceas of one generation all too frequently are seen as disasters by the next (*Bartollas in Cilliers 1998:25*). For two hundred and fifty years, various methods have been implemented to improve, change or rehabilitate offenders. Through the years, researchers cannot claim to have established a system for the treatment of offenders that genuinely works.

The progress of the treatment systems over the different period will be analysed.

2.5.2 Treatment During the Colonial Period

There was little faith in the usefulness of treating offenders in this period. Prisoners were classified according to the seriousness of their crimes and accommodation for prisoners would vary according to their classification.

There was no overcrowding during this period for little use was made of detention. Release of prisoners was determined according to the progress in their reform programmes.

2.5.3 Treatment and the American System

The Walnut Street prison was improved in 1790. Prisoners were paid for their labour, corporal punishment was banned and provision made for remission of sentence (*Cilliers and Cole 1997:126*). Lower costs resulted from the simpler facilities required by mass imprisonment, and from group workshops which provided economies of scale unachievable under solitary confinement. Reverend Louis Dwight believed that the Pennsylvania style of imprisonment was unconscionable and inhumane (*Schmallegger 1997:439*). In keeping with criticisms fielded by Dwight and others, most American prisons built after 1825 followed the Auburn architectural style and system of prison discipline.

Prison programmes applied during these years unfortunately failed after a while because of overpopulation, poorly trained staff and idle prisoners. The unsatisfactory conditions typical of this system continued until the twentieth century.

Although the reformatory period was not a success, the principles that were established remain important even today. Thus, indeterminate sentencing, parole, trade training, education, and primacy of reformation over punishment all serve as a foundation for ongoing debates about the purpose of

punishment (*Schmallegger 1997:442*). After the failure of the reformatory style of prison, concerns over security and discipline dominated the American prisons. Inmate populations soared, expenditure escalated and practical alternatives were sought. One option was found in the profitability of prison labour and the industrial prison era was born.

The widespread abuse and exploitation of inmate labour prevalent during the Industrial Era called for change. But unfortunately, change came in the form of political restrictions rather than practical reforms. For years corrections struggled to cope with complete reversal from forced labor to forced leisure. Although inmate idleness is a problem that still faces correctional administrators, there have been renewed efforts to provide offenders with meaningful labor (*Stinchcomb and Fox 1999:110*).

The situation in many countries with regards to the idleness of inmates is a problem. In South Africa this is especially so, with regards to awaiting-trial prisoners. Awaiting-trial prisoners are not allowed to participate in programmes nor are they given any 'privileges'. Due to high numbers of awaiting-trial prisoners, who have a long wait before their trial, they basically spend many days in idleness. Should something not be done **now** about this?

2.5.4 Contemporary Models of Approach to Institutional Treatment

By the late 1930s, in America, punitive punishments became unacceptable and the accent was more on treatment and the rehabilitation of the offender.

The negative effect of imprisonment on inmates raised much attention and alternate sentencing options received attention. Similarly, courts were beginning to recognise the rights of inmates to challenge conditions and procedures that violated constitutional protections (*Stinchcomb and Fox 1999:112*). Despite all these changes, the accommodation of increased numbers of inmates in outdated facilities was implemented.

Over the past forty years there have been considerable changes worldwide and in South Africa with regards to prison architecture and administration. These developments have mainly been centred on the assumption of rehabilitation (*Cilliers 1998:25*). Rehabilitation is an essential justification of punishment and imprisonment, as about 95% of all prisoners will go free one day (*Annual Report Judicial Inspectorate of Prisons 2002/2003*). By the same token, (*Schmallegger 1997:361*), contends that rehabilitation seeks to bring about fundamental changes in inmates and their behaviour. During the contemporary period the correctional treatment and planning have progressed through the following stages:

- The medical model
- The adjustment model
- The re-integration model
- The warehousing/overcrowding era
- The justice model
- The neo-utilitarian punishment model
- The restorative justice model

An exposition of each of these models will be given.

2.5.4.1 The Medical Model

This model was used extensively during the 1920s. The medical model provides for the offender to be viewed as a diseased person. According to this model, his crime is merely a symptom of his disease (*Cilliers 1998:25*). Due to his illness the offender was unable to control his behaviour, and the best place to 'treat' him was in prison.

The development of rehabilitation programmes began in the 1930s and 1940s when the skills of psychologists, social workers, educators and ministers of religion were used by the treatment team. Although they could make diagnoses, psychiatrists found it difficult to design a treatment programme for prisoners (*Cilliers and Cole 1997:128*).

The medical model was based on determinism, which held that the offenders' behaviour is determined by circumstances beyond his control-offenders are thought not to be able to exercise free will, thus they cannot be held for their actions. *Allen in (Bartollas 1985:26)* lists the presuppositions of the medical model:

- Human behaviour is caused by events in the person's past;
- Knowledge of these causes makes it possible to control human behaviour;

- It is the responsibility of scientists to discover these causes;
- The mechanisms used to treat offenders must be used in order to make positive changes to the offender's happiness, health and gratification.

The popularity of this model declined in the late 1960s in America. Institutional treatment did not succeed in reducing recidivism. The community began to doubt whether treatment could lead to change. With regards to overcrowding, it was also realised that due to the inhumane conditions in prisons, it was almost impossible to bring about changes in the offender. Most corrections were not equipped to accomplish rehabilitative ideals. The high recidivism rates also resulted in congested prison cells and strengthened the prisoner's negative self-image. Administrators were still compelled to house even greater numbers of offenders, often in archaic facilities. In approximately sixty years, the recidivism rates are still extremely high (studies are being currently being conducted in South Africa by the Institute for Security Studies to ascertain the exact percentage of recidivism). Although rehabilitation programmes are trying to be implemented by officials in prisons, social evils like poverty and social injustice hampers this. Although crowded correctional institutions receive significant notice presently, the problem of overcrowding in prisons is far from a modern manifestation.

2.5.4.2 The Adjustment Model

While offenders cannot change the facts of their emotional and social deprivation of the past, they can display responsible behaviour in the present, and can avoid using their past problems as a justification for delinquent or criminal behaviour (*Bartollas in Cilliers 1998:26*).

The adjustment model is based on certain assumptions:

- In order to adjust to society's expectations, the offender needs assistance or treatment. It has to be pointed out to the offender repeatedly that the causes of their crimes stem from their maladjusted, negative behaviour and inappropriate personal relationships;
- If offenders accept the fact that they must be held responsible for their behaviour, then they can lead a life free of crime;
- In order to appreciate anti-social behaviour, the environment at large must be taken into account. The offender can be taught different patterns of behaviour while in prison, which will eventually help him to refrain from repeating his offence; and
- The punishment that the offender endures may cause some behavioural problems for the offender may feel alienated or to a certain degree rejected by society (*Cilliers 1998:26*).

Ironically, in reality, the converse to this happens in prison. In prison the offender is 'taught' different patterns of behaviour (that is criminal behaviour)

and more often than not, due to the extreme overcrowding, the conditions, the lack of resources, the minor offender goes into prison and returns to society a more experienced criminal because he comes into contact with hardened criminals. If one takes into cognisance the social environment of the majority of South African people, then the environment that they emanate from is more conducive to anti-social behaviour due to socio-economic conditions and this only increases the prison population. It could be argued that the offender is sent to prison 'for punishment' rather than 'as punishment'.

2.5.4.3 The Re-integration Model

Beginning in the 1960s the realities of prison crowding, combined with a renewed faith in humanity and the treatment era's belief in the possibility of behavioural change, inspired a movement away from institutionalised corrections towards the creation of opportunities for reformation within local communities (*Schmallegger 1997:448*).

The re-integration model is founded on the principles that the offender's problems emanated in the community; therefore they have to be solved within the community. The community therefore is also responsible for affording the offender the possibility for becoming a law-abiding citizen and continuous, adequate contact with society is necessary to achieve re-integration (*Cilliers 1998:27*). Within the framework of the reintegration model change comes about by means of internalising.

In South Africa the present standpoint being adopted by the Department of Correctional Services is that the relationships between the offender, the victims, both the individual and the victim community, the community of origin, and society at large need to be nurtured and rebuilt throughout the period that the offender has been sentenced to (*Department of Correctional Services Draft Green Paper 2003*).

Thus social re-integration is an essential component of rehabilitation and success cannot be achieved in isolation with the Department. Involvement of the community at large is crucial for the reduction of the recidivism rate. According to the (*Department of Correctional Services Draft Green Paper 2003*), the rate of recidivism in South Africa, (namely the rate at which offenders re-offend after completion of sentence), is widely acknowledged as being unacceptably high. The lack of a proper infrastructure to handle released offenders contributes extensively to the overcrowding of prisons. The emphasis has been on transforming the South African prisons from being so-called 'universities of crime' into effective rehabilitation centres that produce individuals who are trained in market-related skills and capable of successful reintegration into their community as law-abiding citizens.

2.5.4.4 The Warehousing: Overcrowding Era

During the late 1970s and the 1980s, public disappointment, bred of high recidivism rates coupled with dramatic news stories of inmates who committed gruesome crimes while in the community, led many legislatures to

curtail the most liberal aspects of educational and work release programs (*Schmallegger 1997:450*). Recidivism rates were widely quoted in support of the drive to warehouse offenders: that is, an imprisonment strategy based upon the desire to prevent recurrent crime, but which has abandoned any hope of rehabilitation.

The American prison population grew dramatically from 1975 to 1995, and prisons everywhere became overcrowded. The National Institute of Justice distinguished crowding in prisons and jails as the most serious problem facing the criminal justice system. Between 1984 and 1994 state and federal prison populations increased by 250% (*Schmallegger 1997:451*). In addition warehousing has its own problems - it is expensive and has led to unmanageable overcrowded prisons. Neither has there been a reduction in the number of serious crimes. Overcrowding led to administrative difficulties, which still continue to influence prison systems internationally. Various measures to deal with overcrowding were implemented, for example:

- Constructing 'temporary' tent cities within prison yards;
- Moving more beds into already packed dormitories;
- Early release for less dangerous inmates;
- Mandatory diversion programs for first-time non-violent offenders;
- Reduction of the sentences of selected inmates by a fixed amount, usually 90 days; and
- Early parole to reduce overcrowded conditions.

Although many of these measures are currently being enforced in countries like America, Britain and South Africa, and various others throughout the world, overcrowding is very much a reality today.

Thus overcrowding is the legacy of the warehousing era. Warehousing, a strategy, which continues to be advocated by many, has produced record prison populations and possesses the potential to expand the number of people in prison still farther (*Schmallegger 1997:453*).

The author contends that in South Africa the problem of overcrowding of prisons has been steadily increasing in the past decade (as will be seen in chapter three of this thesis). One of the main reasons for this is the crime rate and the fear of crime among the South African public continues to rise. Long sentences were introduced as a temporary measure to allay the fears of the public, but this has contributed to long sentences becoming the norm.

2.5.4.5 The Justice Model

Warehousing and prison overcrowding have been primarily the result of both public and official frustration with rehabilitative efforts. Since rehabilitation didn't seem to work, early advocates of warehousing -not knowing what else to do -assumed a pragmatic stance and advocated separating criminals from society by keeping them imprisoned for as long as possible. Their avowed goal was the protection of law-abiding citizens (*Schmallegger 1997:453*).

The debate about the treatment of prisoners has been raging for centuries. The various areas that created problems were: unfair sentencing; autocratic parole boards; the inaccessibility of the justice system to some groups of people; and the fact that prisoners have their rights taken away from them. The justice model of the 1970s was a result of the drive towards justice. It was proposed by David Fogel and was not really aimed at the rehabilitation of offenders-it was more like a set of principles intended to 'rehabilitate' the correctional system (*Cilliers and Cole 1997:133*).

Fogel (1975:192) states that the justice perspective is not so much concerned with administration of justice as it is with the justice of administration. The model is thus based on the following principles:

- Justice can only be served through just, reasonable and humanitarian practices;
- That each person has a free will, allowing him to choose between right and wrong-responsibility must be accepted for behaviour;
- Operates within the principles of just deserts-implying that punishment is deserved if a crime is committed; and
- There was distrust in the authority of the state and abuse of power; for example, different sentences were handed down for exactly the same offence (*Cilliers 1998:27*).

The era of the justice model represents a genre to the root purpose of incarceration, that is, punishment of the offender. Without the advance planning required to accommodate longer and more punitive sentences, the justice model was no more equipped to achieve its goals than its predecessor. Just as the funds were never forthcoming to implement the medical model effectively, the facilities needed to incarcerate greater numbers for longer periods of time were not appropriated. Correctional institutions were unprepared for the massive influx of offenders into already strained facilities. Nor were the courts willing to endure vastly overcrowded institutions (*Stinchcomb and Fox 1999:117*).

2.5.4.5.1 Arguments in favour of the Justice Model

The author agrees with many of the principles of the justice model. The basis of this model is the principle of free will. Although free will may not exist perfectly, the criminal law is largely based upon its presumed vitality and (free will) forms the only foundation for penal sanction (*Bartollas 1985:48*). Supporters of this model believe that offenders should be punished. The author is of the opinion that if people commit crimes and violate the laws, then they deserve to be punished. This punishment should be as humane as possible and should be in keeping with the crime committed-it should 'fit the crime'.

Another argument in support of this model is that only serious offenders should be kept in prison. By following this premise, prisons would not face the

disastrous situation that it is facing presently in terms of overcrowding. A high percentage of offenders currently in prison are there for minor offences, for example, shoplifting. The way in which custodial sentences are imposed should never become an additional punishment. Imprisonment is punishment in itself, so prisoners have to be treated with humanity and dignity (*Cilliers and Cole 1997:136*). Other factors in favour of this model are:

- Justice as fairness is very important and could have a genuine impact on the entire correctional system;
- Considers the entire criminal justice system; and
- Recognises the brutality of imprisonment, poor working conditions for warders, what it means to be a victim of crime, and ways in which prisoners used to be treated.

If some of the principles of the justice model could be put into practice rigorously, then major problems stemming from overcrowding could be curtailed. On the other hand *Bartollas (1985:55)* is of the opinion that legislatures are likely to be influenced by the hard-line mood of society in creating more punitive and prolonged sentences than are humane or equitable. Most orders from the court relate to reducing prison populations or improving conditions of confinement relating to overcrowding. To rehabilitate offenders, long sentences are not necessary. Shorter sentences can be regarded as just sentences with sufficient time for rehabilitation. If sentences were lengthened inordinately, the result would be more and more overcrowded prisons with less and less scope for rehabilitation.

2.5.4.6 The Neo-Utilitarian Punishment Model

The principles of this punishment model are based on the following (*Cilliers 1998:28*):

- Government is responsible for establishing a legal order within which residents enjoy security and happiness;
- The basic objective of punishment is to enforce compliance with the laws of the country;
- It is accepted that punishment will prevent criminal behaviour;
- Offenders are capable of making their own decisions and are not influenced by powers that are not under their control;
- Street crime is viewed in a more serious light than, for example, white collar crime;
- Only removing them from the community for a certain period of time deters criminals;
- The belief exists that rehabilitation as an objective in punishment does not work, and that there is insufficient proof of the fact that it prevents recidivism;
- Concern is expressed about the policy effected by the habitual criminal;
- Prisons are not supposed to be pleasant places.

Supporters of this philosophy believe that crime leads to insecurity in the community. The proposition of this model is that the 'get tough with crime'

approach will have a deterrent effect on criminals and further protect society. This approach is presently being adopted in South Africa and the get tough legislation has resulted in the proliferation of the prison population in all provinces of the country eclipsing those of the warehousing era.

2.5.4.6.1 Arguments in Support of The Neo-Utilitarian Punishment Model

The most important argument in favour of this model is its popularity. Supporters of the approach believe that punishment should be applied to a greater extent than at present because 'nothing else works'. Furthermore the community deserves to be protected from criminals (*Cilliers 1998:139*). The argument then arises as to why are awaiting-trial prisoners being punished before they have been found guilty? The number of awaiting-trial prisoners in South Africa constitutes a major percentage of the present prison population.

According to *Schmallegger (1997:456)* the "lock 'em-up" philosophy may bode ill for the future of American corrections. The combination of rapidly increasing prison populations and newly popular restrictions on inmate privileges could soon have a catastrophic and disastrous effect-leading to riots, more prison violence, work stoppages, and an increased number of inmate suicides, and other forms of prison disorder. By the same token the answer to both overcrowding and control came in the form of gain time, whereby a specified number of days is automatically deducted from an offender's sentence for every month served without disciplinary infractions. This modification was

necessary to reduce prison populations to somewhat more manageable levels (*Stinchcomb and Fox 1999:117*).

The most important characteristic of managing the offenders within the institution during the eighties and nineties was the trend to move away from rehabilitation towards the administrative management within economic principles (*Cilliers 1998:28*). The neo-utilitarian view on rehabilitation and the handling of the offender is that the rehabilitation policy confuses prisoners and that imprisonment of this kind is not an adequate punishment for the harm that offenders do to the community. Thus overpopulation, violence and inhumane treatment do not belong in prisons.

2.5.4.7 The Restorative Justice Model

Restorative justice, as opposed to retributive justice, requires synergy across the integrated justice system as to the rationale of sentencing an individual, the process of incarceration, and the role of correction (*Department of Correctional Services Draft Green Paper 2003*).

Restorative justice endeavors to restore the balance within the community after offences have been committed. The current justice system in South Africa focuses on the relationship between the perpetrator and the state; the victim, however, is marginalized. Restorative justice puts victims back into the spotlight of the justice process. Restorative justice brings victims and offenders together in an attempt to promote community reintegration of the

offender, rather than the exclusion resulting from punitive prison sentences. (*Giffard 2002:1*).

Thus Restorative Justice can be defined as a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities generated by crime. The principles that underlie the approach to restorative justice shape the Department's approach to corrections namely:

- Crime is a violation of one person by another;
- All human beings have dignity and worth;
- The focus is on problem solving, healing and restoration of harmony and relationships; and
- Dialogue/Mediation and process negotiations are normative.

According to *Zehr (1990:1)* viewed through a restorative justice perspective, crime is regarded as a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions, which promote repair, reconciliation, and reassurance, for example, the Truth and Reconciliation Commission in South Africa where reconciliation, restoration and harmony became the fundamental basis of adjudication in the country (*Skelton 1998:4*).

By the same token *Giffard (2002:3)* maintains that a restorative justice approach in South African prisons can assist prison authorities to help develop the offender's sense of responsibility. A prison based restorative justice approach has as its central principle a confrontation between offender

and victim. Rather than removing all decision-making from offenders, prison authorities using this approach can support the offender in preparing for the responsibilities of a life in the community while he is still in prison. Restorative justice can provide the structure within which prison authorities can develop transformation strategies, which are still underdeveloped in South African prisons.

2.5.4.7.1 The Focus of Restorative Justice

Contrasting with the conformist criminal justice approaches, which place the emphasis specifically on the offender, restorative justice offers triple focus namely individual victims, victimized communities and offenders. Crime is understood to consist of acts against people within communities, as opposed to the traditional notion that crime is an offence against the state (*Neser et al 1998:106*).

The approach of the Department of Correctional Services in South Africa towards rehabilitation is informed by a commitment to a restorative justice approach, which outlines an alternative philosophy requiring correctional services to devote attention to (*Department of Correctional Services Draft Green Paper 2003*):

- Enabling offenders to make amends to their victims and the community;
- Increasing offender competencies; and

- Protecting the public through processes in which individual victims, the community, and offenders are all active participants.

Therefore, those directly affected by crime are given active roles in restoring peace between individuals and within communities. Restoration of material and emotional loss is seen as far more significant than imposing escalating levels of costly punishment on offenders. Offenders are thereby encouraged to work to restore their victims' and community's sense of peace (*Neser et al 1998:106*).

Thus the Republic of South Africa is at present undergoing changes and major reforms. The future development of the country is being re-evaluated not only on the political, social and cultural front, but also in respect of the judicial processes in general (*South Africa Law Commission 1997:5*). However, the high crime rate, the unprecedented prevalence of violence and overcrowded prisons in South Africa pose problems. One approach to the alleviation of overcrowding in prisons is the implementation of the restorative justice philosophy.

2.5.5 Prisons Today

Prisons are crowded in South Africa. Modern prisons are the result of historical efforts to humanize the treatment of offenders. 'Doing time for crime' has become society's answer to the corporal punishments of centuries past.

Even so, questions remain about the conditions of imprisonment in contemporary prisons and jails, and modern prisons are far from a panacea (*Schmalleger 1997:473*). It is undeniable that the re-evaluation of the methods in terms of which punishment is meted out currently taking place is as radical as those factors that resulted in the acceptance of the system of imprisonment in the 18th century.

The factors that caused this re-evaluation are complex. One factor is undoubtedly the realisation that the traditional methods of punishment were ineffective in the rehabilitation of prisoners. An end to crowding is nowhere in sight, neither in South Africa nor internationally. A new 'just deserts' era is influencing today's prison policy, characterized by a 'get-tough' attitude, which continues to swell prison populations even as it reduces inmate privileges. Prisons today exist in a state of limbo. As prison populations grow, uncertainties about the usefulness of treatment have left few officials confident of their ability to rehabilitate offenders (*Schmalleger 1997:473*).

2.6 THE DEVELOPMENT OF PRISONS IN SOUTH AFRICA

2.6.1 Origin and Development up to 1910

Significant developments of correctional law occurred in the period immediately after the Union of South Africa. The Department of Prisons formed part of the Department of Justice for a number of years. The author will examine the development of the prison system in the Cape, Natal, Orange

Free State and the Transvaal. The British occupation for the Transvaal and the Orange Free State Republics in 1900 led to a major reorganisation of the penal systems in these provinces.

This period is remembered most for an already inflated prison population, due primarily to transgressions of the pass laws, and that mining companies exploited prison labour.

2.6.1.1 The Prison System of the Cape

Jan van Riebeeck, during his stay at the Cape, followed a policy in regard to the punishment of criminals that had its roots in 17th century Dutch judicial practice. The full panoply of punitive measures was presented as a cruel and public spectacle. For example, the execution of convicted persons by firing squad was preceded by a military parade involving three companies of troops (*Venter 1959:11-12*). This judicial system inevitably had an influence on various aspects of judicial practice, the penal system and the administration of justice in South Africa. The kind of punishment used for offenders was directed at the body-public executions by firing squads and public crucifixion. The imprisonment of convicted persons and the use of such persons for manual labour did not appear to be prioritised. According to (*Van Zyl Smit (1992:8)*):

“Convicted persons were occasionally held in chains in the Dutch East India Company’s slave lodge and made to labour in public works... An attempt was made to extract labour from convicts deported to Robben Island. Deportation removed the criminal from a society which did not have much interest in his welfare.”

Only after the Fort and the Castle were built in the Cape, was detention possible. Incarceration was reserved mainly for condemned, awaiting trial and judgement debtor prisoners.

Some of the cruel forms of punishment were abolished during the 18th century, which led to the expansion-however informal- of imprisonment. The small existing places of detention were overpopulated with people held for minor offences. Places of detention were also erected for people who had to serve longer sentences. During this period the whole prison system was extremely disorganised with no reference whatsoever to rehabilitation (*Cilliers and Cole 1997:111*).

Venter in (Neser 1993:65), states that the most important reformations in respect of punishment occurred after the British occupation of the Cape in 1795 to 1803. In 1795 the orientation of the penal system towards physical harm began to decline. Punishment that resulted in physical suffering was abolished and replaced with “incarceration for a fixed period proportionate to the heinousness of the offence” (*ISS Correcting Corrections Monograph No 29 1998:1*).

In 1807, the slave trade was abolished and full emancipation occurred in 1834. Penal policy began to develop in the Cape. Slavery was a form of imprisonment, and the abolition of slavery caused the supply of labour to the farms to suffer. A rudimentary pass system for indigenous inhabitants-later to become a well-known feature of apartheid- was introduced. Those who abused the system were put to work as prisoners" (*ISS Correcting Corrections Monograph No 29 1998:1*).

John Montagu had to take control of the local penal system in 1843. Together with Captain Maconochie, they drafted regulations for the functioning of the prison. Provisions were made for the rehabilitation of offenders and the rewarding of good behaviour. Also a classification system based on the rewarding of good behaviour was implemented.

In 1854 Montagu introduced a form of classification, namely a punishment group, a probation group and a good- behaviour group. Prisoners could advance from one group to another on grounds of good behaviour. They could also receive small sums of money, privileges and remission of sentence. At this stage in the development history of the prison, provision was already being made for literacy training and religious instruction. Rehabilitation was also encouraged (*Cilliers and Cole 1997:111*).

Some of the changes implemented by Montagu, are being implemented in prisons presently. Privileges are given to prisoners as incentives for good behaviour: remission of part of a sentence for this good behaviour and the

understanding of rehabilitation as the desired outcome of the criminal justice process. Although circumstances in which prisoners were detained were unpleasant, the purpose of detention changed to the principle that the influence of the prison was intended to reform prisoners.

The reform of the penal system instituted by Montagu is regarded as a milestone in the development of South African criminal justice policy. His classification system was fairly sophisticated and similar to what came into later use. After his departure in 1852 the whole prison system went into decline (*Cilliers and Cole 1997:111*).

In 1871, there was a demand for labour in the mining industry. The prison system was used to provide labour and public policy regarding incarceration was adapted. In 1885, the De Beers Diamond Mining Company was the private organisation to employ convicts for labour. The prison supplemented the labour force for many workers spent time in prison because of the pass laws. Violations of these pass laws contributed extensively to the overcrowding of prisons (*ISS Correcting Corrections Monograph No 29 1998:1*). This early period is remembered for its already inflated prison population, mainly due to transgressions of the pass laws, and the fact that mining companies exploited prison labour at very low rates.

Van Zyl Smit (1992:15) points out “the role of the State as the provider of unskilled black labour for the mines through the penal system had become manifest. “

Another aspect of penal policy that emerged in the 1880's was the first systematic attempt to segregate prisoners on racial lines. Van Zyl Smit further states that:

“Mine owners treated white workers differently from black workers. White workers were allowed some measure of freedom to organize and campaign for better conditions for themselves. Black workers were tightly controlled in the compounds and the prisons.”

During the British occupation of the Cape in 1806, there was only one prison in the country. The control of the prison was vested in the colonial secretary in England, which resulted in the British prison system having a strong influence in the Cape Colony thereafter. By the year 1848 there were already 22 prisons in use outside Cape Town, reflecting the increase in the prison population.

In 1888 the “Act to consolidate and amend the Law relating to Convict Stations and Prisons,” (Act 23 of 1888), was passed by the Cape Parliament. The new Act together with its regulations, followed the Ordinances introduced by Montagu. A system of classification was introduced which revived Montagu's tripartite categories of a penal, a probationary and a good conduct class for the longer term prisoners detained in convict stations (*Van Zyl Smit 1992:17*). There was a move to unite all places of detention under a single prison system. There was also an introduction of gender-based classification

and provision for the segregation of different categories of offenders, for example, awaiting-trial offenders.

2.6.1.2 The Prison System of Natal

For a substantial period there was no prison in Natal in the true sense. In 1849 a brick building was established with the provision for ten communal cells. By 1907 due to the increasing offender population this had increased to 260 cells. Proper accommodation was a problem in Pietermaritzburg for a considerable period, but a prison was completed in 1863. The initial number of 25 cells had expanded to 158 by 1907. By this stage there were already 40 prisons in Natal (*Cilliers and Cole 1997:112*).

The prison conditions were deleterious and unhygienic. Prisons were overcrowded and there were fundamental shortcomings in the system. A recurrent problem was that of escapes and attempted escapes. Due to the overcrowded conditions in prisons, there was no question of classification. Neither was there any other type of institution that could make this possible. Corporal punishment was common and included the use of the whip. Objections were raised against the use of this instrument, however, and the cane replaced the whip. There was no question of reform at this juncture because of the lack of scientific knowledge of crime causation and inadequate facilities in the existing institutions (*Cilliers and Cole 1997:112*).

A lot has changed in Natal since decades ago. Firstly corporal punishment, in South Africa, has been abolished for it goes against the constitutional rights of the individual. Secondly, there is adequate knowledge about crime causation and facilities are being upgraded in prisons so that programmes for the rehabilitation and prevention of recidivism could be implemented. Despite the slow progress, the overcrowding and appalling conditions in prisons hampers the efforts that are instituted for transformation.

In 1887 a tripartite classification system of 'Europeans'(coloured), 'Indian and 'Native' (African) was adopted in a government notice. In 1888 this classification system was applied to labourers. This had a ripple effect in terms of segregation of accommodation for prisoners. Thus there was no major penal reform in Natal before the Union in 1910 (*Van Zyl Smit 1992:18*).

2.6.1.3 The Prison System of the Orange Free State and Transvaal

There is insufficient research into the development of the early prison system in both the Orange Free State (OFS) and the Transvaal. It emerged that in both the Orange Free State and the South African Republic (Transvaal) the early Republican periods were characterized by a low priority being given to the development of a prison system or a legislative framework to encompass it (*Venter 1959:82*).

In the Orange Free State, the first prison was introduced after 1854 in Bloemfontein. By the year 1873 there were thirteen other institutions. The

prison system used in the Cape and Natal was also applied here after the British occupation in 1902.

The conditions in the prisons of the OFS were extremely inadequate. Although commissions were appointed to investigate prison conditions, nothing could be done about the matter owing to limited funds for this purpose and the widespread poverty prevailing in the Republic at that time (*Cilliers and Cole 1997:113*).

The constitution at that time laid down that prisoners had to do hard labour in public. During the 1840s and 1850s, offenders were made to particularly build roads and later ships. These prisoners sentenced to hard labour had to be chained and further provisions were made for sentencing prisoners to work for a maximum of five years under contract to a civilian with or without remuneration and with or without prior imprisonment. Section 6 of the Constitution (*Constitutie van die Oranje Vrystaat*) stipulated that if a prisoner refused to comply with the discipline, they could be sentenced to corporal punishment of not more than 25 lashes.

The first prison in Pretoria was built in 1865 and by 1893 there were already 33 penal institutions in the Transvaal. The British system was also applied here. In 1894 the system of internal discipline was reorganised and the local landdrost was given exclusive jurisdiction to try infringements of prison regulations. He could impose corporal punishment of up to 25 lashes, imprisonment, with or without hard labour, of up to 12 months or solitary

confinement, with or without reduced rations, of up to seven days. *Van Zyl Smit (1992:19)* states that only one significant alteration was made to regulations.

Du Pre in Neser (1993:66) states that in 1877 the control of all British prisons was transferred to the central government when a union prison system was accepted. The British occupation of the Orange Free State and the Transvaal in the mid 1900 resulted in a reorganization of the penal systems of both territories. In the Transvaal there was an increase in the prison population and authorities were also faced with the problem of the disorganisation of the availability of labour to the mines. Attempts to control the latter through a system of 'pass laws' further increased the prison population (*Van Zyl Smit 1992:19*). A Commission of Inquiry into conditions at the Fort in Johannesburg, one of the main prisons in the Transvaal, revealed that the prison system was inadequate and needed necessary changes.

As on the diamond mines in the Cape, the 'solution' adopted was to allow a mining company (in this case the ERPM gold mine in Boksburg) to erect a prison for approximately 800 black prisoners. The company then had to pay the government one shilling per day per prisoner to be allowed to use the prisoners as labourers on its mines (*Venter 1959:122*).

The resultant change of prison law reform in the Orange Free State and the Transvaal was the introduction of the indeterminate sentences. Section 9 of the Criminal Law Amendment Act No 38 of 1909 made provision for the indeterminate detention as hard labour prisoners of persons who had been

declared by a court to be habitual criminals. They could only be released after a statutory body, the Board of Visitors, which was created for this purpose, had made recommendation. Another requirement of this body was to report to the governor on all prisoners who had served a sentence of more than two years. After the establishment of the Board of Visitors these prisoners could be considered for unconditional release, or release on probation (*Cilliers and Cole 1997:113*).

Thus the early part of last century saw the prison system regulated mainly by various Provincial Ordinances. The British occupation of the Transvaal and Orange Free State Republic in 1900 led to major reorganisation of the penal systems in these provinces. This early period will probably be remembered most for an already inflated prison population, mainly due to transgressions of the pass laws, and the fact that mining companies used prison labour at very low rates (*Department of Correctional Services Draft Green Paper 2003*). The transgressions of 'pass laws' were further enhanced by the Natives Land Act No 27 of 1913 which separated South Africa into areas in which either blacks or whites could own freehold land: blacks, constituting two-thirds of the population, were restricted to 7.5% of the land; whites, making up one-fifth of the population, were given 92.5%. The act also stated that Africans could live outside their own lands only if employed as labourers by whites. In particular, it made illegal the common practice of having Africans work as sharecroppers on farms in the Transvaal and the Orange Free State (*U.S Library of Congress*).

The above factors discussed are a clear indication that this would impact negatively to the overcrowding of prisons.

2.6.2 After the Union Of South Africa

In the year 1910, the year of the unification of South Africa, there was an endeavour at creating a penal and prison policy for the country as a whole. An attempt at this was embodied in the Prisons and Reformatories Act, Act 13 of 1911, and in the institution of a Department of Prisons. This Act repealed, either wholly or in part, all the legislation concerning the penal systems, which had been in force in the four colonies before Union that is 1902-1910. As the title infers the Prisons and Reformatories Act, Act 13 of 1911, sanctioned the responsibility of the management of reformatories onto the prison system. Courts started playing an increasing role in the development of prison law, *inter alia*, with findings that it was unlawful to detain awaiting-trial prisoners in solitary confinement and the ruling that prisoners who felt they had been unfairly treated in prison had the legal right to approach courts of laws for intervention (*Annual Report Department of Correctional Services 1999:1*).

In 1908 Jacob de Villiers Roos was appointed Director of Prisons. He was knowledgeable in the international penological ideas of his time. In the first Annual Report for the new prison system of the Union as a whole, *Roos in Van Zyl Smit (1992:23)* paraphrased the key findings of the Congress:

“The essential principles on which the modern reformatory system should be based are: that no person, no matter what his age or past record, should be assumed to be incapable of improvement. That it is in the interest of the public, not merely to impose a sentence which is retributive and deterrent, but also to make an earnest effort to reform the criminal, which is most likely to be attained by religious and moral instruction, mental quickening, physical development, and such work as will best enable the prisoner to gain his livelihood in the future. And that the reformatory system is incompatible with short sentences, and that a long period of reformative treatment is more likely to be beneficial than repeated short terms of rigorous imprisonment. That reformative treatment should be continued with a system of liberation and parole under suitable guardianship and supervision on advice of a board.”

Thus rehabilitation is the idea that punishment can reduce the incidence of crime by taking a form which will improve the individual offender's character or behaviour and make him or her less likely to re-offend in the future (*Cavadino and Dignan 1992:36*). The system of handling habitual and long- term offenders was part of the new legislation.

A Prison Board was instituted under section 45 of the Prisons and Reformatories Act No13 of 1911, to ensure more effective treatment of convicts and prisoners and to provide better guidance concerning the

conditions on which prisoners should be granted remission of sentence (*Cilliers and Naser 1992:177*). Section 25(3) of the new Act made provision for the isolation of prisoner's awaiting-trial and their subjection to mechanical restraint 'if the isolation or restraint is requested by the police authorities in the interests of justice'. The guiding principles of the Union penal system was to rescue the child from a criminal environment and prevent it from becoming a criminal; to build up and supplement in the criminal the elements necessary to prevent a recurrence of crime; and, if all else fails, by means of the indeterminate sentence to remove the habitual criminal from society and prevent his remaining a menace to it; but even then to allow him an opportunity of self-redemption (*The Official Year Book of the Union of South Africa 1918:362*).

It can be seen that certain elements contained in the Prisons Act have formed an integral part of the present prison policy. This period saw the introduction of a system that allowed for the remission of part of a prison sentence subject to good behaviour on the part of the prisoner and the system of probation that allowed for the early release of prisoners, either directly into the community or through an interim period in a work colony or similar institution (*Department of Correctional Services Draft Green Paper 2003*).

Both these elements, remission and probation, should therefore contribute to a lessening of the prison population and thus help the problem of overcrowding, which prevails in South African prisons today. However, this is not the case.

With regards to rehabilitation, although there was much speculation, very little really materialised. Within the prison system, punishment for transgressions was extremely severe and harsh. It included whipping, solitary confinement, dietary punishment and additional labour. Law prescribed racial segregation within the prison and throughout the country it was rigorously enforced. Section 91(1) of the Prisons and Reformatories Act No 13 of 1911 provided:

“In any convict prison or goal, as far as possible, white and coloured convicts and prisoners shall be confined in separate parts thereof and in such manner as to prevent white convicts or prisoners from being within view of coloured convicts or prisoners. Whenever possible coloured convicts or coloured prisoners of different races shall be separated.”

Prisons that were built in the last century are still operational. These prisons were not designed to cater for the rehabilitation of offenders but the more cardinal reason of prisons remaining foremost as places for punishment was that, to a considerable extent, the system set up by the 1911 Act remained captive of its legal and social history. It was designed to imprison offenders and efforts were made to segregate prisoners along racial lines. Undoubtedly, this led to the overcrowding of prisons because majority of the general population consisted of non-whites. In May 1910 there were 4 million Africans, 500 000 coloureds, 150 000 Indians, and 1 275 000 whites (*U.S. Library of Congress*).

Whenever imprisonment was employed, it was imposed disproportionately against the poor, the powerless, the marginalized or those whom the repressive government deemed expedient to eliminate from society.

The Prisons and Reformatories Act No 13 of 1911 consolidated earlier colonial legislation, and strict segregation was enforced throughout the system. Thus, some of the most punitive features of prison systems of the four colonies survived unscathed (*Van Zyl Smit 1992:24*). The development of the prison system was closely linked to the progressive institutionalisation of racial discrimination in South Africa, from the time that widely enforced 'pass laws' were introduced for Africans in the 1870's, to the elaboration of an official theory and systematized practice of apartheid following the victory of the National party in the election of 1948 (*Human Rights Watch 1994:1*).

2.6.3 Later Developments in the South African Prison System

The continued incarceration of Africans for failing to pay taxes and for pass offences meant that men were still available for work in the road camps. Prison populations continued to rise. Prior to unification of South Africa on 31 May 1910, each of the four provinces had its own prison system and own laws and directives regarding the control of prisons as well as the treatment of prisoners. On unification, a Union prison system was established. The Prisons Act has been amended from time to time to meet the demands of circumstances and to keep pace with modern developments in penal reform.

All the laws have been repealed and replaced by the Prisons Act, Act 8 of 1959. The Act was amended slightly by Prisons Amendment Act No 75 of 1965. This meant that South Africa had a new Prisons Act, which was to a certain extent based on previous legislation but also incorporated new elements conforming to modern penological thought and the *Standard Minimum Rules for the Treatment of Prisoners* which was passed by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders at Geneva in August and September 1955 (Cilliers 1992:178).

A new, and more individualised system of classification of prisoners came into use in 1958. Neser (1993:70-71), states that according to this system, prisoners were classified under four groups: a) ultra-maximum, b) maximum, c) medium and d) open prisons and observation centres were instituted.

- **Group A:** This group was regarded as the least dangerous of the prison population and could receive actual training in a variety of fields. The group included a considerable number of first offenders, as well as prisoners from the other groups who had shown over a period that they would like to improve themselves.

The overcrowding in this group was extensive due to the fact that the 'pass laws' was implemented and because the majority of the population comprised of non-whites.

- **Group B:** These were the hardened criminals who were detained in medium and maximum-security prisons.
- **Group C:** This group included offenders who had committed aggressive crimes.
- **Group D:** These prisoners were detained in ultra-maximum security prisons. Their criminal background and behaviour in prisons was of such a nature that the focus was mainly on protecting the community against them.

Classification really meant segregation-by race, age, and sex, for decades. There was no attempt to ascertain the problems of a specific offender within the context of a treatment program. From 1 January 1958 the privilege system was linked to the various types of prisons and therefore eventually to groups into which a prisoner was classified.

The principle of classification of prisons and the effective separation of prisoners according to levels of security risk is embodied in the present Correctional Services Act No 8 of 1959. It is generally accepted that a good security classification system forms the backbone of good prison administration. Due to overcrowding and the lack of resources, although the classification of prisoners is implemented, the overload of prisoners in the system makes it almost impossible to administer the system effectively.

2.6.3.1 The Lansdown Commission on Penal Reform - 1945

In 1945 progress of special significance was made with the appointment of the Penal and Prison Reform Commission - the Lansdown Commission. The impetus for its appointment had come from the Penal Reform Committee of the South African Institute of Race Relations (SAIRP). The objectives of the Penal Reform Committee *Van Zyl Smit (1992:26)* included:

- Urging greater use by the courts of remedial and rehabilitative measures in place of imprisonment;
- Demanding the abolition of racial discrimination resulting in unequal sentences;
- Suggesting improvements in prison regulations and the abolition of spare diet, solitary confinement, and corporal punishment.

This programme implied that unjust racial discrimination rather than the justifiable shouldering of the 'white man's burden' was the underlying approach of the State to prisoners.

The Commission warned against militarisation. The Lansdown Commission found that the Prisons and Reformatories Act No 13 of 1911 had not introduced a new era in South African Prisons but that it had in fact been a vehicle for maintaining the harsh and inequitable prison system that preceded (*Department of Correctional Services Draft Green Paper 2003*). Africans continued to be incarcerated for failing to pay their taxes and for pass offences, which meant that imprisoned men were still available for work.

The Commission held the conviction that prisoners should not be hired to outsiders. An increased emphasis on rehabilitation also found favour with the Commission, which recognised the need for making a major effort to extend literacy, in particular to all blacks (*Van Zyl Smit 1992:28*).

The Commission was critical of the Government's decision to reorganize the prison service on full military lines, which was seen to be an attempt to increase the control it had over prison officials. It explained that the Commission was not in accord with this view [that is the need for complete militarization], but on the contrary holds the opinion that senior officers are better able, when not vested with military rank and clothed in military uniform, to hold the balance between the subordinate officers and the inmates of the institution, and themselves are far more accessible to the inmates than they would be as military officers. Nor, in the opinion of the Commission, under a scheme of military ranks and discipline, would that human contact between officers and inmates exist enabling the former to apply to the latter the various rehabilitative influences which modern views deem essential (*Van Zyl Smit 1992:29*).

The Nationalist Government, which came into power in 1948, had great hostility to the general approach of the Commission. At the same time the fragile social consensus around prisons was breaking down in other aspects. Defiance of the pass laws, of the kind that the Lansdown Commission had warned against, increased. It impacted directly on prisons (*Van Zyl Smit 1992:30*).

The first instinct of the government was, in the opinion of *Van Zyl Smit* (1992:30-31) to:

“tighten up’ the prison administration. Thus, the control which it exercised above prison officials at all levels was increased by reorganising the service on fully military lines, notwithstanding the explicit recommendation of the Lansdown Commission that this should not be done. Moreover, the use of prison labour on private farms was increased during the 1950s by allowing ‘bona fide Farmers Associations’ to build ‘prison farm outstations’ which were then handed over to the Department of Prisons to manage. Farmers who contributed were allowed to employ convicts in proportion to their contribution to the construction of the prison.”

Thus the Government of the time was not sympathetic to the Commission’s proposals (*ISS Correcting Corrections Monograph No 29 1998:1*). Lansdown recommended that rehabilitation of prisoners should be the focus of the Prisons Department, which would be enhanced by the civilian accoutrements, and administration of senior officials. On the question of statutory offences applicable only to Africans, the Commission was more evasive. It acknowledged that these offences led to many short sentences of imprisonment being imposed and agreed that such sentences not only caused overcrowding, but also held the danger of criminalizing a large section of the population (*Van Zyl Smit 1992:28*).

As a result of the recommendations of the Lansdown Commission relating especially to alternatives to imprisonment through community-oriented sentences, section 352(1) of the Criminal Procedure Act, No 56 of 1955 came into being. These recommendations were made because of the extreme overload and the chronic conditions of the penal system.

However, Lansdown failed to recognise the role, which the ordinary warder could play in 'rehabilitating' prisoners, instead confining that role to the senior officers and professional staff. In reality, it is the warder who interacts with the prisoner on a regular basis, and few prisoners ever have access to the 'treatment orientated' staff. Disregarding Lansdown's recommendations, the Department of Prisons was fully militarised with the rewriting of the Prisons Act No 8 of 1959 (*Dissel 1997:3*).

2.6.4 Developments since 1959

With the introduction of the Prisons Act, No 8 of 1959, the former South African government introduced legislation, which effectively provided for the application of the policy of apartheid in the then Prisons Service. On 1 September 1959 the new Prisons Act 8 of 1959 was amended and this resulted in a completely new dispensation. The department's responsibilities were described in section 2(2) of the above act as follows:

- Safe custody of prisoners;
- Treatment and rehabilitation of sentenced prisoners;

- Efficient management of prisoners; and
- Other duties charged from time to time.

New laws were introduced which were based on the policy of apartheid and entrenched the racial segregation of prisons. This resulted in not only the segregation of whites and blacks, but also the ethnic separation of black prisoners. The Act not only implemented a two-stream correctional policy for Bantu and European offenders, but also (so far to a lesser extent), special arrangements for members of different Bantu nations in one institution. Placing the Bantu offender in a correctional institution for people of his own group and race not only recognises existing ethnological differences but also is in accordance with the national policy of differential developments (*ISS Correcting Corrections Monograph No 29 1998:1*).

The Act abandoned the “nine pennies a day” prison labour scheme and replaced it with a system of parole. It entrenched the military character of the prisons management, and made provision for commissioner and non-commissioner officers. Although staff members were defined as civil servants, their status was that of paramilitary personnel (*ISS Correcting Corrections Monograph No 29 1998:1*).

Before the establishment of the new Prisons Act No 8 of 1959, the department’s most important function was the safe custody of prisoners. In the light of the important social services, which were expected of prison, personnel, recruiting and training methods had to be changed drastically

(Neser 1993:69). In addition, all prisons became closed institutions: all media and outside inspections were prohibited: that is, the reporting and publishing of photographs. The consequence of this was the entrenchment of a relatively closed institutional culture within the prison service and as a consequence the norms of prison law were relatively remote from everyday practice (*Department of Correctional Services Draft Green Paper 2003*).

There were also attempts to gain international acceptance for the South African prison system. At the centre of this was the Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Geneva from 22 August to 2 September 1955. The Director of Prisons, Mr V.R. Verster, who was also a member of the International Penal and Penitentiary Foundation, represented the Union of South Africa. Mr Verster, in 1958, produced a booklet in which he made an analysis of the existing system in relation to international standards (*Van Zyl Smit 1992:32*). He claimed that:

“the prison system of the Union of South Africa is conducted in conformity with the basic principle of non-discrimination on grounds of race, colour, sex, language, religion, political outlook, national or social religion, birth or other status. All laws, regulations, etc, pertaining to penal institutions and the manner in which prisoners confined therein are to be treated, refer specifically to ‘prisoners’ in the widest sense of that word without any discrimination whatsoever.”

At the congress a large variety of resolutions were adopted, the most important being related to the following matters, (*Annual Report of the Director of Prisons 1955-56:5*):

- The establishment of standard minimum rules for treatment of prisoners;
- Standards for the selection and training of prison personnel;
- The establishment of open prisons;
- Prison labour;
- The prevention of juvenile delinquency;
- Technical assistance in the prevention of crime; and
- The treatment of offenders.

The Standard Minimum Rules, which was also supported by South Africa, was faced with the challenge of putting the newly accepted ideas on the treatment of offenders into action and bringing them into line, taking into consideration local conditions and the local prisons administration. Due to the fact that the old Prisons and Reformation Act (Act 13 of 1911) had become obsolete and was inadequate in terms of the new international idea of punishment and reform, drastic steps had to be taken. The new Prisons Act No 8 of 1959 was promulgated. In this Act ample provision was made for implementing the new international ideas in the fields of criminology and penology, especially regarding the treatment of offenders. The parole system was introduced.

With regards to imprisonment, a shift in emphasis would now occur from retaliation and punishment to detention and reform or rehabilitation. The renewed emphasis on rehabilitation was reflected in the introduction of further indeterminate sentences in terms of the existing sentence under which the offender could be declared a habitual criminal. Thus the Criminal Law Amendment Act No 16 of 1959 made provision for imprisonment for corrective training and imprisonment for the prevention of crime. The Prisons Act followed suit as it did for the new sentence of periodical imprisonment (*Van Zyl Smit 1992:32*). Other important aspects, such as the prohibition of corporal punishment for prison offences were ignored.

Post 1959, prisons were managed under the rules of apartheid and the militaristic approach increased. At first, prisons were not used on a large-scale to control political unrest. However, this soon changed in the post-Sharpville period of the early 1960's, when the incarceration of political detainees and sentenced political prisoners became a characteristic of South African prisons (*ISS Correcting Corrections Monograph No 29 1998:1*). Thus from the 1960s an even-larger number of political prisoners were added to the South African prison population. The written documentations and legal protests to the authorities contributed to an international disapproval at prison conditions. This led to an increasing attack on the legitimacy of the prison system. The incarceration of high profile prisoners raised great concern among international organisations such as the Red Cross, Amnesty International and the United Nations. The response of the government at the time was to grant even wider powers to prison authorities.

In addition, there were gross human rights violations in South African prisons. Most prisoners were held in overcrowded communal cells, a situation which persists even today. The South African Government's policies, influenced as they were by the doctrine of apartheid, had a major impact on the budgetary allocations, which the department received. Limited funds and the disparity in the provision of services provided to 'white' and 'non-white' South Africans resulted in inadequate rehabilitation programmes being made available (*ISS Correcting Corrections Monograph No 29 1998:1*).

During the 1970s there were other changes to the prison legislation, which were not associated with the political changes. The Mental Health Act No 18 of 1973 made provision for the treatment of psychopathic offenders in special prison hospitals. The Prisons Amendment Act No 88 of 1977 made provision for the establishment of special prison hospitals for psychopaths.

The Viljoen Commission proposed another important "agent of legislative change" in 1976. This Commission had some impact on the evolution of prisons. The Viljoen Commission was appointed to inquire into the penal system of the Republic of South Africa and to make recommendations for its improvement, provided that the question whether the death penalty should be retained shall not be inquired into.

In paragraph 1.1 of Part 2 of its report, the *Viljoen Commission (1976:3)* perceived the reasons for its appointment to be the following:

“While the Commission is conscious of the fact that an important motivating cause for the appointment of the commission was that the penal system could with advantage be submitted to a broad investigation in the light of constantly altering circumstances and approaches and new knowledge that became available since the last comprehensive report on penal reform and prison reform, the Lansdown Commission report, was published as long ago as 1947, it also believes that a precipitating cause for the appointment was the alarmingly high prison population of the Republic, a matter which has evoked the concern not only of the general public but of the Government of the RSA. For this reason the Commission will devote considerable attention to the causes of this unhealthy condition in the penal system and make an effort to find solutions therefore and to recommend steps to be taken for the amelioration and relief thereof.”

Therefore it is deduced that overcrowding in South African prisons today is not a new problem, but rather, it is an on going problem, inherited from past Governments.

The Viljoen Commission pointed out the importance of section 352 of the Criminal Procedure Act No 56 of 1955 within the punishment sphere since it made provision for a number of alternatives to imprisonment and provided the

sentencing officer an opportunity 'to exercise his inventiveness and ingenuity in devising alternative sentences'.

In 1977, as a result of the Commission, imprisonment for corrective training and imprisonment for the prevention of crime were abolished. Another important amendment to article 212 of the Criminal Procedure Act No 51 of 1977 allowed social workers, correctional officers, criminologists, psychologists and other behavioural scientists who play an important role in assisting the court in the sentencing process, to make recommendations for an appropriate sentence by means of a sworn statement, instead of giving oral evidence (*Naude Acta Criminologica Vol.4: 1991*).

In addition, the system of releasing prisoners was recognised as a response to the Commission's proposals that a 'parole board' be introduced. However, the new system was not designed to limit the power of the executive to release prisoners to the extent that an independent parole board may have done (*Van Zyl Smit 1992:37*).

2.6.5 Developments in the Prison System in the 1980's

After the uprisings of the 1976-1977 and 1980, when youth protested against Bantu education, prisons were used to detain political activists. A vast majority of the prisons were filled with youths who were treated in the same way as adult prisoners. This resulted in an even greater overload to the correctional system. The legitimacy of the prison system was further questioned in the

1980s. On 1 November 1980 the Department of Prisons once again became part of the Department of Justice. The prison service, with its assignment of protection and security service, its semi-military character and military ranks still continued to exist independently within the new and larger department (Neser 1993:72).

During the early 1980s there were a number of disclosures about the conditions in prisons near the town of Barberton in the Eastern Transvaal. A committee of inquiry was appointed to investigate conditions in prisons in and around the Barberton area. In 1984 a major autobiographical account of life in prison, Breyten Breytenbach's *The True Confessions of an Albino Terrorist*, was published in South Africa and not suppressed. It conveyed the shortcomings of the South African prison system in a manner which no publication allowed in South Africa before had been permitted (Van Zyl Smit 1992:38).

In South Africa by 1981 the state acknowledged that drastic steps were necessary in order to restrict the prison population figures, which had grown disproportionately world-wide (Neser 1993:415). The Krugel Committee was appointed to examine the overcrowding problem, yet it took 10 years before correctional supervision could be legally implemented. There were amendments to the law for the imposition and implementation of correctional supervision in the Criminal Procedure Act, Act 51 of 1977, and the Prisons Act 8 of 1959 were approved during the 1991 parliamentary session. The amended Correctional Services and Supervision Matters Amendment Act 122

of 1991, which made provision for the treatment of sentenced and unsentenced offenders was approved by the State President in August 1991. It would have been beneficial if the state and other decision-makers acted swifter in legislating or implementing recommended changes and policies to ease the current overcrowding crisis (*Neser et al 2001:5*).

Since the beginning of the 1980's a start has been made in investigating community-based forms of punishment and placing these alternative penalty options on the Statute Book. The Interdepartmental Working Group on Community Service was appointed in 1983 to investigate community service as an alternative sentencing option in South African Criminal Law and to establish community service orders as a meaningful and viable sentencing option.

The *Krugel Working Group (1984:26-33)* in paragraph 10.2 to 10.4 of its report highlighted the fact that in light of the Republic's overpopulated prisons, there was a need for alternatives to imprisonment. As a result of the Working Group's report and recommendations, the Criminal Procedure Act No 51 of 1977 was amended in 1986 to establish community service sentences as a viable sentencing option.

In 1984 the Judicial Inquiry into the structure and functioning of the courts reported that the incarceration of prisoners as a result of influx control measures was a major cause of the overcrowding in prisons and it condemned these measures. Judged by civilized norms these people are not

real male factors. They are the needy victims of a social system that controls the influx of people from rural to urban areas by penal sanctions. The reason for this virtually unstemmable influx is poverty (*Van Zyl Smit 1992:38*).

It could be debated that at one time, penal reformers honestly believed crime to be a product of poverty, and they therefore pinned their hopes on the eradication of poverty. They also hoped to combat crime through education of prisoners. Today, large areas of the world are prospering, and education and culture are widely prevalent, but none of these developments have managed to halt the increase in the crime rate (*Cilliers 1998:23*). Thus the increase in the prison population was uncontrollable making overcrowding inevitable.

Progressive changes started taking place with the closing down of prison outstations and a general decline in the use of prison labour for agricultural purposes. The system of paroling prisoners under paid contracts was also phased out. When the Abolition of Influx Control Act No 68 of 1986 finally abolished the pass laws in 1986, a further factor inhibiting the normalisation of the prison system was removed. Thus prisons were mainly regarded as overcrowded places of security (*Department of Correctional Services Draft Green Paper 2003*). Despite the many rehabilitative changes taking place, they were minimal.

In 1985 top management held a strategic planning session during which organizational planning and long-term strategies were formulated. It was decided that the prisons service should plan and create its own future. On 20

May 1988 management decided that the prisons service belongs to the security field rather than to the social field of the government sector. The purpose of the prisons service was adjusted accordingly to promote community order and security by dealing with prisoners according to statutory directives (*Neser 1993:73*). The mandate with which this objective was to be attained was described as the detaining of prisoners safely and with dignity until they are legally released and to run programmes to promote community integration.

These marginal improvements in the prison system were however soon overshadowed by the declaration of the State of Emergency on 21 July 1985, which lasted until 1990. This resulted in the incarceration without trial of a large number of persons. The mass detention of political prisoners during this period further inflated the already problematic prison population (*Department of Correctional Services Draft Green Paper 2003*). The State of Emergency also had a ripple effect on various other aspects and brought with it further restrictions on news reporting, including that of prisons. Gradually amendments to the specific emergency regulations reduced the differences between the conditions of detention of detainees and prisoners awaiting trial (*Van Zyl Smit 1992:39*).

During 1988 important amendments were made to prison legislation. By excluding all references to race, a reversal of the almost total racial segregation of the prison population was brought about although it took some years before it was implemented. The infamous prison regulation that ruled

that 'white' staff members automatically outranked all 'non-white' staff members was also repealed (*Department of Correctional Services Draft Green Paper 2003*).

Overcrowding for many years has plagued South African prisons and this problem has not been adequately addressed. Community Service Orders was introduced as a sentencing option to alleviate the pressures on the already overcrowded prisons and also to present magistrates with another sentencing option (*Muntingh 1996:1*).

2.6.6 Developments in the Prison System in the 1990's

During the late 1980s and the early 1990s there were extensive reforms in the prison system. The political changes, which began in 1990, had a direct impact on the prison system in South Africa. Reference to race was removed and prisons were desegregated. The gradual release of political prisoners during the course of 1990 and 1991 meant that the prison authorities could look forward to a period in which prison management would not necessarily be linked to major national political questions (*Van Zyl Smit 1992:40*).

After the release of Nelson Mandela and the unbanning of the African National Congress in the early 1990s, steps were taken to restructure and reform the Department. The Criminal Procedure Act was amended in 1990 in order to restrict the imposition of the death penalty. There was also the lifting of the State of Emergency in 1990 and the Internal Security Act No 74 of 1982

in 1991, was modified. Amendments to the Prisons Act No 8 of 1959 to the (Prisons Amendment Act 92 of 1990), looked at the abolition of apartheid in the prison system. Most fundamental in this respect was the removal of the requirement that 'white' and 'non-white' prisoners had to be housed separately (*Van Zyl Smit 1992:40*).

A key factor in change is the Police and Prison Officers Civil Rights Union (POPCRU). This organisation was committed to the recognition of the civil rights of all prisoners. POPCRU was perceived as a threat to the emerging but still fragile consensus surrounding prisons. The Government moved simultaneously to (re-) legitimate the prison system and to isolate critics such as POPCRU who would demand more radical change. Thus the 1990 amendments to the Prisons Act, also outlawed strikes by members of the Prison Service (*Van Zyl Smit 1992:41*).

In the latter part of 1990 the Prison Service was separated from the Department of justice and renamed the Department of Correctional Services. The new Department was now responsible for the supervision of offenders in the community as well as operating the prison system. An important milestone in this period was the introduction of the concept of dealing with certain categories of offenders within the community rather than inside prison, a system known as non-custodial 'correctional supervision'. The introduction of correctional supervision allowed for the possibility of a reduction in the prison population and also acknowledged the limited usefulness of custodial sentences.

During 1990 the Minister of Justice and of Correctional Services and senior officers of the Departments of Justice and Correctional Services went overseas in order to investigate, amongst others, ways in which correctional supervision is dealt with and addressed in other Western countries. It was found that the search for another form of punishment has taken place worldwide and that it has led to an international move towards community-based sentences (*White Paper 1991:22*).

Thus, correctional supervision was introduced as a more cost-effective way of implementing corrections. It was introduced as a response to the gross overcrowding of the South African prisons. This would have the supposed effect of minimising the increasing prison population.

In 1991, the Correctional Services and Supervision Matters Amendment Act No 122 of 1991 undertook a far-reaching revision of the Prisons Act No 8 of 1959. The changes of categorization were confirmed, the title of the Commissioner of Correctional Services and the Correctional Services Act of 1959 respectively. Legislative changes were introduced. In October 1989 the government decided that all state departments should be managed according to business principles. These gave effect to the newly announced policy of running the prison system on business principles by removing many of the restrictions on the use of prison labour (*Van Zyl Smit 1992:42*). *The White Paper (1991:9)* states that this strategy focuses on, the development and implementation of a management model based on business principles and makes provision for the division of the Department of Correctional Supervision

into strategic management units with the accompanying of responsibilities to the lowest possible levels of management together with an appropriate procedure and control framework.

Despite the changes, the growing prison population was becoming a serious problem. The release policy and the automatic system of remission were revisited and a system of credits, which prisoners could earn for appropriate behaviour, was introduced. At the same time, in the face of rising challenges to the racial barriers on promotion of black members into the officer ranks in the Department, the Prisons Act No 8 of 1959 was amended to make it illegal for warders to become union members without the permission of the Commissioner, and made it an offence to strike (*Department of Correctional Services Draft Green Paper 2003*).

On 27 April 1990 the Minister of Justice and Prisons announced that the creation of alternative community-based sentence options should be researched and developed. On 25 October 1990 the mission statement of the prisons service was formulated to: promote community order and security by the control over, detention and dealing with prisoners and persons under correctional supervision in the most cost-effective and least restrictive manner (*Neser 1993:73-74*).

In 1990, apartheid in the prison system was formally abolished, with the repeal of the section requiring black and white prisoners to be housed separately. The Prison Service was separated from the Department of Justice and renamed the Department of Correctional Services and on the 21

September it was re-instituted as a fully-fledged state department. The Prisons Act No8 of 1959 and the Criminal Procedure Act No 51 of 1977 were amended during 1991 to provide for the imposition and execution of correctional supervision. The Prisons Act was renamed the Correctional Services Act No 8 1959 in 1991. The Department of Correctional Services activities were adapted as follows (*Neser 1993:74-75*):

- Every prisoner who is legally detained in a prison, is kept there in safe custody until he is legally released or removed therefrom;
- Convicted prisoners and probationers should receive treatment so that they can rehabilitate and can internalise habits of diligence and labour;
- Correctional supervision is applied to probationers;
- Prisoners must be self-sufficient as far as possible by the optimal application of production resources based on business principles;
- All work necessary for, emanating from or in connection with the effective management of the department must be performed;
- Any other duties that the Minister of Correctional Services gives to the department from time to time must be performed.

In 1991 a Probation Services Bill was prepared wherein provision was made for correctional supervision as a sentencing option. Furthermore in 1991 there was a mass release of approximately 57 000 prisoners. *Giffard in (ISS Correcting Corrections Monograph No.29 1998:2)*, highlights that approximately 94 000 sentenced prisoners were granted 'special remissions' between 1 April 1990 and 30 June 1994. These 'goodwill' or 'bursting' remissions were granted in December 1990, April 1991, July 1991 and January 1994. Although general amnesties had been granted in the past, the scale of these releases caused public concern. The overriding impression was that the authorities, who, in a White Paper released in May, had expressed concern about the high rate of incarceration in South Africa and the inability of the State to provide adequate accommodation for increased numbers of prisoners, had decided to reduce the prison population drastically before the new legislation took effect (*Van Zyl Smit 1992:42*).

In addition the Department's release policy was changed to its present format. In striving towards greater efficiency and a more effective service to the community, the Department of Correctional Services did a critical analysis in respect of its mission and mandate in relation to results achieved. At the same time it made a study of the penological systems, which are applied in various countries abroad. In conjunction with this and in reaction to the Government's call for a more cost-effective Public Service a comprehensive study was undertaken into the increasing prison population and accompanying escalating detention costs (*White Paper 1991:5*).

The introduction by the government in 1993 of the Public Service Labour Relations Act brought about further transformation. This Act was introduced as a result of continuous pressure on the Government to grant public service employees protection from unfair labour practices. The scope of the Act was made applicable to the Department of Correctional Services in 1994. This was an important development as it allowed employees of the Department to belong to trade unions, to engage in collective bargaining with the Department as employer and to declare and refer disputes to Conciliation Boards and to the Industrial Court for adjudication and settlement (*Department of Correctional Services Draft Green Paper 2003*).

Although the release of large numbers of prisoners to relieve the overcrowding in the prison system was welcomed in opposition circles, the release of security and other prisoners proved controversial amongst white South Africans. Moreover, when combined with the publicity about release of political prisoners, it provoked an outburst of discontent in the prisons themselves amongst prisoners left out of the process. In 1991, hundreds of prisoners went on hunger strike demanding political status and early release; various prisons were hit by severe rioting. Hunger strikes by prisoners claiming political status continued, although they reduced in frequency and determination after the last large group of security prisoners were released by the Government in late 1992 (*Human Rights Watch 1994:2*).

Despite the release of these prisoners having brought about the restoration of some humanity and relief to the overcrowded prisons, the total prison population still remained unacceptable.

2.6.7 Transformation of Correctional Services in Democratic South Africa

In 1993 the Interim Constitution and the post- election Constitution introduced in 1996, embodied the fundamental rights of the country's citizens, including those of prisoners. The result of this was the introduction of a human rights culture into the correctional system in South Africa, and the strategic direction of the Department was to ensure that incarceration entailed safe and secure custody in humane conditions (*Department of Correctional Services Draft Green Paper 2003*).

The democratic elections of April 1994 brought with them the ANC's commitment to transform South African society at all levels. The Reconstruction and Development Programme (RDP), introduced in 1994, was the policy on which such a transformation would be based. Apart from the fact that the document highlighted the need for the implementation of non-racial and non-sexist principles, it also focused on human rights, the rehabilitation of offenders, as well as the effective implementation of demilitarisation (*ISS Correcting Corrections Monograph No 29 1998:29*).

Section 35 of the Constitution specifically provides for the rights of detained, arrested and accused persons to the extent that they have the right to (*Annual Report 1999:xi*):

- Be informed promptly of the reason for detention;
- Be detained under conditions that are congruent with human dignity;
- Consult with legal practitioner;
- Communicate with and be visited by a spouse or partner, next of kin, religious counsellor and medical practitioner of the prisoner's own choice; and
- Challenge the unlawfulness of his or her detention before a court of law.

The dawn of the Government of National Unity in 1994 meant that the Department of Correctional Services could look forward to a future where it will never again be misused to further policies that are in conflict with the standards of the international community.

In October 1994, the Department released the White Paper on the Policy of the Department of Correctional Services in the New South Africa. Its aim was to “stimulate debate on correctional matters and redefines priorities that will eventually lead to where we should be, coming to grips with a correctional model for the new South Africa.” On 21 October 1994, a White Paper on the Policy of the Department of Correctional Services recognised the fact that the

legislative framework of the Department should provide the foundation for a correctional system appropriate to a constitutional state, based on the principles of freedom and equality (*Department of Correctional Services Draft Green Paper: 2003*). The transformation of the Department in the first five years of the new democracy entailed:

- Significant changes in the representativity of the DSC personnel and management;
- The demilitarisation of the correctional system in order to enhance the department's rehabilitation responsibilities on 1 April 1996;
- Progressive efforts to align itself with correctional practices and processes that have proved to be effective in the international correctional arena;
- The introduction of independent mechanisms to scrutinize and investigate its DCS activities, such as the appointment of an Inspecting Judge.

The White Paper failed to address the central problems of the correctional system of South Africa. The White Paper fell woefully short of mark, "merely [attempting] to couch departmental policy in new rhetoric" (*ISS Correcting Corrections monograph No 29 1998:2*). On the 16 February an Alternate White Paper on Correctional Supervision was written by the Penal Reform Lobby Group, (PRLG-1995), setting out reforms to be considered for future legislation.

In addition to ensuring the protection of human dignity, liberty and equality of all people, and the general protection against cruel, inhuman and degrading treatment or punishment, the Constitution provides specific protection for detained, accused and arrested persons. Section 35(2), for example, deals with the rights of detained and arrested persons, including the right to 'conditions of detention that are consistent with human dignity; including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment' (*Disse/ 2002:1*).

In 1995 the death penalty was repealed. On 1 April 1996 the correctional system was demilitarised, a step that was necessary for the department to be able to carry out its responsibilities with regard to the development and rehabilitation of offenders. The National Crime Prevention Strategy (NCPS) approved by Cabinet in 1996 adopted an Integrated Justice System (IJS) approach that aimed through Pillar 1 of the NCPS at making "the criminal justice system more efficient and effective. It must provide a sure and clear deterrent for criminals and reduce the risks of re-offending" (*Department of Correctional Services Draft Green Paper 2003*).

In 1996 the Constitution was passed and this provided the overall framework for governance in a democratic South Africa. It enshrined the Bill of Rights, and all Government Departments had to align their core business with the Constitution and their modus operandi with the framework of governance. The

New South African Constitution embodies fundamental rights of citizens, including prisoners (*Oliver and McQuoid Mason 1998:25*).

Transformation has occurred in various parts of the Department. The Transformation Forum on Correctional Services precipitated such changes. Focus areas were prioritised, including demilitarisation, prisoners' health, independent inspection, human resource management, and the establishment of a management team (*ISS Correcting Corrections monograph No 29 1998:2*).

The forum's aim to influence the transformation process was a failure. Some of the recommendations made were: the establishment of an independent prison's inspectorate, a lay visitors scheme and a change in management team. The forum ceased its operations in September 1996 because of withdrawal of the Department and conflict caused by political arguments.

The National Programme on Appropriate Community Sentencing indicated that available correctional resources must be used in a targeted way to deal more effectively with serious offenders. The imposition of prison sentences on minor offenders reduces the likelihood of re-integration into society and further burdened the criminal justice system. Increasing the availability of community sentencing options on conviction increases humane treatment of minor offenders and improves the effectiveness of corrections more widely by reducing the burden on the correctional services department. This will also reduce recidivism within the sector (*Department of Correctional Services Draft Green Paper 2003*).

The imposition of prison sentences on minor offenders contributes to the overcrowding of prisons. By the same token it also stigmatises the offender and prevents large-scale reformation among inmate population.

A milestone in the history of the Department was the promulgation of new legislation in the form of the Correctional Services Act, Act 111 of 1998. According to this legislation, there had to be a total departure from the 1959 Act and it embarked on a modern, internationally acceptable prison system, designed within the framework of the 1996 Constitution (*Annual Report 1999:xii*).

The most important features of this Act are:

- The entrenchment of fundamental rights of prisoners;
- Special emphasis on the rights of women and children;
- A new disciplinary system for prisoners;
- Various safeguards regarding the use of segregation and force;
- A framework for treatment, development and support services;
- A refined community-involved release policy;
- Extensive external monitoring mechanisms; and
- Provision for public and private sector partnerships in terms of the building and operating of prisons.

It recognises international principles on correctional matters and establishes certain mandatory minimum rights applicable for all prisoners that cannot be withheld for any disciplinary or other purpose (*Dissel 2002:1-2*).

The Correctional Services Act No. 111 of 1998 led to the establishment in 1998 of independent oversight of prisons through the Independent Judicial Inspectorate, which is headed by an inspecting judge. This office is mandated to inspect prisons and report on the treatment of prisoners and conditions in prisons. Mr Justice Fagan, the current inspecting judge, has prioritised the reduction of the population and instigated early releases in 2000 (*Dissel 2002:3*). The Judicial Inspectorate is also entrusted with the appointment of Independent Prison Visitors (IPVs) from the community. One, or more, IPV will be appointed for each prison. They will make regular visits, interview prisoners and deal with their complaints by reporting these to the head of the prison, and monitor how they are dealt with. The author will expand on the complaints of prisoners in chapter four of this thesis.

2.6.8 The Department of Correctional Services since 2000

The overpopulation of prisons continued to be a problem. During the period between 2000 and 2003 there has been continuous engagement with the Strategic Direction of the Department. Various role players have tried to interpret the purpose of the correctional system and decide on the policy direction, which was essential for successful delivery on rehabilitation and the prevention of recidivism (*Department of Correctional Services Draft Green Paper: 2003*).

On the 1 and 2 August 2000, the Department hosted a National Symposium on Correctional Services. The need to promote a collective social responsibility for the rehabilitation and re-integration of offenders into the community was recognised. The establishment of a 'Partnership Forum for Correctional Services' was also recommended. The National Symposium focused on the following objectives (*Department of Correctional Services Draft Green Paper 2003*):

- To develop a clearly articulated national strategy to attain the desired fundamental transformation of correctional services;
- To create a common understanding of the purpose of correctional system;
- To create a firm foundation for coherent and cohesive role-playing by all sectors of society;
- To achieve national consensus on the human development and rehabilitation of all prisoners and their integration into community as productive and law abiding citizens.

2.6.9 Strategies Employed to Reduce Overcrowding in Prisons

The escalation of the prison population persisted to be a problem and it was clear that the unacceptably high occupancy rate was going to continue to be a burden in the foreseeable future. Different strategies were employed to curb the problem of overpopulation but they did not have lasting long-term effects. During September 2000, 8 262 awaiting-trial prisoners who were accused of

less serious offences and had been granted bail of less than R1000-00. An additional 8 678 prisoners were placed into the system of community corrections earlier than usual through the advancement of the approved parole dates of certain categories of prisoners (*Department of Correctional Services Annual Report 2000-2001:7*).

The Department commissioned the new Qalakabusha Prison at Empangeni on the 4 November 2000 in order to expand the accommodation capacity but although existing prisons are overcrowded, new ones are extremely expensive to build.

On 22 and 23 January 2001, the Department committed itself to step up its campaign to put rehabilitation at the centre of all its activities, by identifying the enhancement of rehabilitation services as a key departmental objective for the Medium Term Expenditure Framework (MTEF) period. This was due to the re-examination of the Department's strategic role in the fight against crime within the broader context of the criminal justice system and in terms of the priority programmes presented by the Justice, Crime Prevention and Security Cluster to the Cabinet Lekgotla (*Department of Correctional Services Draft Green Paper 2003*).

The Department identified the enhancement of rehabilitation services as a key starting point in contributing towards a crime free society. The following strategies were developed for the implementation of the enhancement of rehabilitation (*Department of Correctional Services Draft Green Paper 2003*):

- The development of individualised need-based rehabilitation programmes;
- Marketing rehabilitation services to increase offender participation;
- Establishment of formal partnerships with the community to strengthen the rehabilitation programmes and to create a common understanding;
- Promotion of a restorative approach to justice to create a platform for dialogue for victim offender and community facilitating the healing process;
- Combat illiteracy in prison by providing ABET to offenders;
- Increase production to enhance self- sufficiency and to contribute to the Integrated Sustainable Rural Development Strategy;
- Increase training facilities for the development of skills.

In the year 2001, amendments were made to the Correctional Services Act 111 of 1998. The Correctional Services Amendment Act 32 of 2001 was instituted to fully implement the principal Act as well as be more compliant with the provisions of the Constitution. Central to the Amendment Act was:

- The treatment of prisoners;
- Accommodation of disabled offenders and gender considerations;
- Disciplinary procedures for prisoners;
- New parole systems;

- Treatment of child offenders; and
- Use of firearms and other non-lethal incapacitating devices.

The Mvelaphanda Strategic Plan for 2002-2005, adopted by the Department in October 2001, put rehabilitation at the centre of all DCS activities. The Department continues to refine the Strategic Plan by further developments of concepts and components of the strategy (*Department of Correctional Services Draft Green Paper 2003*).

In South Africa, in addition to the various strategies undertaken to manage the challenge of 'overcrowding', which is an occurrence throughout the world, prototype designs for the construction of cost-effective new generation prisons were instituted. The so-called 'new generation prisons' would offer the Department the facility to effectively carry out the rehabilitation mandate within the principles of Unit Management.

Unit management was identified as the missing component in the transformation of the South African prison system. This is an approach that makes provision for:

- The division of the prison into smaller manageable units;
- Improved interaction between staff and prisoners;
- Improved and effective supervision;
- Increased participation in all programmes by prisoners;
- Enhanced teamwork and a holistic approach;
- Creation of mechanisms to address gangsterism.

It can be seen that this approach will not be a workable one while conditions of overcrowding persists.

Furthermore in 2001 the Department had a three-pronged Anti Corruption Strategy to tackle the problem of corruption and mismanagement within the Department' focusing on (*Department of Correctional Services Annual Report 2001-2002:11*):

- The investigation of allegations of corruption and mismanagement;
- Disciplinary sanctions against corruption and mismanagement; and
- The prevention of corruption by adopting a style of management that creates an environment that is not conducive to either corruption, non-compliance with policy or indiscipline.

Upon the request of the Minister of Correctional Services, the President appointed the Honourable Mr TSB Jali as the chairperson and sole member of a Commission of Inquiry into allegations of corruption and mismanagement in the Department. The Jali Commission was duly constituted in terms of Proclamation 135/2001 dated 27 September 2001 (*Department of Correctional Services Annual Report 2001-2002:14*).

On the 26 November 2001, the Minister of Correctional Services, Mr Ben Skosana launched the Restorative Justice Approach to bring together the offender, the victim, families and the community into the mediation process for purposes of repairing the harm created by the crime. The aim for this was also to create an environment of reparation and forgiveness, thereby bringing along healing in the community and effective reintegration of the offender upon release.

In 2002, the Department recognised the incompleteness in the transformation of the Department, which resulted in a lack of coherence of paradigm, and the lack of a common understanding of the meaning of rehabilitation across the entire Department. A concept document called “Conceptualising Rehabilitation” was developed for internal discussion in all components of the Department (*Department of Correctional Services Draft Green Paper 2003*).

Between 1 April 2001 and 31 March 2002, the Parole Boards considered 59 179 cases for conditional/unconditional release. The Department’s Asset Procurement, Maintenance and Operating Partnerships Programme, resulted in the commissioning of two public-private partnership prisons during 2001-2002 (*Department of Correctional Services Annual Report 2001-2002:13*).

The Department of Public Service and Administration began the implementation on a Public Service Central Bargaining Chamber Resolution, No 7 of 2002, which facilitated the overall transformation and restructuring of all government departments within specific time frames. At the beginning of

2003, all of these have consolidated into an understanding of corrections not merely as the prevention of crime, but as a holistic phenomenon incorporating and encouraging social responsibility, social justice, active participation in democratic activities and contribution in making South Africa a better place to live in (*DCS Draft Green Paper 2003*). Government recognised the family as the basic unit of society and as the primary level at which correction takes place; the community, including schools, churches and other organisations as the secondary level at which correction takes place and recognises the state as the driver and overall facilitator of correction and the Department of Correctional Services as the state's agency for rendering the final level of correction.

Thus a combined strategy is required in order to address the issue of overcrowding in correctional facilities, to resolve the crosscutting responsibilities in respect of overcrowding and to monitor the criminal justice processes in this regard. The Departmental approach to resolution of overcrowding has tended to move away from a reactive crisis management approach, such as bursting strategies that often contradict the essence of rehabilitation for release and re-integration, to concentration on crime reduction and expansion strategies, such as improved efficiency of the criminal justice processes, strategies to get those who are incarcerated by default through poverty and lack of legal access out of DCS facilities, and a capital works programme to build appropriate and cost effective facilities (*DCS Draft Green Paper 2003*). The following are some of the initiatives adopted within the Cluster to reduce overcrowding:

- The awaiting trial prisoner project, which is meant to reduce the detention cycle of time of awaiting trial prisoners in an integrated manner;
- The Department's involvement in the Saturday courts project, which was introduced in ninety-nine courts countrywide as one of the major factors that can reduce the number of Unsented detainees;
- The establishment of a departmental task team to liase with a task team working on overcrowding within the security cluster at implementation level;
- The utilisation of sections 62(f) and 63(a) of the Criminal Procedure Act by the Heads of Prisons in court applications which resulted in the release of prisoners; and
- The use of the amendment of Section 81 of the Correctional Services Act to allow the release, under specific conditions, of awaiting trial prisoners who have been allowed bail but could not afford to pay due to the prisoner's personal social conditions.

Despite the implementation of all these initiatives the overcrowding in prisons remains one of the most crucial challenges facing the Department of Correctional Services today. Although in theory the above stated initiatives should be implemented, in reality various practical hurdles exist.

To further try and reduce overpopulation the Department adopted a new approach to a cost effective expansion strategy by building low cost “New Generation” prison facilities for medium and low risk prisoner categories, who are the majority of the country’s prison population. Inspecting judge of prisons, *Judge Hannes Fagan (The Mercury July 2003:6)* stated that reducing the 190 000 prison inmates by 70 000 was the answer to prison overcrowding-not building new prisons. Correctional Services Minister Ben Skosana said four new prisons; each housing 3000 inmates would be built. Judge Fagan pointed out that what was needed was not more prison but to get the number of prisoners down.

The author will elaborate on the above-mentioned facts in chapters four and five of this thesis. Some aspects of the prison system are unlikely to change in the short-term because South Africa has an extremely high rate of violent crime. Well over 20 000 people are murdered every year, roughly fifty for every 100 000 of the population (the figure for the United States is 17.2 per 100 000). Statistics for rape and other violent offences are at similar levels. These are unlikely to change until the economic and social crisis in the townships can be addressed-something that will take many years. In the meantime, there is little alternative to incarceration for violent offenders. The prisoner-to-population ratio will remain high and overcrowding will remain the norm for most prisons (*Human Rights Watch 1994:3*).

The author is of the opinion that there has to be a reduction in the prison population, and the target for this reduction should be the reduction of the inflow of the number of petty offenders and the number of awaiting-trial

prisoners through the criminal justice system. Alternatives to incarceration should be explored and implemented extensively.

2.7 RESUMÉ

Dutch colonists introduced prisons in South Africa, but it was after the British occupation that the penal policy, including incarceration, began to take shape. Historically in South Africa, as in England, the duty of the prison administration to reform criminals was interpreted in order to accommodate the economic needs of the age (*ISS Correcting Corrections Monograph No 64 Sept 2001:1*).

Imprisonment began in the eighteenth century by the Pennsylvania Quakers as a humane way to treat lawbreakers. Instead of being subjected to public humiliation, being mutilated or flogged, offenders were given the Bible to read and placed in solitary confinement to do penance. Over the decades, despite the changes and improvements in the prison systems of most countries, imprisonment has still remained an instrument of retaliatory punishment rather than an instrument of rehabilitation. History has indicated that prisons that are focused on punishment to the exclusion of everything else fail miserably in their attempts to reform and rehabilitate offenders. The same applies to prisons where discipline and control are absent (*Cilliers 1998:31*).

The pre-election period in 1994 was characterised by simmering prison disturbances. While the political context has changed dramatically, continued

overcrowding, poor relations between wardens and prisoners and the availability of few alternatives to imprisonment, means that there is a possibility that prisons can once again be characterised by unrest.

Despite formal demilitarisation, the military culture is still evident in the Department. Prison officials do their work behind closed doors both literally and figuratively. Although the recent process of transformation enforces equality, transparency and democracy, it will take many years to dissipate such a deeply entrenched culture (*ISS Correcting Corrections Monograph No 29 1998:15*).

Political changes require adjustments in the present Public Service as well as in that of the future. Actions such as privatisation, commercialisation, corporatization, deregulation and greater management autonomy have also created new challenges. Managing the department according to business principles accorded a special contribution to cost-effectiveness. Another important aspect, which was demonstrated, was the department's ability to accept the various challenges with confidence.

Dealing with change will be an essential aspect of the new South Africa and of the Public Service of today and the future. Many of the historical features of the South African prison system will continue to exercise an influence on the development of prison law in South Africa for many years to come (*Van Zyl Smit 1992:43*).

Thus there are various factors that contribute to the crisis in South African prisons. The problem of overcrowding stems from the criminal justice system as a whole. To transform prisons involves all of society-not just the Correctional services. The prison system that is in place in the twentieth century is in line with modern correctional practice and it is acceptable to the international community. This does not mean that the Department of Correctional Services does not face any difficulties (*DCS Annual Report 1999*). The challenge facing it is to ensure that the new legislation and principles that have been established are upheld and enforced.

These often-contradictory historical fluctuations make it difficult to forecast just where corrections will be tomorrow, as society again re-evaluates its priorities. In the meantime, the challenge is to adapt to more punitive sanctions without abandoning more positive solutions (*Stinchcomb and Fox 1999:120*).

Thus overcrowding remains one of the greatest challenges to continue to confront corrections. It will be seen in successive chapters of this thesis that it impacts negatively on all aspects of corrections, on staff morale, on the health of offenders, on the effective safe custody and on the ability of the Department to allocate resources effectively for the rehabilitation of offenders.

CHAPTER THREE

OVERCROWDING IN PRISONS

3.1 INTRODUCTION

The level of prison overpopulation compared to the available accommodation clearly indicates that South African prisons are seriously overpopulated. On 31 March 2002, the Department had cell accommodation for 109 106 prisoners as opposed to a total prison population of 178 998 prisoners. This situation constituted an average national level of overcrowding of 64%. The prison population increased from 170 959 prisoners on 31 March 2001 to 178 998 prisoners on 31 March 2002 (*Department of Correctional Services Annual Report 2001-2002:67*). This represents an increase of 4,49%. Latest available prison statistics indicate that there are approximately 190 180 prisoners in custody. The prison capacity remains at 111 241, which means that there is an overpopulation of 78 939 or 71% (*Skosana 2003:2*).

In countries like the United States of America, Russia, Kazakstan and England, the criminal justice system is overstretched. Each of these countries has a total prison population of 1 933 503, 962 700, 84 000 and 67 056 respectively (*Ash 2002:70*). The United States of America incarcerates five to eight times more citizens per capita than any Western European nation (*Abramsky in Pollack 2004:1*). The police, courts and prisons simply cannot cope. As the numbers in prison increase, the case backlogs extend further; the police have less time to detect and investigate crime. This both impairs

the quality of justice and prejudices the ordinary person's access to justice. In turn this undermines public confidence in the rule of law.

The idealism and optimism that existed in the 1970's in America, was replaced with overcrowding and cynicism. Prisons have again become warehouses, albeit modern ones. Despite all the public concern about crime during the 1980s and the 1990s, very little attention has been directed to the inside of the prison, or to those who live there (*Pollock 2004:8*).

In South African prisons, although brutality is illegal, it is still widely prevalent (*South African Human Rights Commission 1998:74*). At some prisons, The Westville Medium B Prison, for example, basic education exists to a certain extent, and legal rights embodied in the Constitution give prisoners very little due process and protection against arbitrary actions of administrators.

Over the past two decades there has been a revolutionary realisation by countries like the United Kingdom, America and even South Africa, that the use of incarceration as a means of punishment is expensive and inadequate to effect positive change in most non-violent offenders. A national survey found that four out of five people favour community corrections programs over prison for non-dangerous offenders, leading to the conclusion by *Stinchcomb and Fox (1999:130)* that:

“Americans are beginning to reformulate their thinking that prison is the only way to punish convicted offender's. It is also

becoming increasingly clear that America cannot build its way out of the prison-crowding crisis. Intermediate sanctions are a viable option to imprisonment and are more cost-effective and beneficial to society in the long run.”

In South Africa, as well as internationally, there has also been an increase in the prison population over the past number of years, placing a strain on the Department’s available resources. This remains a real problem that handicaps the proper functioning of the Department in many respects. It is generally accepted that overpopulation has a negative impact on the humane detention of and service delivery to prisoners. In this chapter, the overcrowding in prisons and its effects on prisoners and related counterparts is examined in detail.

3.2 THE DIMENSIONS OF OVERCROWDING

What are the criteria for the measurement of overcrowding of prisons? It should be noted that Rule 10 of the United Nations Standard Minimum Rules for the Treatment of Prisoners states that “all accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard be paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation” (*Discussion Guide 3 1999:1*). Prison crowding can be measured along a number of dimensions *Schmallegger (1997:452)*:

- Space available per inmate (such as square feet of floor space);
- How long inmates are confined in cells or housing units (versus time spent on recreation, etc.);
- Living arrangements (that is, single versus double bunking); and
- Type of housing (use of segregation facilities, tents, etc., in place of general housing).

Three forms of prison capacity in terms of which occupancy rates can be expressed have been distinguished (*Harding 1987:16-17*):

- **Estimated capacity:** This is the number of beds or prisoners authorised by correctional administrators to be assigned to a prison. This is regarded as an adjustable and flexible figure, which tends to be revised upwards.
- **Operational capacity:** This is the number of prisoners that can be accommodated consistent with the maintenance of programmes, institution's staff, and services.
- **Design capacity:** This forms part of the architectural planning of an institution. In South Africa, a prison's maximum occupancy rate is expressed in terms of a certified (calculated) detention capacity.

Thus prison over-population results when the number of prisoners in a particular prison can no longer be coped within the infrastructure. Estimated capacity usually yields the largest inmate capacities, while design capacity

typically shows the highest amount of overcrowding (*Schmallegger 1997:452*). The following question arises: is there a level that can be identified as a tolerable overcrowding situation both for prisoners and officers? Although experts agree that prison overcrowding can be measured along the above-mentioned dimensions, the author is of the opinion that any extra prisoner over and above the endorsed capacity should be regarded as an intolerable situation for prisoners and staff.

3.3 CONCERNS ABOUT OVERCROWDING

Even the best-intended and most sophisticated programs cannot accomplish their objectives in institutions that are severely crowded. In South Africa, interests in international comparisons on the use of incarceration have increased in recent years. Internationally, in countries for example, America, England and South Africa, high prison populations invariably lead to overcrowding. The state of prisons in South Africa has been an issue of great concern for the criminal justice system, especially the correctional component, the Department of Correctional Services. The most crucial challenges facing Correctional Services today revolve around the serious overcrowding of prisons and the extent to which this state of affairs effectively negates the rehabilitation of offenders. *Skosana (2002:1)* states that for a while now there has been talk about overcrowding and attempts have been made within the framework of the Justice, Crime Prevention and Security Cluster, to initiate a range of approaches aimed at ameliorating this problem. While these have certainly started to make a difference, the reality is that prisons are still 63%

overcrowded. It is not possible to manage these prisons in such circumstances thereby rendering the idea of rehabilitating those inside them a pipe dream.

In Europe, prison chaplains from thirty countries have expressed alarm at the continuing growth in prison populations in many European countries. They expressed concern about the large numbers of foreigners in Europe's prisons. "We are concerned about the disproportionate numbers of minority communities who are imprisoned," stated (*Havinga 2001:1*). With the imprisonment of foreign prisoners, there is growing concern on the difficulties that can be posed for prison management when prisons become places of detention for offenders who have breached immigration regulations.

In 2000, about 72 000 prisoners were kept in South African prisons without the necessary infrastructure such as toilets, beds, showers and other basic amenities being available to them. This situation was worsened by the uneven distribution of prisoners resulting from the need to separate different genders and categories. While a few prisons were under-occupied, many were over 200% full with one topping almost 400% (Mount Frere Prison), (*Judge Fagan: Judicial Inspectorate of Prisons 2002*).

Overcrowding exacerbates the intrinsic design problems of prison cells, with the number of inmates in most prisons approaching, if not exceeding, double their intended capacity. Prison overcrowding, in South Africa and many developing countries is a crucial and pressing problem, which is not only a

manifestation of the increasing numbers of prisoners or lack of space. It is a problem of gross inadequacy of basic facilities such as sanitation, water for bathing and washing, medical and recreational facilities. In these crowded institutions, overcrowding becomes more a crisis rather than a simple problem.

New bail and sentencing laws that strengthen the hand of the government in the fight against crime include the following (*Oppler 1998:3*):

- Tougher criteria for the granting of bail to criminals: It will be extremely difficult for a person accused of serious crimes to be let out on bail; only if the accused can prove exceptional circumstances, will bail be granted;
- Heavy minimum sentences which cannot be suspended; and
- Qualifying for parole after a longer proportion of the sentence: The new parole system provides that all prisoners must serve at least fifty percent of their sentence, and that the court can increase this to 67%. Prisoners serving life sentences must serve at least 25 years before they can apply to the court for parole.

Although these laws send a clear message to those who commit serious violent crimes, it seems that the last stage of the criminal justice system has not been considered. Tougher conditions of bail, minimum sentencing and a tougher parole system will undoubtedly increase the number of inmates going

to and staying in prison. With the severe problem of overcrowding, it is uncertain where all these criminals are going to be housed. In particular, the harsher bail law will further increase the number of people awaiting trial in prison, adding to the enormous number of people already being 'warehoused' by the department (*Oppler 1998:3*).

An accepted justification by justice systems for overcrowding of prisons in developing countries, such as Ruanda and South Africa, is the increasing crime rate. Delays or long periods in the law taken for the disposal of cases, exorbitant or inadequate use of bail and the opinion of the public regarding punishment and imprisonment, are a few of the prevalent reasons for overcrowding (these will be discussed further in this chapter).

3.3.1 Public Opinion Regarding Imprisonment

To a certain extent cognisance must be taken of the fact that the imposition of punishment must keep abreast with the views of the community. It is not so important to the community that harsh penalties are imposed, but *rather* that the punishment is effective and that justice prevails. Punishment must also be fair to the offender as well as being in the interests of the community.

In response to public calls for increased punishment, a minimum sentencing for serious offences was introduced in 1997. In general, the length of prison sentences is increasing, with more prisoners now receiving sentences upwards of two years (*Muntingh in Dissel 2002:3*). Many accused cannot afford even

small bail amounts for less serious offences and thus spend long periods in prison awaiting trial. The author is of the opinion that although the reason postulated by Lucas Muntingh is a contributing factor in the crowding of prisons, another important fact is that due to the recent development in police efforts on crime prevention and operational effectiveness, with no relative increase in the judiciary or prison facilities, the overcrowding of the penal institutions locally has been realised. Furthermore concern about overcrowding was expressed by *Justice Chaskalson in Bakken (2003:2)* when he questioned the imposition of lifelong sentences on those found guilty of serious crime, noting that a high proportion of those in the country's prisons were below the age of 25 years. He also noted that the imprisonment of people for long periods had a major impact on the prison population and subsequently more money is needed for the construction of new prisons.

A former Secretary of Justice, *Oberholzer in Avery (1987:150)* indicated that although punishment cannot be customized to satisfy the public, the courts should nevertheless be conscious of public sentiment. It is further stated that it cannot be gain if a citizen who has suffered innocently at the hands of a transgressor looks to the court for redress and if the offender is not adequately punished such a person goes away with a feeling of injustice having been done to him. It is not only the particular individual that looks to the court for redress but the whole community affected or likely to be affected by the type of transgression. It follows then that if the cooperation of the public towards law and order is to be retained the courts must act in such a way that those who require to be protected are in fact protected and feel a

sense of security while those who are punished should also have no cause for complaint, that is, the treatment meted out to them was unduly harsh. The courts must, therefore, as it were, always have their fingers on the pulse of the crime circumstances and the public feelings about it.

Court backlogs and crackdowns on crime are not exclusively responsible for the continuing rise in the prison population. The implementation of harsher sentencing and the increasing inclination of politicians to espouse 'tough on crime' rhetoric should be considered cause for alarm (*ISS Correcting Corrections Monograph No 64: 2001*). Part of the rise in prison population is attributed by many experts to an increasing belief in a number of countries that prison is preferable to the alternatives (*Walmsley 2001:3*).

An increased fear of crime, a loss of confidence in the criminal justice system, disillusionment with positive treatment measures, the strength of retributionist philosophies of punishment, all lie behind this belief. Loss of confidence in the system may lead to more draconian legislation being passed, and more severe, harsher sentences may be used as emergency remedies to keep society integrated. Retributionist philosophies can readily be translated into popular demands for longer, tougher sentences (*Khun in Walmsley, 2001:3*).

3.4 IMPRISONMENT AS A FORM OF PUNISHMENT

Imprisonment has been provided for by legislation as a form of punishment. The current provision therefore, is contained in Section 276 of the Criminal Procedure Act, No. 51 of 1977.

There are certain set of laws and regulations to which the prisoner is subjected. In terms of Section 94 of the above Act, the State President has wide powers to make regulations there under *inter alia* as to the general government and management of prisons, the preservation of good order and discipline therein, the acts or omissions which shall be deemed to be offences against discipline and the manner in which sentences of imprisonment are to be carried out. The purposes of imprisonment will be dealt with in detail in chapter five of this thesis.

For the offender, imprisonment entails loss of freedom of movement and confinement within an institution where his whole life is managed and governed. Confinement in an institution removed from the social order entails furthermore the loss of goods and services, the loss of heterosexual relationships and the loss of all autonomy.

3.4.1 Advantages of Imprisonment

According to *Terblanche (1999:244)*, imprisonment has only two real advantages:

- It removes the offender from society, with the result that society is then protected from that offender for the duration of incarceration; and
- It provides the sentencing court with an appropriately severe punishment to impose on an offender deserving of severe

punishment. It is particularly traumatic for well-educated people.

The author agrees with the fact that by imposing a sentence of imprisonment the offender is removed from society and that society is protected to a certain extent. The question arises to the fact that besides offenders who have committed serious crimes are incarcerated; a substantial number of petty offenders are also incarcerated. All categories of prisoners are housed together due to lack of space. Secure inhumane containment is not enough if prisons are seen only as a cloakroom in which the enemy of society is deposited for a fixed period of time. Therefore imprisonment has more disadvantages, especially, the imprisonment of offenders in inhumane conditions of overcrowding.

3.4.2 Disadvantages of Imprisonment

“Prisons, even the most reformed ones, produce damage and disease, in varied forms and intensity, they produce damaged and ill people” (*Ruggiro in Oppler 1998:5*). This suggests that harm is inevitable and too extreme for an imprisoned individual. Although many may argue that it is what offenders deserve, the risk of psychological and physical harm to an inmate must be acknowledged, knowing that such ‘damaged’ individuals will return to society (*Oppler 1998:5*).

Furthermore, prisoners are eventually released when they have served their sentence, or occasionally when there is an amnesty. This turnover and continual movement in and out of prison makes it even more important to control any contagious disease within the prison so that it does not spread into the community. The statement by British prison commissioner Paterson that 'prisoners are sent to prison *AS* punishment, and not *FOR* punishment, implies that a loss of an individual's right to liberty is enforced by containment in a closed environment (*Reyes 2001:1*).

By the same token *Terblanche (1999:244)*, postulates that imprisonment has many potential disadvantages. The following are considered to be some of the disadvantages:

- Financial costs;
- Most prisoners in South Africa spend a considerable number of hours per day in the cell, doing nothing. Due to a lack of funds there is a shortage of the resources which are required for the treatment and training of prisoners, and only a small percentage can be taught manual labour skills, or have access to books to read or from which to study;
- Most prisoners are kept in communal cells, which hold up to 40 prisoners in one cell. This situation also leads to an almost total loss of privacy;
- Prisoners are removed from the 'normal' society and placed into an abnormal society, which operates along different

rules and principles to those which exist outside the prison walls... In this process they become *institutionalised*, which means that they lose the ability to cope in a normal society, where they have to make their own decisions; and

- Prisoners are also removed from the positive influences and love that are experienced within the family environment.

In keeping with the view of *Terblanche*, the effects of overcrowding are felt not only in the area of space required for prisoners, but also in various other sectors, for example, discipline, control, hygiene and the implementation of effective treatment programmes. Adaptation to imprisonment is difficult for virtually everyone. It can create habits of thinking and acting that are extremely dysfunctional in periods of post-prison adjustment. At the very least, prison is painful, and this compounded by overcrowded facilities exacerbates the long-term consequences of having been subjected to this pain (*Haney [n.d] 9*). Furthermore, the term 'institutionalisation' is used to describe the process by which inmates are shaped and transformed by the institutional environments in which they live. Sometimes referred to as '*prisonization*' when it occurs in correctional settings, it is the shorthand expression for the broad negative psychological effects of imprisonment (*Haney [n.d]:10*). These factors and the problems of imprisonment and overcrowding will be dealt with in detail in chapter four of this thesis.

In reality, prisons are far from comfortable institutions. South Africa's prisons hold a daily average of about 190 180 prisoners (despite early release) in

space designed for about 111 241 (*Department of Correctional Services April 2003*). Most prisoners live in large overcrowded communal cells often controlled by prison gangs. Rape and other forms of violence and coercion are rife. Many prisoners spend 23 idle hours a day in these cells, and some the entire day. Very few prisoners have the opportunity to work, and to learn skills. Only the privileged receive assistance from social workers or psychologists. No formal programme exists to 'rehabilitate' the prison population (*Giffard and Dissel 1996:1*).

3.5 JUSTIFICATION FOR PUNISHMENT

Violations of criminal law result in the imposition of punishment. The punishment of an offender is philosophically justified by the fact that the criminal *intended* the harm and is responsible for it. When punishment is imposed in a criminal case, however, it is for one basic reason: to express society's fundamental displeasure with the offensive behaviour (*Schmallegger 1997:123*).

There has to be a justification for the imposition of punishment, since it is something that is detrimental or unpleasant to the receiver. Imprisonment, for example, causes physical discomfort, psychological pain, indignity, general unhappiness, and an array of other disadvantages (such as impaired prospects for employment and social life). Thus, intentionally inflicting suffering on people is at least *prima facie* immoral, and needs some special moral justification (*Cavadino and Dignan 1992:32*). On the other hand in some

instances the receiver may not find the punishment painful, or even welcomes it, for example some offenders might discover that prison forms a safe haven against the unbearable pressures of the outside world.

Despite this, punishment is still something that is inflicted; it intrudes on the freedom of the person punished, which also requires a moral justification (*Cavadino and Dignan 1992:32*). The main justification for punishment is: Retribution, Incapacitation, Deterrence, Rehabilitation and Restoration.

3.5.1 Retribution

In its modern practice, retribution corresponds to the just deserts model of punishment. This philosophy holds that offenders are responsible for their crimes and when convicted and punished, they have received their 'just deserts'. Retribution sees punishment as deserved, justified-and even required-by the offender's behaviour. The primary sentencing tool of today's just deserts model is imprisonment (*Schmallegger 1997:360*.) According to *Jenkins (1984:144)* the idea of retribution is also known as revenge or retaliation. By the same token *Primortaz (1989:70)* postulates that retribution has two forms, revenge and punishment. The acceptance that there must be moral guilt (was there real intention?) and the concept of proportionality (punishment fitting the crime), often makes the degree of harm that needs to be paid for, appear to be the only morally acceptable basis for punishment (*Purposes of Punishment 2001:4*).

3.5.2 Incapacitation

Incapacitation seeks to protect innocent members of society from offenders who might harm them if they were not prevented in some way. It is the use of imprisonment or other means (for example, electronic monitoring) to reduce the likelihood that an offender will be capable of committing future crimes (*Schmallegger 1997:361*). Incapacitation is also called the 'lock 'em up approach' and forms the foundation for the movement toward prison 'warehousing' discussed in chapter two of this thesis. Furthermore, incapacitation is an object of punishment that has been known since early times. The idea is that offenders should be dealt with in a manner that will make it impossible for him to repeat his offence- execution or banishment in earlier times, in more modern times by lengthy periods of incarceration, resulting in overcrowding of penal institutions (*Encyclopaedia Britannica 1995:809*).

By the same token, *Reiman (1996:166)*, asserts that the criminal justice system protect the community members against the real dangers that threaten people and that it not be an accomplice to injustice in larger society. The justification of the incapacitation of an offender is to protect society.

It has been argued that if career criminals and offenders with high risk of repeating serious crime were identified and given longer specific terms of imprisonment, crime could be prevented without prison populations increasing drastically (*Visher 1995:526*).

3.5.3 Deterrence

Deterrence uses punishment as an example to convince people that criminal activity is not worthwhile. Its overall goal is crime prevention (*Schmalleger 1997:361*). *Glazer (1984:85)* contends that punishment prevents crime and it rehabilitates the offender. Fundamentally, with the element of deterrence the occurrence of crime is reduced due to people's fear or apprehension of punishment that they may sustain if they transgress.

Bedau in Schmalleger (1997:361) contends that, retribution is oriented towards the past; it seeks to redress wrongs already committed. Deterrence, in contrast, is a strategy for the future; it aims to prevent new crimes. By serving as an example of what might happen to others, punishment may have an inhibiting effect. By the same token, offenders are deterred from crime only through the awareness that unlawful behaviour will result in a period of isolation from society (*Bartollas and Conrad 1992:125*).

Deterrence can be divided into two categories, specific (individual) deterrence and general deterrence (*Cavadino and Digan 1992:33*).

3.5.3.1 Specific Deterrence

Specific deterrence seeks to reduce the likelihood of recidivism (repeat offences) by convicted offenders. Individual deterrence occurs when someone commits a crime, is punished for it, and finds the punishment so unpleasant or

frightening that the offence is never repeated for fear of more of the same or worse (*Cavadino and Dignan 1992:33; and Jenkins 1984:152*). The effectiveness of this type of deterrence can be measured, at least in theory, by examining the conduct of the offender after the administration of the punishment to determine whether he has committed the offence again (*Encyclopaedia Britannica 1995:808*).

By preventing an offender from engaging in repeat criminality, this may impact on the reduction of offenders incarcerated and thus the reduction of overcrowding.

3.5.3.2 General Deterrence

This is a goal of criminal sentencing which seeks to prevent others from committing crimes similar to the one for which a particular offender is being sentenced by setting an example of the person sentenced (*Schmallegger 1997:361*). In the same light *Murphy (1985:5)* indicates that even when punishments are not actually inflicted on individuals, the possibility that they might be inflicted may be sufficient to generate enough fear in those individuals to cause them to refrain from acting in ways they otherwise would have found desirable: a coercive curtailment of liberty.

Deterrence shares with retribution the idea that punishment should be related in severity to the gravity of the crime. The principle of proportionality is central to the idea of deterrence, on practical grounds. If all punishments are the

same, irrespective of the gravity of the crime, there may be no incentive to commit the lesser rather than the greater offence (*Encyclopaedia Britannica* 1995:809).

3.5.4 Rehabilitation

Rehabilitation seeks to bring about fundamental changes in offenders and their behaviour. As in the case of deterrence, the ultimate goal of rehabilitation is a reduction in the number of criminal offences. Whereas deterrence depends upon a 'fear of the law', and the consequences of violating it, rehabilitation generally works through education and psychological treatment to reduce the likelihood of future criminality (*Schmallegger* 1997:362).

The reaffirmation of rehabilitation and development of modern rehabilitation philosophy in the 1980s and early 1990s resulted from a reaction to Martinson finding and 'nothing works' (discussed in chapter two of this thesis), school of thought. According to *Reid* (1994:109-110), this coincided with aspects like prison overpopulation and a rising crime rate that resulted from conservative 'get tough' sentencing policy. By the same token *Lesieur and Welch* (1995:205) also hold the view that modern rehabilitation philosophy protects the offender against the harshness of the conservative punishment perspective (the neo-utilitarian punishment model).

The purpose of the correctional system in South Africa is not punishment, but the protection of the public, promotion of social responsibility and enhancing

human development in order to prevent recidivism. Sentences do provide a deterrent to repeat offending if justice is seen to be swift, effective, consistent, but the essence of deterrence is rehabilitation, buy-in that crime does not pay and that good citizenship is the duty of all. It is rehabilitation and not punishment that breaks the cycle of crime leading to a reduction of crime-hence a reduction in the prison population (*Department of Correctional Services Draft Green Paper 2003:2*).

3.5.5 Restoration

Victims of crime or their survivors are frequently traumatized by their experiences. Some victims may be killed, and others, receive lasting physical injuries. For many, the world is never the same. The victimized may live in constant fear, reduced personal vigour, and unable to form trusting relationships. Restoration is a sentencing goal that seeks to address this damage by making the victim and the community 'whole again' (*Schmallegger 1997:363*).

Although reparation is a penalty often given by the judge as part of a sentence, it is not necessarily considered punishment by either the court or the public. It requires the offender to make amends by paying back compensation to the victim or to society for the harm, resulting from the criminal offence (*Callison 1983:4-5*).

By the same token *Schmallegger (1997:363)* contends that the restoration philosophy and the payments and work programs that benefit the victim, can

also have the added benefit of rehabilitating the offender. The hope is that such sentences may teach offenders personal responsibility through structured financial obligations, job requirements and regularly scheduled payments.

3.6 THE CONSEQUENCES OF IMPRISONMENT

Overpopulation in prisons continues to be an ongoing problem and a serious threat to the recognition of basic rights of prisoners. The adverse psychological effects of imprisonment and also the social effects of imprisonment on persons, is an area of great concern for social scientists today.

There are certain inevitable consequences of the implementation of imprisonment as a form of punishment, for example, contamination, psychological effects, stigma and disgrace, etc (discussed further in this chapter). These consequences or side effects, which are dysfunctional and negative in character, are enhanced due to the overpopulation of prisons. Thus the consequences due to imprisonment and the resultant overcrowding, contribute to adverse conditions.

Overcrowding is the foremost problem facing the Department of Correctional Services. *Oppler (1998:5)* contends that at Pollsmoor Prison, the worst is the Admissions Centre, where prisoners awaiting trial are held:

“One enters a Dickensian world when walking into the complex; the passages are long and dark with a minimal amount of daylight. All areas are lit with artificial light. Several of the cells are in darkness as inmates who seem to prefer semi-darkness regularly destroy lights. Many of the single cells, designed for one inmate, measure 8 x 6 feet and are occupied by three inmates. Three bunk beds with a negligible amount of space between them hang on the walls. The communal cells, which are built for nine prisoners, are overflowing with fifteen. In Pretoria Central Prison, cells designed for between 28 and 30 inmates hold 50 and 55. Blankets are hung along the width of the walls to serve as additional dividers.”

By the same token *Krestev, J. et al ([S.a.]:2)* states that prisons aim to cure criminals of crime. However their record has not been encouraging. Instead prisons do more harm than good. The pains of prison confinement affect all prisoners in different ways. To begin with prisoners need to withstand the entry shock by adapting quickly to prison life. Prisoners are exposed to a new culture, which is very different from their own culture.

As stated above due to overcrowding prisoners spend their time under these horrific conditions that are a consequence of imprisonment and overcrowding. The plight of awaiting-trial prisoners is even worse. They are not afforded the ‘privileges’ of sentenced prisoners. Much of their time is spent playing *karum*,

a popular game, and smoking marijuana, which is readily available. Idleness leads to further problems: frustration, fights and attempts to escape. Some prisoners stay in such an environment for months, perhaps, even years waiting to appear in court, because of the overloaded system of justice (*Oppler 1998: 5*).

There are both primary consequences of imprisonment, which relate to the offender himself, for example exposure to contamination and secondary consequences that take in broader considerations such as cost and overcrowding. There are certain unavoidable consequences from its implementation, despite the various stated objectives of imprisonment as a form of punishment. A discussion on this will now follow.

3.6.1 Primary consequences of Imprisonment

The primary consequences are extremely detrimental because they impact the most in areas such as the prisoners' work and family. These consequences emanate from the negative nature of imprisonment and the removal of the offender from society, as indicated above.

According to *Stinchcomb and Fox (1999:229)* the rates of death, suicide, homicide, inmate assault, and disturbance increase as prison population density increases. The incidence of colds, infectious diseases, tuberculosis, sexually communicable diseases, psychological disturbances, and psychiatric crises is also related to overcrowding. The more overcrowded the institution,

the higher the incidence of medical problems. The author is of the opinion that this is the reality of the consequence faced by the overcrowding of penal institutions and the conditions of imprisonment faced by prisoners.

Schmallegger (1997:453) states that overcrowding is not necessarily dangerous if other prison services are adequate. Prison housing conditions may be 'restrictive and even harsh', for they are part of the penalty that offenders pay for their crimes. However, overcrowding combined with other negative conditions may lead to a finding against the prison system. While there are no more chain gangs, no more floggings, and no physical tortures, and although in general, material conditions have become more humane, the "pains of imprisonment", are still very acute (*Sykes 1971:68*).

Sykes further states that in the Western World, material possessions are a fundamental part of the individual's self-conception, and that, depriving an offender of these means to attack him 'at the deepest layers of personality'. A standard of living constructed in terms of so many calories per day, so many hours of recreation, so many cubic yards of space per individual, and so on, misses the central point when discussing the individual's feeling of deprivation.

By the same token *Krestev, J. et al ([S.a.]:1)* maintains that safe keeping of prisoners comprises of keeping inmates locked away, counted, and controlled whilst allowing for isolated moments of welfare activities to satisfy needs through recreation, education and counselling. Unfortunately, the welfare and

psychological freedom of the individual inmate does not depend on how much education, recreation, and counselling he receives but rather, on how he manages to live and relate with the other inmates who constitute his crucial and only meaningful world.

Neser (1993:398) indicates that research into the experience of imprisonment endeavours to describe what the individual experiences during imprisonment.

Two major principles exist:

- To understand the individual's behaviour within the environment and his experience of it; and
- In spite of the assumption that the individual's experience of his world is unique, it is accepted that the experience of different people in the same situation corresponds in certain respects.

Upon imprisonment, restrictions are placed on the offender. When he is released these restrictions fall away. The constant fear that upon release, he will have to live amongst people other than fellow-prisoners and warders is daunting. Therefore it is the task of the prison authorities to use specific programmes to let certain convictions take root in the prisoner. He has to be made to feel accepted, to show willingness to acknowledge his autonomy and security, to protect his intimacy and to activate his urge for self-fulfilment (*Neser 1993:411*).

The author is of the opinion that in theory this may be applicable, but in reality due to the overcrowding, these goals are extremely difficult to achieve. In South Africa in trying to implement the above stated philosophy one of the greatest obstacles the Department is facing, is the severe overcrowding in penal institutions. The prison community is utterly different from 'normal society'. All aspects of prison life are managed and governed by the same authority in the same physical environment.

3.6.1.1 The Prison Sub-Culture

When an offender enters the so-called 'total institution', he has to adjust to a social system where every aspect of human existence is confined to the same limited environment and subjected to restrictive rules and regulations imposed by a single official authority. The prisoner must primarily adjust to the formal (official) organisation and secondarily to the social conditions that exist in prison (*Cilliers and Cole 1997:142*). Furthermore, it is a unique social system and may be defined as a subculture with typical values and norms that differ from those of the mainstream culture. This subculture consists of customs, traditions, behaviour, codes and informal laws and rules that are unique to prison life. This influences the attitude and conduct of prisoners.

On the other hand *Schmallegger (1997:483)* contends that prisons today are overcrowded places where inmates can find no retreat from the constant demands of staff and the pressures brought by fellow prisoners. Prison

subcultures are basically an adaptation to deprivation and confinement. It is a way of addressing the psychological, social, physical and sexual needs of prisoners living within the context of a highly controlled and regimented institutional setting.

The prison subculture can be explained by using two models, the deprivation model and the importation model.

3.6.1.1.1 The Deprivation Model

The explanation of the deprivation model is that prison life has a unique display of functional and structural properties. Its social system and the circumstances in which prisoners make their adjustment combine to make imprisonment a painful and depriving experience ('pains of imprisonment'), compounded by such factors as the loss of security, autonomy, heterosexual relationships and freedom. The pains of imprisonment; the frustrations induced by the rigors of confinement; form the nexus of a deprivation model of prison culture (*Schmallegger 1997:483*).

It must also be acknowledged that offenders are drawn from a society in which possessions are closely linked with concepts of personal worth by various cultural definitions. However in prison, inmates find themselves reduced to a level of living near basic subsistence. Whatever physical discomforts this deprivation may entail, it has deeper psychological significance as to the prisoner's conception of his personal adequacy.

Neser (1993:399) maintains that when someone finds himself in prison, he is isolated to a large extent from reality and freedom of choice. He is therefore deprived of the meaning of life to a great extent. One of the most significant moments of imprisonment is the experience of this emptiness or meaninglessness, the prisoner has a more deeply seated need for security and peace of mind.

3.6.1.1.2 The Importation Model

In contrast to the deprivation model, the importation model of prison culture suggests that inmates bring with them values, roles and behavior patterns from the outside world. Such external values, second nature as they are to career offenders, depends substantially upon the criminal worldview. When offenders are confined, these external elements shape the inmates social world (*Schmallegger 1997:483*).

Therefore the importation model can be regarded as the way in which a considerable number of prisoners use their experiences of life (which they have brought in with them) to protect themselves and help them in adapting to the deprivation that is part of prison life. There are various consequences to custodial sentences, which will be discussed further in this chapter:

- Contamination and exposure to anti-social elements;
- Lack of treatment facilities for specific needs;
- Disruption of family life/family ties are broken or weakened;
- Damaged self image through stigma/disgrace;

- Loss of employment and economic burden;
- Loss of goods and services;
- Loss of heterosexual relationships;
- Loss of autonomy, especially responsibility;
- Reintegration problems; and
- The offender is isolated from the community.

3.6.1.2 Contamination

Over half a century ago Sykes (1958:63) wrote that 'life in the maximum-security prison is depriving or frustrating in the extreme; and very little has changed to adjust this perspective. Presently in South Africa there is even more being said on the above observation than when Sykes first introduced it, as will be discussed in this chapter. It is asserted by Haney ([n.d.]: 3) that the prolonged conditioning to the deprivations and frustrations of life inside prison, what are commonly referred to as the 'pains of imprisonment', carries with it certain psychological cost. Not only are there psychological costs but also physical repercussions due to worsening overcrowding.

According to the *The Viljoen Commission* (discussed in chapter two of this thesis), when prisons are overcrowded with short-term prisoners there is a danger of recidivism arising from their contact with and contamination by professional criminals and the prison environment (Avery 1987:92). One of the main consequences of imprisonment is that prisoners are housed in the

company of other criminals and are therefore exposed to further anti-social norms (such as drugs, sodomy and extreme violence).

In South Africa due to crowding and a lack of space, different categories of offenders are often housed together. Classification and segregation become impossible. Contamination of first offenders and non-violent prisoners from violent and hardened criminals cannot be avoided and this has adverse effects on inmates. Due to this, the offender may return to society more embittered and anti-social than before incarceration.

According to *Mti (2001-2002:1)* overcrowding in prisons contributes to the spread of communicable diseases such as TB, skin infections, sexually transmitted infections and other diseases. By the same token *Stinchomb and Fox (1999:494)* contends that those with Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome (hereinafter referred to as HIV/AIDS) infection are appearing more frequently within institutional populations. With the spread of HIV/AIDS throughout society, it is not surprising to find that this disease is on the increase among inmates, particularly those convicted of drug offenses who are likely to be sentenced to prison or jail terms. Drug abusers represent another component of correctional population that is growing at alarming rates (*Stinchomb and Fox 1999:494*).

Prisoners are incarcerated in inhumane conditions. In addition, the closed, often vastly overcrowded living conditions also lead to hostilities between inmates. The tedious prison environment, lack of occupation of mind and body

and just plain boredom, lead to accumulated frustrations and tensions. This environment leads the way to high-risk activities, such as the use of drugs, sexual activities between men, tattooing and other 'blood brotherhood' style activities. Some indulge in these activities to combat boredom. Others, however, are forced to engage in them, in a coercive play for power or monetary gain. Risky lifestyles can lead to the transmission of diseases from prisoner to prisoner, and pose a serious health risk due to contamination (Reyes 2001:2). Unprotected sexual acts with exchanges of potentially contaminated human secretions pose a real risk.

These are some of the contaminating aspects that inmates are exposed to. Further in-depth study on the effects of HIV/AIDS in prisons will be examined in chapter five of this thesis.

Prisons are often the scenes of brutality, violence and stress. Prisoners are faced with incidences of violence and are constantly concerned about their safety. A long-term prisoner named Jack Abbott stated that 'everyone is afraid' (Tosh 1982:86). He further states that it is not an emotional or psychological fear. It is a practical matter. If you don't threaten someone at the very least, someone will threaten you. Many times you have to 'prey' on someone, or you will be 'preyed' on yourself. Thus prisoners may resort to violence as a means of protection and survival.

Although this problem is to a large extent counteracted by techniques such as classification it is unavoidable. The offender learns to fit in with the

expectations of the prison environment, which are not always in keeping with those of a normal society. The overall effect of prison conditioning is to shape a personality that generally conforms to prison demands and expectations, which, on release, will be in conflict with law-abiding norms.

As far back as 1986, during the course of his speech reading of the *Criminal Procedure Amendment Bill*, 1986 in the House of Delegates, the Minister of Justice reiterated the necessity of avoiding contact between hardened criminals and young people (*Republic Delegates Debates*, Vol. 3, 1986; Column 609). This contact leads to the contamination of young people. In South Africa's prisons such contact cannot be avoided, thus leading to the effects discussed below, such as, disruption of family life, loss of employment, etc. According to *Krestev, J. et al* ([S.a.]:3) a number of case studies on the effects of prison life have indicated that imprisonment can be brutal, demeaning, and generally psychologically a devastating experience for many individuals. Psychological symptoms described in these studies, which are believed to be directly caused by imprisonment, include psychosis, severe depression, inhibiting anxiety, and complete social withdrawal. Another major stressor, which the prisoner is faced with in prison, is the fear of contagious and incurable diseases, such as, HIV/AIDS.

The damage caused by institutionalisation is generally in direct relation to the length of incarceration. Some stable personalities can endure institutionalisation for a long time, while others 'cave in' (*Fox 1985: 249*). Thus

some groups of people are more vulnerable to the pains of imprisonment than others.

Zamble and Proporino in (*Krestev, J. et al. ([S.a.]:4)*) studied the coping strategies of inmates in several Canadian penitentiaries and discovered that emotional disruption and adjustment were clearly problems for most inmates during the early stages of their sentence, resulting from the dramatic disruptions of their life caused by the many restrictions, deprivations and constraints inherent in prisons. By taking on identity, folkways, dogma, customs, and the general culture of the penitentiary, prisoners mould themselves into a state referred to as *prisonization*, which for the most part is a method of adaptation.

According to *Giffard in Nair (2002:2)* prisons are not closed systems. What happens to prisoners inside prison has a direct impact on the community. Sometimes, an individual entering prison to await trial for a minor offence might return to the community a 'hardened criminal' (more aggressive and prone to violence and crime), having been affected by the violence associated with gang rule in prison. South African prisons are a breeding ground for criminals because of the inhumane conditions and violence rife in prisons. Imprisonment even for a few days or a short period, poses a special problem because such prisoners associate with hardened criminals and there is a possibility that after serving a few days of imprisonment, they would emerge worse characters than when they went in. In South Africa the legislator has recognised that, especially in the case of youthful and first offenders, the

danger of contamination should be avoided as far as possible as it has an impact not only on the offender but also on the wider community.

The use of illegal drugs is rife and very easily available and prison gangs are powerful and influential. *Muntingh (2002:4)* states that overcrowding, violence, riots, gangs, rape, corruption, drugs and insufficient resources are characteristic of most prisons across the world and South Africa is no exception. The detrimental effects of the physical environment prisoners have to endure year after year cannot be underestimated. Conditions, especially overcrowding, are such that it is nearly impossible to create an environment conducive to preparing someone for life outside prison. Thus the dangers of contamination should be avoided as far as possible. The psychological effects of incarceration on the prisoner have a tremendous impact on the offender adjusting to the post-prison free world.

3.6.1.3 Psychological Effects of Imprisonment

Charles Dickens (1842) was one of the first to point out that humane intentions are no guarantee of humane results, and that prison causes psychological damage as severe as the old physical tortures (discussed in chapter two of this thesis). His words are as true of many present-day prisons as they were of the even more gruesome regime of silence and separation inflicted on prisoners in his time (*Pollock 2004:42*).

It is further stated by *Pollock (2004:43-44)* that the psychological effects of imprisonment, as described by prisoners, are a varied mixture of tension and flaccidity. A common phrase is 'winding up', which refers to the way in which one person can deliberately or other-wise drive another into a state of anxiety, frustration and anger. Largely it seems to be the situation itself which winds prisoners up: worry about their families, or about their own future, frustration at the completely enforced subservience to authority, and, particularly at the beginning of a long sentence, fear of becoming a 'cabbage'.

By adopting an identity, the beliefs, customs and the general culture of the prison, prisoners mould themselves into a state of prisonization. Prisonization can have devastating effects, and may lead to a 'psycho-syndrome' which includes the loss of memory, clouding of comprehension, apathy, infantile regressions, hopelessness and the appearance of various psychotic characteristics such as obsession and major depression (*Krestev et al [S.a.: 5)*. By the same token *Fox (1985:230)*, is of the opinion that the inmates world is simple and sparse. Loss of self-determination and the process of 'prisonization' involve acute psychological stress for the individual. Release to the outside transmutes bad times into bad memories. A primary component in prison life is homesickness. Grief, mourning, and depression frequently lay the foundation for the immobilization and automaton-like style of many prisoners.

Crowding can also have an impact on the psychological state of a prisoner because crowded correctional institutions have limited work and recreational

programs available to inmates. Those that are available are implemented for shorter periods, which intensify the free time that an offender has thereby contributing extensively to boredom and anxiety *Krestev, J. et al ([S.a.]:7)*.

3.6.1.4 Disruption of family life

The transgression of a law results in there being victims other than the primary victim(s). These secondary victims include the families of the primary victim and another often overlooked group of victims, family members of the person who has committed the crime. The families of inmates are often overlooked in research and in designing social programs, yet many suffer devastating consequences as a result of a loved one's incarceration.

Cesare Beccaria in his book on *Crime and Punishments*, states that while innocent people can suffer when a criminal is punished, the “families of criminals are especially harmed by certain types of punishment which are meant only for the family head. He also points out that imprisonment is the most common type of punishment used today, and the separation not only punishes the inmate, but also the family”. *Flanagan (1995:112)* also suggests that the loss of contact with family and friends outside prison is a source of stress for all prisoners, but long-term inmates fear that these relationships will be irrevocably lost and this creates concern. While relationships with spouses, family members, girlfriends, and others may withstand enforced estrangement for a few years, the prospects for maintaining these relationships over the long-term become faint.

By the same token *Foucault in Muntingh* (2002:1) reports that the prison directly produces delinquents by throwing the inmate's family into impoverishment. The same order that sends the head of the family to prison reduces each day the mother to destitution, the children to abandonment, the whole family to vagabondage and begging. It is in this way that crime can take root. To the majority of the prisoners, the major source of stress would include the loss of contact with family and friends outside the prison. Imprisonment of an offender involves enforced separation from all those who are close to him- his wife, his children, his parents, his relatives and his friends. According to *Fox (1985:249)* in female institutions, inmates frequently invent 'families'; the value of family life is so firmly established in American culture that reformatory inmates frequently attempt to construct some facsimile of it. Female inmates try to shake off the alienating and disorganizing experience of imprisonment by creating family structures.

The incarceration of an individual in prison inevitably places a severe strain on his or her family relationships. The Florida House of Representatives Justice Council Committee on Corrections, *Maintaining Family Contact When a Family Member Goes to Prison* ([n.d.]:4), contends that:

"while separation from a parent can be difficult for a child under any circumstances, losing a parent to incarceration can be especially problematic. Not only do children suffer the burdens of incarceration along with the rest of the family, but the removal of the inmate family member may even place children at a

greater risk of someday becoming involved in the criminal justice system themselves.”

By the same token *Hostetter and Jinnah (1993:3)* maintain that because of the feeling of social disrepute, the family is most often denied the normal social outlets for grieving the loss of a loved one from the family. The adjustment for a child with a parent in prison seems to be much harder for those who have a good relationship with a parent before incarceration. The child mourns the loss of their parent often worrying about how they are doing.

Carlson and Cervera (1991:279) note that losing a loved one to prison is “even more demoralizing to wives and children than losing a loved one to death.” Throughout their lives women have been confronted with difficulties arising from male criminality. These problems do not simply vanish when the men disappear behind prison walls. Husbands continue to have a significant impact on their wives’ daily lives, which is as important as that generated by dramatic encounters with police, courts, and prisons. Prisoners’ wives are not simply ‘separated’ from their husbands, although they share similarities with others facing “crises of separation” (*Flanagan 1995:149 and Cornelius 1991:110*).

The family is in fact sentenced by the incarceration of the offender. The family will do the same amount of ‘time’ as the incarcerated person, and usually harder time. In many cases, families face financial difficulties, emotional trauma, assumption of a single parent lifestyle, community ostracism and uncertainty and fear in dealing with an intimidating correctional system.

Carlson et al in (Howard, J. 1994:3.) postulates that in talking with inmate families, many mention that loneliness is probably the hardest stress to deal with on a day-to-day basis. If the relationship was a close one, the wife misses being able to share the everyday happenings with her partner. It is further postulated that one of the greatest stressors for both the inmate and the rest of the family to deal with is the change in the family roles. The wife now becomes the head of the household. The husbands do sometimes try to maintain control as the head of the family, but at the same time, they lose touch with day-to-day realities. This can be a frightening experience for some wives who were very dependent on their husbands. The wife becomes responsible for daily decisions in not only the mother-role, but in the father-role as well.

According to the United States Department of Justice, *Howard, (1994:3)* notes that one of the greatest needs of families is the need for information. Families can feel so helpless and frustrated in the first few confusing months of a loved one's incarceration. Another major need shown in the survey was a need for temporary lodging while visiting. Families with already tight budgets and limited financial resource were paying a great deal for lodging. Some would sleep in cars and in bus stations. Although this is costly and unsafe, these conditions limit the number of times family members are able to visit. They also maintain that the incarceration of a loved one can be a major hardship for a family. The offender may have been the main source of income and thus in addition to the lost resources upon incarceration, the family take on additional

expenses in order to maintain contact: including expenses relating to visiting, accepting phone calls, providing writing materials, and funding the inmate's institutional account.

Compounded with financial difficulties, families may find other difficulties in attempting to maintain a relationship with the offender, or even just to keep in touch. The physical isolation of the inmate from the family means that families must make active efforts to maintain relationships. An important concern for many prisoners is disassociation from their families and friends. The pain of separation is often profound, and with the passing of time, the probability of continuing to maintain contact, becomes an important concern. As inmates watch relationships between other prisoners and their families diminish, fears of their own betrayal and complete abandonment arise. Worries about their children's schooling and behavioural problems, the financial situation at home, transportation to visit, and divorce are ever present (*Flanagan 1995:42*).

Loneliness is probably the hardest stress factor that inmate families have to deal with on a day-to-day basis. If the relationship was a close one, the wife misses being able to share the everyday happenings with her partner. Simple things such as sharing a meal, tucking in the kids or having coffee together become important memories (*Howard 1994:3*).

Fishman in Howard (1994:4) is of the opinion that the pre-trial phase is a very confusing time for families because everyone else is too busy to explain how things work to the families. This is the first crisis period for a family beginning

with the arrest and separation from the loved one for the first time. The family is experiencing shock, denial and a lot of pain. He goes on to explain that the second period of crisis comes on sentencing day when on many times the family is totally unprepared. When the sentence is pronounced, often the inmate is whisked away and the family is left in a state of shock.

Families may find difficulties in attempting to maintain a relationship with the offender, or even to just keep in touch. The physical isolation of the inmate from the family means that families must make active efforts to maintain relationships. Family contact is governed by rules and institutional operating procedures that are sometimes rigid in application and difficult to understand. It is maintained that, *Flanagan (1995:149)*, whether men are voluntarily or involuntarily separated from their families, their wives find that they must adjust to their husbands' physical absence. In order to make this adjustment successfully, wives must be willing to shift roles and take up many of their husbands' responsibilities.

Thus the disruption of family life is a negative consequence of imprisonment that is desirable to be avoided. The experience of incarceration weakens the prisoner's family structure that may lead to 'increased criminality in the second generation (*Friends of the Family [n.d.]:1*).' Furthermore, overcrowding which leads to stresses and the 'prisonization' effect discussed above will surely cause the contact with families to be difficult as the offender is not his or her normal self.

3.6.1.5 Loss of employment

Another consequence of imprisonment is that the prisoner loses his employment and as a result his ability of financially supporting himself and his family. A very real hardship for the families can be financial, especially when the breadwinner is removed from the home. If there were financial resources before the arrest, they are often drained by court and attorney costs. The wife may need to enter the job market with very few marketable skills, and many times a family ends up as part of the welfare system. If her husband has been moved to a facility far from home, she will have the cost of travel to see him (*Howard 1994:2*).

Imprisonment of the husband and father is usually a traumatic experience for the wife and children. They are confronted with the practical problems of earning a living and child rearing. The loss of income may force the prisoner's wife to seek employment that, in turn, may lead to neglect of the children. This can have a detrimental effect on the family when the mother is incapable of caring for the children on her own, they may have to be placed in foster-care, or into a children's institution.

The negative effects of such broken homes are tremendous. The male prisoner is usually the family breadwinner, with a number of people dependent upon him. They would also be severely affected by his loss of employment. Loss of employment also negatively affects the self-image of the prisoner; he may develop a sense of worthlessness.

In *S v D* 1995 1 SACR 259 (A) 264e, Nicholas AJA made reference to the following, even if imprisonment has no permanent detrimental effect on a prisoner, it means loss of employment, temporary, if not permanent, loss of wife and family, the risk of contamination and impaired ability to get further employment.

Thus the incarceration of a loved one can be a major hardship for a family. First, the families may experience serious financial problems as a result of the incarceration. The offender may have been the family's main source of income. Alternatively, the family may have drained their already scarce resources for the offender's legal costs. In addition to the lost resources upon incarceration, the family must take on additional expenses in order to maintain contact, including expenses relating to visiting, accepting phone calls, providing writing materials, and funding the inmate's institutional account (*Maintaining Family Contact When a Family Member Goes to Prison [n.d.]:1*).

3.6.1.6 Stigma and Disgrace

The entire experience of being arrested, appearing in front of a court and being sentenced to prison is a traumatic experience, especially for first offenders. It is a deeply humiliating and degrading ordeal for many. The

perception of the public is that prison is a place where evil persons are kept in order to protect society. The offender who is sentenced to prison is further aware of the low status to which he has sunk. He is aware of the stigma that is attached to imprisonment, and, to a certain extent, he views himself as society sees him, as a worthless, evil being. To many offenders, being sent to prison is the ultimate rejection; which has often started in early childhood and has continued throughout a prisoner's life.

Holt and Miller ([S.a]:2) maintain that involvement with the criminal justice system affects the inmate's social relationships in various ways. Each arrest and conviction brings with it a certain social stigma that would ordinarily make former friends and family less willing to become involved. The extent to which the inmate is ostracized in this way varies with the degree of stigma of the particular crime and the cumulative effect of repeated charges and convictions. Some distinctions in the extent of ostracism are also related to the different degrees of stigma different groups attach to various crimes.

In *S v Schuttle* 1995 1 SACR 344 (C) 350b-c Steyn declared:

“[There] can be little doubt that the fact of incarceration and the deprivation of freedom, the awesome discipline of the prison within the impersonal institutional environment, the

stigma of having been in jail and the separation from family and friends are consequences of a prison sentence which almost all accused persons try anxiously to avoid.”

There are families who feel stigmatised because another family member has been incarcerated. Family members may also feel shame and embarrassment. Wives become labelled because of the crimes committed by their spouses (*Howard 1994:1*). Similarly, *Flanagan (1995:149)* maintains that the stages in the criminalization process- from arrest to sentencing, incarceration and release- set up a series of changes in the roles the wives found themselves enacting: ‘wives of accused’, ‘prisoners’ wives’, and finally ‘wives of ex-convicts’. It is assumed that whenever wives fill these roles, they become stigmatised unless they live in crime familiar communities.

Hostetter et al (1993:7) maintain that the “social stigmatisation” is probably the most damaging effect on children whose parents are incarcerated. The report goes on to say that the children are often ostracized or made fun of by other children and even adults. These children often exhibit aggressive behaviour or may withdraw or become very depressed. By the same token *Locke in Howard (1994:2)* contends that, the children of inmates may keep their parent’s incarceration a secret and become quite and reclusive. Children may carry around a load of guilt because their parent is in prison or because they may not want to visit the parent. Sometimes the children are not told the truth

about where their father is. This lie just compounds the problem when they later discover the truth.

Sometimes, the embarrassment is too strong and wives or parents of inmates will lie to friends and other family members, saying he is away for a while (*Fishman in Howard 1994:2*). Many times, a family will move in order to get away from the feeling that they are stigmatised (*Howard 1994:2*). This causes even further disruption of the family structure. He also maintains that another area where the family may experience the feelings of guilt and shame is during visits to the correctional facility. Often they are subjected to humiliating searches, regarded with suspicion, and subject to rules that may change at any time.

The process of stigmatisation and disgrace continues as the prisoner enters prison. *Pollock (2004:43)*, asserts that many prisoners have described the routine of stripping off one's clothes, and with them one's identity as a free person; then comes the regulation bath and issue of prison uniform and the symbolic prison number. This indignity, depending on the social standing of the offender, gives rise to differing degrees of disgrace to the prisoner.

3.6.1.7 Lack of Treatment Facilities

Overpopulation places a heavy burden on various facilities in the prison system. Not only does it place a strain on ablution facilities in cells, but also on the rest of the prison infrastructure, which includes kitchens, hospital

sections, laundries, recreational facilities, rehabilitation and educational facilities.

The *South African Human Rights Commission (SAHRC)* (1998:20) conducted an inquiry into human rights in prisons. The SAHRC found that although the majority of prisons in South Africa have basic medical facilities there were no provisions made to cater for special needs of prisoners, for example prisoners with HIV/AIDS. Although prisoners living with HIV/AIDS are not isolated and in some prisons receive counselling, there was no uniformity regarding the application of Department of Correctional Services policy.

Educational facilities in majority of the prisons were very poor and in some instances non-existent. In some prisons there were no educational facilities even for juveniles, for whom education is compulsory under the United Nations Standard Minimum Rules (*SAHRC 1998:22*). It was further stated that overcrowding made it difficult for those who are studying to concentrate on their studies and completion of assignments. The lack of space in most prisons made it difficult for officials to make available the much-needed space for educational purposes.

Few prisons had recreational facilities. The shortage of work and recreational opportunities threaten the operational effectiveness of the institution, as prisoners are largely idle (*SAHRC 1998:33*). As a result, prisoners turn to gangsterism and drug dealing for social interaction. Overcrowding causes rioting and unrest and the lack of facilities may create tension between prison

authorities, prison staff and prisoners that may result in inmates rebelling against prevailing conditions.

Rehabilitation is a grave problem within Correctional Services and little or nothing is done to prepare the prisoner for re-entry into normal life or to make a living (*SAHRC 1998:28*). It was further stated that most prisons have no rehabilitation programmes in place. The acquisition of adequate skills is very often the key to successful rehabilitation. The problem of recidivism in the South African prison system is exacerbated by the reality that prisons have been unable to prepare prisoners meaningfully for release or to cope in the outside world. Prison systems have failed to provide adequate treatment services for those prisoners who suffered the most extreme psychological effects of confinement in deteriorated and overcrowded conditions (*Haney [n.d]:6-7*).

3.6.1.8 Loss of freedom

The imprisonment of an offender is about loss, loss of freedom, loss of control, loss of family and friends. Prison is about punishment and the loss of freedom forms part of this punishment. By committing a crime the offender has abandoned his claim as a fully trusted member of society. Thus the loss of freedom is the greatest deprivation undergone by the offender in prison (*Neser 1993:190*).

The prisoner is not only restricted to a given physical area, and even there restricted in his activities, but is also, against his will, cut off from his family and friends. Although his loss of status and civil rights may affect the individual greatly, one of the greatest deprivations associated with this punishment is the loss of trust on the part of his fellow men (*Neser 1993:190*). Depriving someone of his freedom as the motive for imprisonment serves its rationale only if the loss of his freedom is made meaningful and acceptable to the prisoner. Because he has been deprived of his freedom, the prisoner is confronted with four major problem areas: the shock of admission, the loss of external interpersonal communication, stability in an apparently chaotic, abnormal environment and the loss of normal activity (*Neser 1993:402*).

It is also postulated by *Neser (1993:190)*, that in addition, this isolation is not the voluntary action of a recluse but isolation against his will among a community of criminals. This isolation is painful and frustrating in the light of loss of emotional relationships, loneliness and boredom.

3.6.1.9 Loss of autonomy

The effects of imprisonment for those serving long-terms, especially those in maximum custody, can be detrimental. The offender is subjected to the same routine daily. Imprisonment entails an almost total absence of responsibility by the prisoner for his daily activities.

The prisoner, within his world of experience, yearns just as strongly to maintain the autonomy of his existence. This is difficult because a prison situation is always group oriented. There is the same clothing, the same routine, the same food and communal cells, dormitory, eating, ablution and other facilities in prison. For this reason, prisoners often appear to be having indistinguishable experiences. They may have suffered rejection, violation of dignity, breach of confidence, victimisation, and many more almost everyday occurrences. This oneness or unity of human experience may be termed as solidarity. However, each individual has a unique personality and must be seen as a unique and unrepeatable being (*Neser 1993:408-409*).

Furthermore *Neser (1993:409)* goes on to state that, together with the fact that everything in the prisoner's life occurs within this context, there is a worldwide tendency for prisons to become more and more crowded and over-population is the norm. The deprivation thus caused aggravates the prisoner's circumstances and the problem of the maintenance of personal autonomy.

A vast majority of prisoners reveal a hostile or negative attitude towards the overwhelming dependence on the decisions of supervisors: the limited ability to make an individual choice or decision, along with the restrictions on physical freedom, disposal of goods and services and heterosexual relationships, may be regarded as part of the pain of imprisonment (*Neser 1993:193*). This state of affairs is not conducive to the prisoner's sense of responsibility, and in extreme cases, it encourages poor social and ethical skills.

The pain of confinement includes the loss of liberty where prisoners experience a limitation of movement. Prisoners must comply with rules and there are restrictions placed on what goods they may have with them and when. Prisoners are required to request for permission to perform even some of the most basic functions such as asking to go to the toilet.

Some prisoners may totally adjust to prison life. This notion is referred to as '*institutionalisation*.' The inmate loses interest in the outside world, views the prison as home, loses the ability to make independent decisions, and in general, defines him or herself totally within the institutional context (*Bartol and Bartol 1994:366*). In addition, it is an acknowledged fact that institutionalisation deprives an inmate of a sense of responsibility, initiative, drive, self-discipline and is generally depressing (*Neser 1993:193, and Prince 1994:126*).

By the same token *Stinchcomb and Fox (1999:368)* states that the institutionalised personality is characterised by moving like a robot according to a *routinized* pattern: losing all initiatives; living on a day-to-day basis; blocking off the past; avoiding the future. The frustration of the inmate's inability to make a choice and the recurrent refusals to provide an explanation for the regulations and commands, descending from the bureaucratic staff, involve a profound threat to the inmate's self-image because they reduce the inmate to the weak, helpless and dependent status of childhood (*Inciardi and Haas 1988:326*).

The prisoner has often to humble himself and to assume a servile attitude in order to gain advantages, such as change of cells or work, or relocation to a better institution. Prisoners sometimes play the role of 'tough guy' in an attempt to surmount their feelings of impotence. There is therefore an attempt to popularise the self-image artificially.

3.6.1.10 Loss of Goods and Service

The prison environment meets only the most basic physical and psychological needs of the offender. In modern society, material possessions form an integral component of the value system of an individual.

Deprivation of these possessions can be experienced as an attack against the innermost being of the person. Deprivation of goods and services of the prisoner, resulting from his misconduct, represents a charge against his basic intrinsic values (*Neser 1993:191*). It is further stated that few people can learn to accept a disappointment of this kind: they tend to resort to rationalizations. This is also applicable to prisoners.

3.6.1.11 Loss of Heterosexual Relationships

The deprivation of contact with the opposite sex in prison is a cause for major concern for prisoners. The lack of normal heterosexual relationships may cause sexual frustrations and can threaten a prisoner's self-image. The prisoner is removed from a world in which the opposite sex lives.

In addition to the physiological effects of sexual frustrations, there are psychological problems created by the lack of heterosexual relationships for male inmates. In a community consisting only of men, feelings of anxiety concerning their masculinity could have a tendency to take root, even if they are not forced, bribed or seduced into a deliberate homosexual relationship (*Neser 1993:192*).

Latent homosexual tendencies may be activated in the individual without being translated into open behaviour and yet still awaken strong guilt feelings at either the conscious or unconscious level (*MSOP News Letter May 2003:2*). Almost a decade ago, Sykes made an observation in his work, *Society of Captives*, which is of relevance in the understanding about male sexuality. Sykes (1958:72) attests that:

“The deprivation of heterosexual relationships carries with it another threat to the prisoner's image of himself, more diffuse, perhaps, and more difficult to state precisely and yet no less disturbing. The inmate is shut off from the world of women, which by its very popularity, gives the male world much of its meaning. Like most men, the inmate must search for his

identity not simply within himself but also in the picture of himself, which he finds reflected in the eyes of others.”

In addition the offenders’ access to mass communication and pornography (contraband) that circulate amongst prisoners, as well as other stimuli, constantly activate their sexual impulses. Therefore, the lack of heterosexual intercourse is a frustrating experience that is accepted with great difficulty during the period of incarceration (*Neser 1993:191*).

Paradoxically, many inmates who consider themselves to be heterosexual assert their masculinity not by suffering through the frustrations of abstinence, but by engaging in homosexual activities (*MSOP News Letter May 2003:2*). It is further stated that receptive males, many of whom are reluctant participants in the sexual activity, are stigmatized and may be subject to prostitution and rape within the institution. The combination of sexual frustration as well as the need to maintain one’s masculine image while facing a long period of incarceration with only members of the same sex leads many male inmates to acquire sexual gratification from other men through persuasion, bribery, coercion or force.

By the same token, it was the research of anthropologist, *Margaret Mead* that brought institutional homosexuality among women to the forefront. Mead declared female homosexuality while in prison to be a temporary substitute for heterosexual relations (*Forsyth et al 2002:68*). Furthermore, in essence, inmates’ behaviors and attitudes are viewed as reactions to the depravations

for imprisonment. Inmates respond similarly to incarceration because of its fundamentally coercive character. Further research needs to be conducted about the deprivation of heterosexual relationships among females.

3.6.1.12 Loss of Security

When an offender is imprisoned, he is placed into prolonged proximity with other offenders, some who may have a history of violent, aggressive behavior. This situation causes anxiety for even the hardest recidivist. Thus these circumstances can prove to be anxiety provoking and can cause feelings of insecurity for even the most hardened criminal (MSOP *News Letter May 2003:1*).

Regardless of the mutual aid and support which may flourish in the inmate population, there are a sufficient number of offenders within this group of offenders to deprive the average inmate of the sense of security which comes from living among people who can be reasonably expected to abide by the rules of society, (Sykes in MSOP *News Letter May 2003:1*). By the same token, an important point is that the acute anxiety caused by this loss of security, is not only due to the violent acts of aggression and exploitation that can result, but also because such behavior constantly calls into question the individual's ability to survive in prison.

The secondary consequences of imprisonment that is overcrowding of prisons in South Africa and England, together with the cost factor will be examined.

3.7 SECONDARY CONSEQUENCES

With regards to any phenomenon, the questions that arise are: 'does it work?' And if it does, 'what is the cost?' This query is also applicable to one of the forms of punishment, that is, imprisonment. The Department of Correctional Services is the 'final destination' agency of the criminal justice system. Being at the end of the criminal justice process it is keenly affected by the problems that afflict the rest of the system (*Masuku 2001:1*). Furthermore *Masuku* notes that the blockages in the criminal justice system contribute significantly to the current problem of overcrowding in prisons. This in turns leads to other problems such as human rights abuses, difficulties in managing incarcerated offenders, and the escalation and spread of contagious diseases.

This section explores the severe overcrowding of the South African prisons as well as that of overseas countries. The progression of overcrowding over the years will be looked at. The cost factor, which increases as the prison population proliferates, is associated with imprisonment and will also be discussed as a secondary consequence.

3.7.1 The Reality: Severe Overcrowding

In South Africa overcrowding has arisen because correctional institutions are pressurised to accommodate far more prisoners than they were designed to imprison, due to the fact that prison populations are on the increase. There is great concern regarding the continual escalation of the prison population.

According to the latest report of the inspecting *Judge Fagan (2003:1)*, the country's prisons currently held about 188 000 prisoners, 70% more than the 120 000 for which they were designed. "This overcrowding is costing the state R18-million a day. There are no more funds available for building more prisons" (*Judge Fagan 2003:1*).

High prison populations and growth in numbers do not only bring about overcrowding. They usually bring with them a host of other major problems- not only restricted living space, but also poorer conditions of hygiene and poorer sanitation arrangements and less time for open-air exercise. In many countries, there is insufficient bedding and clothing for prisoners when there is significant prison population growth, and the food is less satisfactory in terms of quality and quantity. Health care is more difficult to administer effectively. There is more tension, more violence between prisoners, and more violence against staff. Risks of self-injury and suicide increase (*Walmsley 2001:5*).

The South African Human Rights Commission conducted a national inquiry into human rights in prisons. The prison population in South Africa was so disproportionately high that the maintenance of prison services was a major drain on national resources (*Pityana 1998:1*).

According to comparative statistics, *White Paper (1991:8)*, the Republic of South Africa has one of the highest prison populations in the world. A total of 375 persons per 100 000 of the general population was in prison during November 1990 compared to other countries where figures vary from 42 in

Sudan, 71 in France, 96 in England and 426 in the United States of America. On 31 March 2001 the Department had cell accommodation for 102 048 prisoners against a total prison population of 170 959 prisoners. This constituted an average national level of overpopulation of 67.53%.

The Commission of Inquiry into the Structure and Functioning of the Courts (referred to as the *Hoexter Commission 1983:580,581-582*), indicated that the overcrowded prisons in this country are a social phenomenon closely linked to the whole system of justice. Overcrowding brings about subsequent consequences:

- It breeds contempt for the administration of justice in general and the courts in particular when thousands of breadwinners are incarcerated;
- It causes imprisonment to lose its deterrent effect because it is no longer regarded as a stigma;
- It causes the ends of justice to be defeated by the enforced premature release of prisoners because of lack of accommodation; and
- It contributes to a backlog of criminal work, especially in the Supreme Court because overcrowding breeds gangsterism leading to prison murders and often protracted court proceedings.

The magnitude of the South African prison population is being questioned and criticized more and more by informed and even well meaning persons and countries (*White Paper 1991:8*). By the same token it is stated that the lack of sufficient alternatives to imprisonment manifests itself in overpopulation of prisons with negative implications, which result in:

- Mass handling of individual needs;
- A reduction in rehabilitation programmes;
- The earlier release of criminal elements;
- Pressure on the Treasury for the supplementation and extension of personnel;
- An increase in capital expenditure for the creation of prison accommodation to eliminate backlogs;
- Negative behavioural patterns in prison; and
- An increasing burden on the Treasury for the support of the families and dependents of prisoners (*White Paper 1991:8*).

The (*Department of Correctional Services Annual report* (hereinafter referred to as *the Department*), 2000-2001:75), emphasizes the fact that the increase in prison population places enormous strain on the Department's available resources and this remains a real problem that handicaps the proper functioning of the Department in many respects. It is generally accepted that overpopulation has a negative impact on the humane detention of the service delivery to prisoners. Reports from Independent Prison Visitors described the awful treatment that some prisoners had to endure due to overcrowded

prisons. Whilst some prisons had an occupancy rate of 100%, many were over 200% with one reaching an astonishing 393%. There was gross overcrowding in numerous prisons, which led to detention under horrendous conditions, especially for awaiting-trial prisoners (*Judge Fagan 2001:11*).

Prison overcrowding creates difficulties in the observance of the *United Nations Standard Minimum Rules (SMR)* for the treatment of prisoners. It causes severe strain on the already meagre essential services and amenities resulting in deprivation of basic necessities for human living, such as, accommodation, personal hygiene, clothing, bedding, food, exercise and medical services. A discussion on the Standard Minimum Rules will follow.

3.7.1.1 The United Nations Standard Minimum Rules (SMR)

The *United Nations Standard Minimum Rules for the Treatment of Prisoners*, adopted in 1957, has particular application for Correctional Services, as does the United Nations Basic Principles on the Treatment of Prisoners adopted in 1990.

These set out the essential elements of what is generally accepted as being good principle and practice in the treatment of prisoners and the management of prisons (*Oliver and McQuoid-Mason 1998:28*). In implementing these programmes in South Africa, and in other countries like Russia, and America, the greatest obstacle the Department is facing is the severe overcrowding in penal institutions. Prison overcrowding prevents the effective implementation

of the SMR for the treatment of prisoners that require the separation of prisoners taking into consideration aspects such as, criminal record and treatment needs. Overcrowding also prevents the segregation of hardened criminals with the not so hardened, thus contributing to some offenders leaving prison as more hard-core criminals. Recognition should be given to the fact the implementation of the SMR internationally is difficult for each country has differing legal, social, economic and geographical conditions.

The incarceration rates in England as well as the United States will be explored.

3.7.2 England and Wales: Statistics Regarding Overcrowding

In England the rise in prison populations is attributed to many factors, but probably the most significant is the rise in the incidence of reported crime and in the number of offenders brought before the court. The majority of the offenders in prison have a number of previous convictions; the offences they have committed are predominantly burglary, theft, violence or robbery (*Encyclopaedia Britannica 1995:811*).

Most prisons housing offenders in England have been constructed more than a century ago. Prisons are classified administratively as local or central prisons. Local prisons serve a variety of purposes, holding prisoners awaiting trial or sentencing and prisoners serving shorter sentences (up to about 18 months). It is here that the worst overcrowding occurs. Prisoners serving

longer sentences are detained in central prisons (*Encyclopaedia Britannica* 1995:811).

Overcrowding in Britain's prisons has forced the Prison Service to house some inmates in police cells. It was for the first time in seven years such drastic measures have been needed. The prison population of England and Wales has reached an all-time high of 71,480 and prisoners were being moved into jails and cells in the West Midlands and West Yorkshire, where local jails are full (*BBC News July 2002*). This marked the culmination of a decade of growth in prison numbers under Conservative and Labour home secretaries.

Fairweather (2001:1) stated that five of Scotland's 17 establishments were overcrowded, compared to two the previous year. He also warned that the situation was having an impact on the rehabilitation of offenders. By the same token Scottish Conservative justice spokesman *Bill Aitken* (2001:4) said that it was a matter of great concern that five prisons were overcrowded. He further went on to state that as more prisons became overcrowded, there will be a temptation to go for early release schemes that fail victims, benefit criminals and endanger the public.

Historically, the United Kingdom's prison population rose throughout the 20th century. The most significant increases began after 1951 when the courts began sending more people to jail. The rise in the number of prisoners halted in 1981 and began to fall, particularly because of the introduction of fixed-penalties and police cautioning for some first offenders (*Casciani 2002:1*).

From 1945 to 1996, the population of England and Wales grew by 17% while the prison population grew by 263%, as will be illustrated by the table below.

Prison Population In England And Wales: 1945 - 1996

Year	Capacity	Officials	Prison Population	Prison per 100 000 Population
1945	14 336	2 400	14 708	32
1950	21 044	3 477	20 474	50
1960	25 354	5 682	27 099	63
1970	32 992	11 155	39 028	81
1980	38 494	17 070	42 580	88
1985	40 000	18 000	46 234	92
1986	-	-	46 900	-
1996	52 000	24 000	52 000	102

TABLE 1 “(Adjusted figures)(Projection)”

Average Prison Population 1992 - 2002 (Home Office)

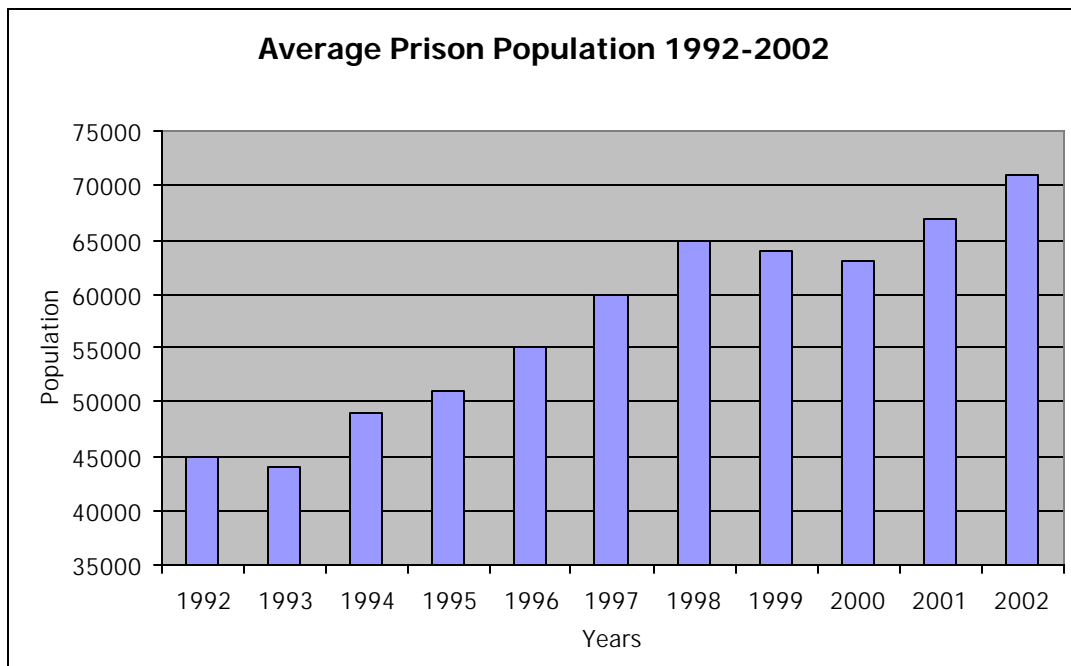


FIGURE 1

Source: UK Home Office

As can be seen from the figure above, the average prison population of England and Wales in 2001 was 67 000. On 26 July 2002, the prison population in England and Wales reached an all-time high of 71 723. Government figures show that by 1999 there were 24 000 more people being sent to prison than ten years before, despite no real change in the number of adults being found guilty of indictable offences. The increased population is expensive. Each prisoner costs the taxpayer approximately 27 500 pounds a year to be kept in jail. Each new prisoner costs 500 pounds per week and each new prison costs the same as two new district general hospitals and 60 new primary schools (*Coad 2002:2*).

Presently, there are 124 prisoners for every 100 000 people in England and Wales, the second highest rate among western European countries. The United States has the highest rate of imprisonment-702 prisoners for every 100 000 people (*Casciani 2002:1*). One of the major reasons for the rise in the prison population under both Labour and the Conservatives has been the increase in the use of shorter sentences. In 1990, just under 14 000 adults were given sentences of six months or less. Ten years later that figure had almost tripled. The largest increases in prison numbers has been seen among young offenders (15 to 20) years. By the middle of 2000, a third of young offenders were serving sentences of between 18 months and three years, mostly for burglary or theft. *Casciani (2002:2)* states that, just before Labour came to power, Michael Howard's final piece of legislation introduced automatic life for some sex and violent offenders and a mandatory three years

for a third burglary conviction. The Home Office predicts that England and Wales would need 5 000 extra prison places by 2010 to deal with this alone.

Penal reformers are also of the opinion that the speeches or statements by Home Secretaries influence the courts. The Howard League for Penal Reform has monitored prison numbers. It states that numbers being jailed remained constant until *Mr Blunkett* (Home Secretary in 2001), made a series of tough speeches early in 2002. Since then jail sentences have risen by up to 500 a week (*Casiani 2002:2*).

Director of the Howard League, *Frances Crook*, has appealed to the government to include a compulsory limit on the prison population in the Criminal Justice Bill (*BBC News August 2002:1*). She contended that prisons are becoming no more than warehouses once again. The consequences of overcrowding are jeopardizing both the safe running of the prison system and the rehabilitation of individual offenders. If prison is to serve any useful purpose it must be to return to the community better equipped to lead crime-free lives. The current crisis effectively precludes this.

One of the main reasons for the escalation in prison population under both Labour and the Conservatives has been the increase in the use of shorter sentences. In 1990, just under 14 000 adults were given sentences of six months or less. Ten years later that figure had almost tripled (*Casiani 2002:2*).

There has been an urgent appeal to improve conditions in jails across the East Midlands in England, after a critical report on prisons was provoked (*BBC News September 2002:1*). The Prison Reform Trust study rated Leicester Prison as the second-most overcrowded prison in England and Wales. It holds 366 prisoners in facilities intended for only 199.

In Lincolnshire, the Board of Visitors at Lincoln Prison said overcrowding is affecting prisoners and staff. The consequences of overcrowding are jeopardizing both the safe running of the prison system and the rehabilitation of individual offenders (*BBC News September 2002:1*). One of the problems outlined in the report was that the overcrowding threatened safety and undermined the Prison Service's work to reduce re-offending.

The international comparison on the use of incarceration has increased in recent years *Mauer (1994:3)*. He is of the opinion that in recent years reports documented that the United States has become the world leader in its rates of incarceration, having surpassed South Africa and the former Soviet Union, and that the black male rate of incarceration in the U.S. is four times more than the rate of incarceration of black males in South Africa, 3 822 per 100 000 versus 851 per 100 000.

The overpopulation problem in the USA is not limited to federal and state prisons but also affects local jails. The British Home Office estimates that the population will increase to 92 600 in 2005, assuming that further increases will

occur in the proportions of prisoners sentenced to prison, with the duration of sentences remaining constant (*Oppler 1998:1*).

3.7.3 South Africa: Statistics Regarding Overcrowding

When considering the statistics of prison populations, according to a report of The National Prisons Project of the *South African Human Rights Commission (SAHRC)* (1998:12), it is clear that there is a very serious overcrowding problem and a breakdown of law, order and standards within the prison system. This is clearly evident in the makeshift arrangements to accommodate the large number of prisoners crowded into the cells. Where serious overcrowding exists, it is inevitable that there will be a lack of basic necessities such as toiletries, towels, blankets and sheets. In instances where it is made available, it is insufficient.

In Newcastle and Eshowe Prisons for example, it was reported (*SAHRC 1998:12*) that there was no privacy in the toilets and showers, no hot water and no heaters. Many cells were dirty and smelt unclean, with some toilets not working, not working properly or leaking. The Commissioner of Correctional Services' analysis of the situation in prisons is that majority of prisons are so overcrowded and in such a serious state of disrepair that they not only pose a health hazard but also contribute to the high rate of escapes. The inhumane conditions in which prisoners are accommodated contribute to a very large extent to the criminality found in the majority of prisons (*SAHRC 1998:12-13*).

The repeated variation in accommodation is due to the closing of 'old' prisons, whether for demolition or modernization, and the commissioning of new, modern prisons. Decreases in over-population percentages in reporting years 1987-1988, 1989-1990 and 1990-1991 were primarily due to the granting of amnesties. The author studies the statistics with regards to the accommodation of prisoners in South Africa. Statistics spanning the period 1987 to present day are examined. The population for the years 1987 to 1992 is illustrated below in table two.

The Overpopulation Rates Between 1987 - 1992

Period	Estimated Accommodation	Daily average Lock-up	Percentage Over-population
1 Jul 1986-30 Jun 1987	84 854	114 098	34,46 %
1 Jul 1987-30 Jun 1988	83 668	111 481	33,24 %
1 Jul 1988-30 Jun 1989	84 626	111 557	31,83%
1 Jul 1989-30 Jun 1990	82 286	110 191	33,91%
1 Jul 1990-30 Jun 1991	83 837	101 778	21,40%
29 Feb 1992	83 031	101 969	22,81%
30 Apr 1992	83 361	106 207	27,41

TABLE 2

Source: Department of Correctional Services

The daily average of sentenced and unsentenced prisoners for the period 1993 to 1997 according to the Department of Correctional Services Statistics (*DCS Annual Report: 1997*) is listed below:

The Daily Average Prison Population: 1993 – 1997

YEAR	MALE	FEMALE	TOTAL
1993	108 284	3514	111 798
1994	108 066	2867	110 933
1995	107 539	2530	110069
1996	115 857	2874	118 731
1997	130 731	3471	134 202

TABLE 3

Source: Department of Correctional Services

The Available Accommodation And Utilization Space From: 1996 - 2001

DATE	PRISON POPULATION	AVAILABLE ACCOMMODATION	OVERPOPULATION	%
31.03.1996	118 080	94 796	23 284	24,6%
31.03.1997	130 635	96 307	34 328	35,6%
31.03.1998	146 435	99 407	47 028	47,3%
31.03.1999	154 574	98 923	55 651	56,3%
31.3.2000	171 462	100 130	71 332	71,2%
31.3.2001	170 959	102 048	68 911	67,5%

TABLE 4

Source: Department of Correctional Services

Between 1996 and 2001 the overall number of prisoners in South African prisons increased by 34%.

Offenders in Custody as at 31 May 2000

SENTENCE CATEGORIES	MALE	FEMALE	TOTAL
Unsentenced	60 515	1 435	61 950
Sentenced			
0-6 Months	6 018	561	6 579
>6 - 12 Months	6 516	321	6 837
>12 - <24 Months	5 984	201	6 185
2-3 Years	14 743	432	15 175
>3 - 5 Years	15 897	433	16 330
>5 – 7 Years	13 659	314	13 973
>7 - 10 Years	18 618	298	18 916
>10 - 15 Years	11 197	156	11 353
>15 - 20 Years	4 945	52	4 997
>20 Years to Life	6 803	71	6 874
Other Sentenced	2 678	33	2 711
Total Sentenced	107 058	2 872	109 930
Grand total	167 573	4 307	171 880
Approved Accommodation	96 284	4 384	100 668
Occupancy Levels	174.04 %	98.24 %	170.74 %

TABLE 5

Source: Department of Correctional Services

On 31 May 2000 according to the Department of Correctional Services there were the following offenders in custody. From the above statistics it is evident that the number of offenders in custody for a short period is extremely high. The number of unsentenced prisoners increased by 27%, and the number of awaiting trial increased by 54%.

The level of prison population compared to the available accommodation capacity clearly indicates that South African prisons are seriously overpopulated. The building of new prisons and the upgrading or extending of existing facilities alleviates overcrowding and enhances living conditions of prisoners to some extent. If alternate forms of sentencing could be used for these offenders it would reduce the overcrowding of prisons.

On 31 March 2001 the Department had cell accommodation for 102 048 prisoners against a total prison population of 170 959 prisoners. This situation constituted an average national level of overpopulation of 67.53%. The following is a composition of the prison population as at March 2001:

Prison Population as at 31 March 2001

CATEGORY	ADULT		JUVENILE		TOTAL
	MALE	FEMALE	MALE	FEMALE	
Sentenced	98 771	2 719	12 814	233	114 537
Unsentenced	41 714	1 067	13 390	251	56 422
Total	140 485	3 786	26 204	484	170 959
Percentage	82.17	2.21	15.33	0.28	100

TABLE 6

Source: Department of Correctional Services

Severe shortage of accommodation and the resultant overcrowding has been a problem within the South African prison system for a number of years. Despite the erection of new prisons and the use of alternatives such as community corrections, South Africa could not eradicate the shortage in accommodation of inmates. The table below illustrates that the gap between available accommodation and utilization is increasing. Below is a graphical representation of the total prison population from 1996 to 2001.

Total Prison Population: December 1996 - June 2001

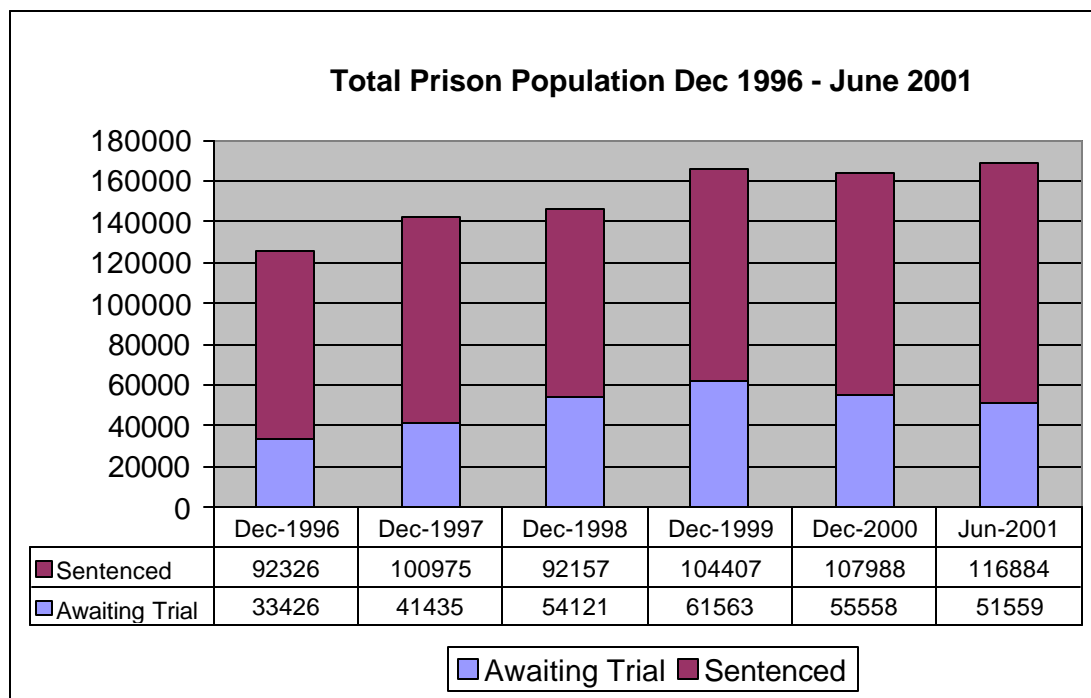


FIGURE 2

Source: Nedbank Institute for Security Studies

Awaiting trial prisoners pose the greatest challenge to prison capacity. The increase in the number of awaiting trial prisoners is related to the pace at which the cases are processed by the police and courts, as well as the inability of many alleged offenders to pay bail, even the smallest amounts (*ISS Crime Index: 2001*). The rise in the prison population in the various provinces in South Africa can be seen from the statistics below Period 2000-2003.

Approved Capacity versus Offender Population: 31 May 2000

No	Province	Capacity	Offender Population			% Occupation
			Unsented	Sented	Total	
34	Free State	9 855	3 710	10 632	14342	145.53%
17	Mpumalanga	7 484	2 826	7 422	10248	136.93%
38	Kwa-Zulu Natal	15 719	11 951	16 661	28612	182.02%
38	Eastern Cape	11 859	7 034	13 047	20081	169.33%
42	Western Cape	18 967	9 114	19 432	28546	150.50%
14	North West	6 697	3 326	8 690	12016	179.42%
12	Northern Cape	3 049	1 916	5 148	7064	231.68%
7	Northern Province	2 341	1 513	3 091	4604	196.67%
24	Gauteng	24 697	20 560	25 807	46367	187.74%
226	RSA TOTAL	100 668	61 950	109 930	171880	170.74%

TABLE 7

Source: Department of Correctional Services

**Approved Accommodation versus Prisoner Population per Province:
31 May 2001**

Provinces	Capacity	Unsentenced	Sentenced	In Custody Total	% Occupation
Eastern Cape	12296	6106	14259	20365	165.62%
Free State	9849	3177	11182	14359	145.79%
Gauteng	24045	17473	27150	44623	185.58%
Kwa-Zulu Natal	16865	10690	16868	27558	163.40%
Northern Province	2315	1435	3827	5262	227.30%
Mpumalanga	7550	2376	7700	10076	133.46%
North West	6697	2724	9131	11855	177.02%
Northern Cape	3055	1661	5597	7258	237.58%
Western Cape	19376	7834	20261	28095	145.00%
TOTAL	102048	53476	115975	169451	166.05%

TABLE 8

Source: Department of Correctional Services

**Approved Accommodation versus Prisoner Population per Province:
31 May 2002**

Provinces	Capacity	Unsentenced	Sentenced	In Custody Total	% Occupation
Eastern Cape	12025	6550	15506	22056	183.42%
Free State	9919	3239	10843	14082	141.97%
Gauteng	25 274	17767	28471	46238	182.95%
Kwa-Zulu Natal	17111	11425	18580	30005	175.36%
Limpopo	2315	1011	4879	5890	254.43%
Mpumalanga	7550	2152	7481	9633	127.59%
North West	6599	2736	9046	11782	178.54%
Northern Cape	3055	1461	5142	6603	216.14%
Western Cape	19383	8006	21281	29287	151.10%
TOTAL	109183	54347	125705	180052	164.91%

TABLE 9

Source: Department of Correctional Services

Approved Accommodation versus Prisoner Population Per Province:

31 May 2003

Provinces	Capacity	Unsentenced	Sentenced	In Custody Total	% Occupation
Eastern Cape	12347	6641	16341	22982	186.13%
Free State	9990	3311	11031	14342	143.56%
Gauteng	26604	18206	29868	48074	180.70%
Kwa-Zulu Natal	19245	10833	20335	31168	161.95%
Limpopo	2315	833	4781	5614	242.51%
Mpumalanga	7550	2371	7632	10003	132.49%
North West	6422	2088	9594	11682	181.91%
Northern Cape	3055	1550	5054	6604	216.17%
Western Cape	19383	8106	22087	30193	155.77%
TOTAL	112863	53939	132675	186614	165.35

TABLE 10

Source: Department of Correctional Services

Approved Accommodation versus Prisoner Population per Region:

31 March 2004

Provinces	Capacity	Unsentenced	Sentenced	In Custody Total	% Occupation
Eastern Cape	13358	6660	16374	23034	172.44%
Gauteng	26709	19115	31313	50428	188.81%
Kwa-Zulu Natal	20179	10590	20177	30767	152.47%
Limpopo; Mpumalanga North West	18420	4277	24330	28607	155.30%
Northern Cape & Free State	16725	5575	18961	24536	146.70%
Western Cape	19396	7659	22609	30268	156.05%
TOTAL	114787	53876	133764	187640	163.47%

TABLE 11

Source: Department of Correctional Services

From the above tables the rise in the prison population in the various provinces can be seen. The figures and percentages over the period 2000 to 2004, is indicative of the serious overcrowding in prisons. The constant escalation in the prison overpopulation places a tremendous pressure on the Department's available resources and this remains a realistic problem that impedes the proper functioning of the Department of Correctional Services. As can be seen from the 2003 statistics (*DCS*), Limpopo province has the highest % occupation of 243.89, followed by the Northern Cape with 225.66%. Thereafter follows, Gauteng, North West, Eastern Cape, Kwa-Zulu-Natal, Western Cape, Free State, and Mpumalanga.

On 31 May 2000 the prisons in South Africa had a prison capacity of 100 668 and an occupancy rate of 171 880 (*Table 7*). On 31 May 2003 the prison had an occupancy rate of 112 863 and an occupancy rate of 186 614 prisoners (*Table 10*). Although the total percentage occupation on 31 May 2000 was 170.74%, compared to 31 May 2003 which was 165.35%, the decrease of 5.39% is mainly due to the release of amnesty prisoners and some awaiting-trial prisoners. From the statistics it can be noted that the total number of prisoners increased from 171 880 in 2000 to 186 614 in 2003, an increase of 14734 prisoners. The number of unsentenced prisoners decreased from 61 950 to 53 939 and the number of sentenced prisoners increased from 109 930 to 132 675 (an increase of 22 745 prisoners). Thus we can see the gross progression or rather 'regression' of the gross increase and overpopulation in the prisons of the various provinces. On 31 March there was a prison population of 187 640- an increase of 1036 prisoners within ten months.

According to *Van Zyl Smit (in Dixon and van der Spuy 2004)*, on the 31 January 1995 the total prisoner population in South African prisons was 116 846. On 31 July 2002 it was 177 620. The total official capacity of the system at the same dates was 96 361 and 110 175 respectively. This means that the occupation rate on 31 January 1995 was 121% and 161% on 31 July 2002. It also means that on the 31 July 2002 the prison service had to accommodate 67 445 more prisoners than for whom there was capacity. This is an increase of 46 980 prisoners compared to 31 January 1995, when the prison system as a whole was 'only' over capacity by 20 485 prisoners (*Van Zyl Smit in Dixon and van der Spuy 2004*).

Van Zyl Smit (in Dixon and van der Spuy 2004) states that the true problem of overcrowding at individual prisons is much worse. A national survey of approved accommodation levels and actual prisoner numbers at all South African prisons on 30 June 2002 reveals that only 21 of 236 prisons were not overcrowded. In all, only 6.3 % of prisoners are being held in prisons that are not overcrowded. On June 2002, 46 prisons had more than double the population for which they officially have accommodation. The result is that 46194 prisoners, or 26% of the entire prison population, are being held in prisons where the occupancy rate is over 200% of the officially prescribed figure.

From 1994 there have been numerous initiatives to effect substantive changes in the way in which the prison system in South Africa is run, which, implicitly or explicitly, promised to improve conditions for prisoners (*Van Zyl*

Smit in Dixon and van der Spuy 2004). He further adds that overcrowding of prisons has continued to rise throughout the 8-year period that the democratically elected government has been in office.

The number of prisoners that has been held in South African prisons has been such that, no matter how well the prison system is organised and administered, it is not able to detain these prisoners in conditions that meet the minimum standards set by the Constitution. *Judge Fagan (2002:3)* states that overcrowding continues to hamper the efforts of the Department of Correctional Services to give effect to its statutory responsibility, namely to detain all prisoners under humane conditions. Thus overcrowding has a negative impact on the humane detention and service delivery to prisoners.

3.7.4 Contributing Factors to Prison Overpopulation

In South Africa the problem of overcrowding in the prisons encompasses both convicted prisoners and unconvicted (awaiting-trial) prisoners. Recent expansion in the efforts of the police on crime prevention, the growths in manpower, resources and operational effectiveness with very little increase in the judiciary and prison facilities are all contributing factors in the overcrowding of prisons. The overcrowding in the awaiting-trial sector, some awaiting-trial for 3 to 4 years, is an indication that there is a heavy backlog in the judiciary that needs to be addressed (*ISS Monograph No. 64 September 2001:2*).

Another contributing factor is the increase in the length of prison sentences, some of which may not have a significant effect as a deterrent to crime. Furthermore, another factor that can contribute to the overcrowding is that most prisons in South Africa are fairly old and do not have adequate facilities. Although new prisons have been built in South Africa, this is very expensive.

Clear and Cole (1990:291-295), Sieh (1989:43-45) and Harding (1987:17-19) link the prison over-population problem with one or more of the following (aspects of which has already been discussed in this chapter):

- Hard-line public opinion regarding crime and criminals is accompanied by demands for longer sentences and strong opposition to early release of prisoners.
- An increase in crimes of violence and in crime in general is connected with a rise in prisoner numbers. An upward tendency in crimes of violence may lead to over-population of penitentiary capacity because:
 - There is a high likelihood that violent offenders will attract prison sentences; and
 - Those guilty of violent crimes attract longer sentences.
- Demographic factors determine fluctuations in the risk population for crime and imprisonment.
- Various authors have expressed the opinion that prison numbers rise in poor economic circumstances.

- Increased state expenditure on crime control and the maintenance of law and order result inter alia in higher success rates for policing and prosecution.
- Policy changes regarding sentencing, parole systems and expeditious trial of awaiting-trial prisoners also have an effect.

The effect on the prison population of awaiting-trial prisoners in South Africa will now be analysed.

3.7.4.1 The Problem: Awaiting-Trial Prisoners

Various factors contribute to the overpopulation of prisons. The increase in the number of sentenced prisoners is directly related to the rise in levels of crimes since 1994. Police statistics indicate that for the 20 most serious crimes recorded by the police, levels increased by 24% from 1994 to 2000. However, the cause of overcrowding was the unprecedented growth of the numbers of awaiting trial prisoners who pose the greatest challenge to prison capacity. The increase in awaiting trial prisoners is related to the pace at which cases are processed by the police and courts, as well as the inability of many alleged offenders to pay bail, even the smallest amounts (*Nedbank ISS Crime Index 2001:1*). It was further stated that the increase in the number of awaiting trial prisoners is far greater than the increase in the number of those who have been sentenced.

In December 2000 the detention cycle for awaiting trial prisoners was 136 days. By June 2001 this figure decreased slightly to 134 days. This means that, on average, alleged offenders are held in prison for over four months awaiting trial. However, in some cases, they are held for years. Below is the graphic representation of unsentenced prisoners for the years 1995 to 2001.

Unsentenced Prisoners in Custody 1995 - 2001

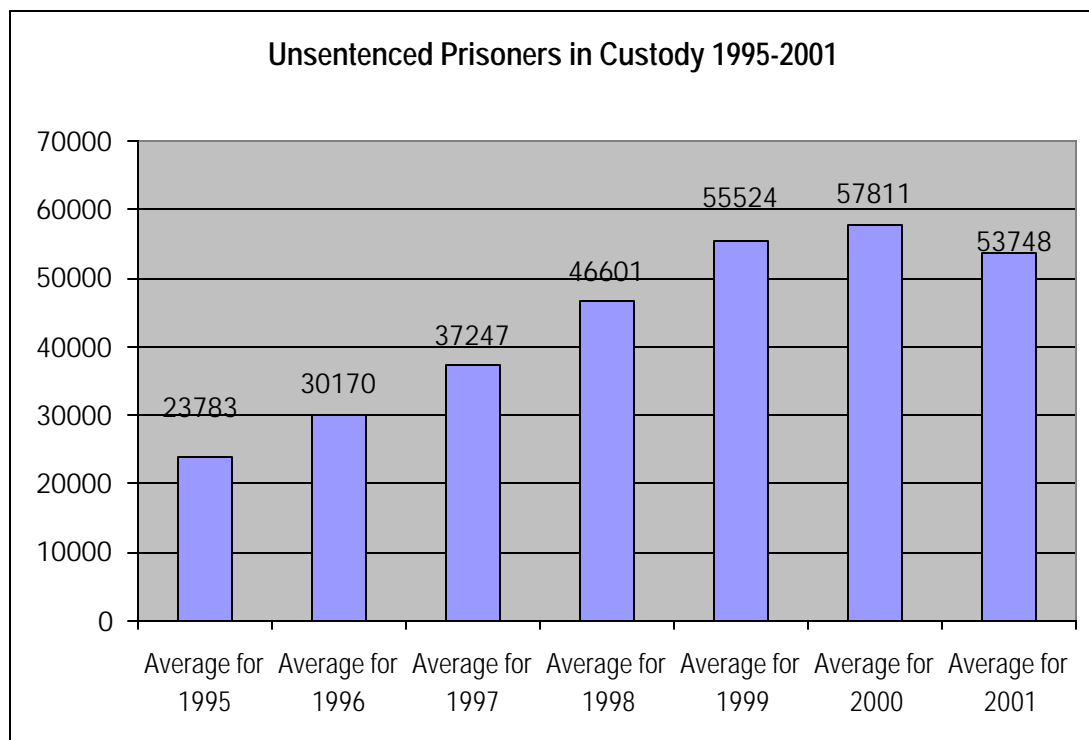


FIGURE 3

Source: Nedbank Institute for Security Studies

The inability of offenders to pay bail is regarded as one of the main reasons for them to be held awaiting trial. In June 2001 a total of 17 588 (34%) of awaiting trial prisoners were being held because they could not afford to pay bail. Over 11000 of these had bail set at less than R1000 (*Nedbank ISS Crime Index 2001:2*).

Table 12 illustrates the number of prisoners awaiting trial who were unable to pay bail: June 2001 – Department of Correctional Services 2001.

Number of Prisoners Awaiting-Trial Unable to pay Bail: June 2001

Province	Below R300	R600/ R300	R1000/ R600	Total Below R1000	Total Above R1000	Total
Gauteng	203	864	1391	2458	3223	5681
KZN	294	816	1264	2374	1465	3839
Eastern Cape	934	946	437	2317	185	2502
Western Cape	484	658	502	1644	264	1908
North West	80	261	339	680	298	978
Free State	109	301	283	693	195	888
Mpumalanga	56	181	259	496	275	771
Northern Province	29	93	176	298	396	694
Northern Cape	153	88	58	299	28	327
Total	2342	4208	4709	11259	6329	17588

TABLE 12

Source: Department of Correctional Services

The majority of the awaiting trial prisoners who could not afford bail were in Gauteng (32%), followed by Kwa-Zulu Natal (22%), Eastern Cape (14%) and Western Cape (11%). This trend correlates with the crime trends in the country where, compared to the other provinces (*Figure 4*), Gauteng, KwaZulu-Natal, Western Cape and Eastern Cape have the highest levels of recorded crimes (*Nedbank ISS Crime Index Vol. 5 2001:3*). Below is a graphic representation of the number of offenders who could not pay bail in the

various provinces as at August 2001. On the 27 May 2003 there were 20 108 awaiting-trial prisoners who could not afford the set bail (*Judicial Inspectorate of Prisons*).

**Number of Prisoners Awaiting-Trial who could not afford to pay Bail:
August 2001**

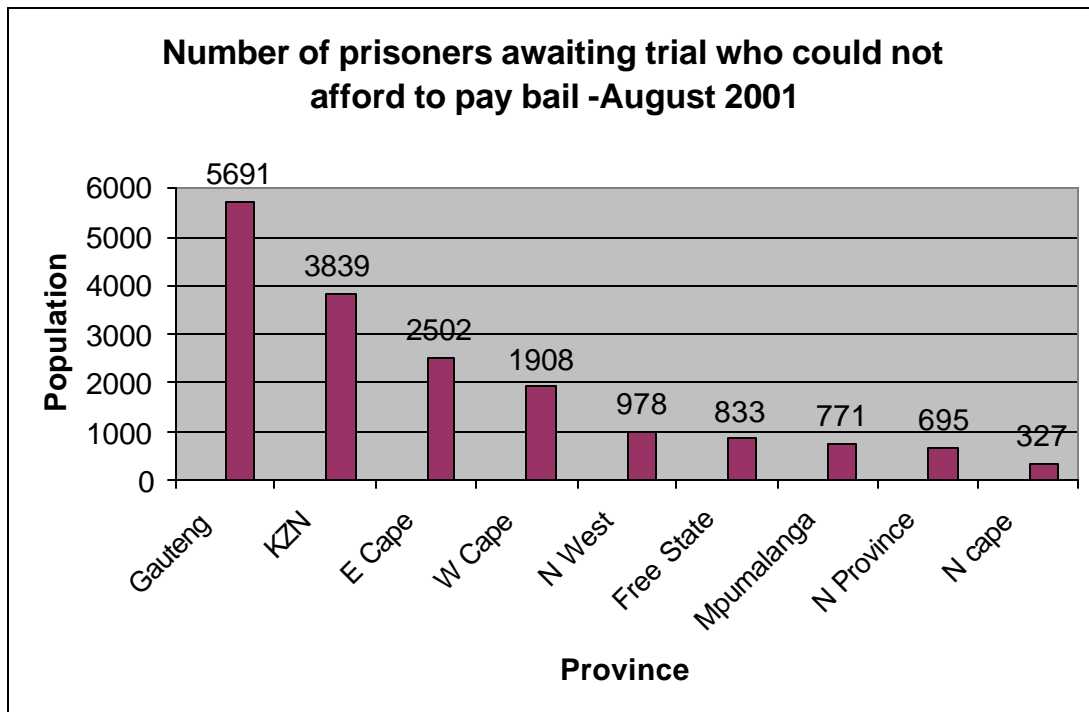


FIGURE 4

Source: Nedbank Institute for Security Studies Crime Index

Judge Fagan (2003:1) states that severe conditions of overcrowding have resulted in detention under horrendous conditions, especially for awaiting-trial prisoners. The courts are faced with a backlog of many, many cases, which means that it takes weeks, months and in many cases years to finalize a criminal prosecution.

On 30 September 2002, a total of 52 965 people were kept in prisons as awaiting-trial prisoners. 21 249 of them had been kept in prisons for a period of more than 3 months and up to 5 years awaiting the finalization of their cases. *Table 13* examines the number of unsentenced prisoners in custody for longer than 3 Months as per Province: 31 May 2002.

Unsentenced Prisoners In Custody per Province: 31 May 2002

Province	3-6 Months	>6-9 Months	>9-12 Months	>12-15 Months	>15-18 Months	>18-24 Months	>24 Months	All Duration
Eastern Cape	1091	511	196	92	72	78	72	2112
Free State	538	262	139	80	53	56	47	1175
Gauteng	3290	1791	896	573	384	556	534	8024
KZN	2175	1307	602	354	237	288	244	5207
Limpopo	172	78	54	32	34	44	66	480
Mpumalanga	361	129	74	42	23	29	22	680
North West	560	276	139	87	39	51	37	1189
Northern Cape	261	123	55	20	25	23	12	519
Western Cape	1200	690	351	291	193	248	314	3287
RSA	9648	5167	2506	1571	1060	1373	1348	22673

TABLE 13

Source: Department of Correctional Services

Unsentenced Prisoners In Custody per Region: 31 March 2004

Province	3-6 Months	>6-9 Months	>9-12 Months	>12-15 Months	>15-18 Months	>18-24 Months	>24 Months	All Duration
Eastern Cape	711	336	131	99	50	49	30	1406
Gauteng	4025	1817	1048	704	451	497	586	9128
KZN	1750	774	435	350	209	230	215	3963
Limpopo								
Mpumalanga	865	439	229	124	76	63	79	1875
North West								
NorthernCape & Free State	1014	391	221	111	100	93	103	2033
Western Cape	1390	719	381	287	178	212	311	3478
RSA	9755	4476	2445	1675	1064	1144	1324	21883

TABLE 14

Source: Department of Correctional Services

From tables 13 and 14 the number of unsentenced prisoners in custody for all duration was 22 673 and 21883 respectively. Although there was a drop in the prisoner population by 796 this number is minimal compared to the number of awaiting-trial prisoners in custody.

During the time of incarceration there is no participation in any rehabilitation programmes for awaiting-trial prisoners. Neither do the prisoners perform any work or attend any programmes. They do not receive social or psychological care. Instead they sit idly for months and years, wasting their lives (*Judicial Inspectorate of Prisons 2003:1*).

Although the Constitution states that the periods of awaiting-trial detention should be as brief as possible, in reality many are incarcerated for extended periods of time. A delay in the processing of cases by the judicial system has resulted in a dramatic increase in the average period of imprisonment for awaiting trial prisoners.

According to the (*ISS Monograph 64 2001:3*) the number of awaiting-trial prisoners incarcerated for longer than three months has increased nearly seven fold since 1996, and the current average detention time is approaching five months. It is not uncommon for unsentenced prisoners to spend up to four years awaiting trial, usually in conditions that are even worse than those of the sentenced prisoner population.

By the same token the Cabinet has identified that there is a policy gap to the responsibility for incarceration of awaiting trial accused persons. Cabinet has noted that the South African legal system presumes innocence until proof of guilt, and yet awaiting trial detainees are accommodated in facilities of correctional system, which are designed primarily for sentenced prisoners (*DCS Draft Green Paper 2003*). It further goes on to state that the long-term policy of Government should confirm that the Department of Correctional Services should accommodate unsentenced correctional clients in correctional facilities and should not use correctional officials to secure care for awaiting-trial detainees. Policy should state clearly what services facilities for the incarceration of awaiting trial detainees should provide. On the basis of this clearly identified list of services, Government policy should define the

appropriate design and resourcing of facilities in which awaiting trial detainees should be accommodated.

According to the (*ISS Monograph No 64 2001:3*), the overcrowding problem in South Africa is directly related to the increase in awaiting trial prisoners. The sentenced prisoner population has increased 17% since 1995, while the number of unsentenced prisoners has increased 164%. Approximately one third of South Africa's prison population are unsentenced prisoners awaiting-trial. Two factors contribute:

- Inappropriately designed or implemented bail laws; and
- Inefficiencies in the processing of cases by the judicial system.

The increase of the prison population in the first few years since 1994 was entirely in the area of unsentenced prisoners. The number of awaiting-trial prisoners almost tripled from 24 265 in January 1995 to 63 964 in April 2000, that is a 164% growth (*Judge Fagan 2000:11*).

Overcrowding has also arisen due to correctional institutions being forced to house far more inmates than they were designed to hold, due to the fact that prison populations are on the increase. *Paulas in (Krestev et al [S.a.]:7)* completed a fifteen year study on the effects of prison crowding and discovered that increasing the number of inmates in correctional facilities significantly increased negative psychological effects, such as stress, anxiety, tension, depression, hostility, feelings of helplessness, and emotional discomfort

3.7.4.2 The implications of prison overpopulation

The South African Prisoners' Organisation for Human Rights (SAPOHR) stated that it would take the government to court for violating prisoners' rights unless it urgently addressed overcrowded prison conditions (*iafrica.com* 2003:1). SAPOHR said that overcrowding contributed to the spread of HIV/Aids and other infectious diseases. It further went on to say that conditions in prisons were inhumane and undermined human dignity as enshrined in South Africa's constitution. The infringement of prisoners' basic human rights caused by overcrowding is tremendous (this will be discussed further in chapter five of this thesis).

Conditions under which awaiting-trial prisoners were being held remained appalling. Often one toilet is shared by more than 60 prisoners; an overwhelming stench of blocked and overflowing sewage pipes; shortage of beds resulting in prisoners sleeping two to a bed while others slept on the concrete floors, often with only a blanket; insufficient hot water, no facilities for washing or drying clothes, broken windows and lights; and inadequate medical treatment for contagious diseases rife in prison (*Judge Fagan* 2002:17).

The extreme levels of overcrowding are harmful to inmates in various ways. Firstly the inmates are subjected to brutality, extortion, and rape at the hands of cellmates. Secondly, personal living space allotted to inmates is severely restricted. Inmates are in constant presence of others, inmates sleep with the knowledge that they may be molested or assaulted by their fellows at any

time. Thirdly, they must urinate and defecate, unscreened, in the presence of others (*Reid 1997:554*).

According to *Neser (1993:279)*, research has demonstrated a connection between over-populated prison conditions and the incidence of physical and mental complaints, for example, tuberculosis, HIV/AIDS, high blood pressure, psychiatric disturbances and psychological problems. Prison over-population leads to higher cell temperatures and noise levels, poorer ventilation in cells, idleness, disagreements and irritations among the prisoners. It is also maintained by *Cobb in (Neser 1993:280)* that overpopulation undermines internal social control, creates a high potential for conflict among prisoners and can negatively influence the relationship between staff and prisoners.

By the same token, *Reid (1997:555)* contends that, in addition to increased violence, overcrowded prisons may induce stress in inmates and staff and result in physical and mental problems. In addition, the majority of the inmates do not work or have access to prison programs. When facilities are overcrowded, the transportation of inmates to and from program sites becomes problematic.

3.7.4.3 Measures to Control Overpopulation

The problems of overcrowding in prisons have been addressed in earnest since the beginning of 2000. The various Departments; Justice, Correctional Services and Welfare and the South African Police Service worked as an

integrated justice system, and commenced projects to reduce the cycle of people held in custody awaiting-trial. On 31 January 2000 the National Council for Correctional Services recommended the advancement of the parole date of certain categories of sentenced prisoners and called for the urgent awareness to be given to the steep increase of awaiting-trial prisoners (*Judge Fagan 2002:17*).

Judge Fagan (*2002:2*), Judicial Inspectorate of Prisons, suggested the release of some awaiting-trial prisoners. This was based on the following:

- Prisoners were detained under inhumane conditions;
- The spread of disease had to be curtailed;
- The enormous stress facing prison staff had to be relieved;
- and
- The state could not afford to pay for the accommodation of so many prisoners.

Thus the targets of the awaiting-trial prisoners for release were those who were poor and could not to pay bail amounts of R1000 or less. These offenders were found by magistrates to pose no danger or harm to their communities if they complied to the bail amounts and were released. This was not an amnesty and offenders had to appear in court when their cases had been remanded for hearing (*Judge Fagan 2002:18*).

The implementation of this policy would result in many advantages:

- Offenders could be reunited with their families;
- They could return to their employment and contribute to their families' upkeep;
- Juvenile offenders could return to school; and
- Would result in daily savings of accommodation costs.

Thus on 27 September 2000, 8451 awaiting-trial prisoners were released and this brought albeit slight, some sort of humanity to the overcrowded prisons.

Flood and Grosfeld (Neser 1993:285) point out that strategies for solutions are seldom applied in isolation and suggest three measures for controlling prison over-population:

- Maximum use of alternatives to imprisonment, such as the release of awaiting-trial prisoners on bail and on their own recognizance, day-parole and placement under correctional supervision;
- Ensuring that the construction of new institutions and the expansion of penitentiary capacity keep pace with increases in prisoner numbers; and
- Establishing and specifying maximum occupancy levels and using early release mechanisms for low-risk prisoners.

Besides the awaiting-trial prisoners being deprived of their constitutional rights to humane detention and a speedy trial, the cost to the state is enormous. At R88.00 a day to house a prisoner, that amounts to R5.6 million per day to keep awaiting trial prisoners in prison (*Judge Fagan 2000:12*).

3.7.5 The Cost Factor

Ten years ago during the financial year 1991/92 the cost to the taxpayer to run the prison amounted to R1 337 777 612,08 compared to the cost for the 2001/2002 year that was about R6 549 314 000,00. This is an increase of about 380% bringing the cost of keeping prisoners locked up to a staggering amount of R18 million per day (*Judicial Inspectorate of Prisons 2003:2*).

The costs of imprisonment are high. In most cases there are other costs to the taxpayer and the economy besides those of prison operation: where the prisoner would otherwise be working, supporting his family, paying taxes, and perhaps making reparations for his offence by paying off a fine, court costs, or restitution. From the discussion that follows, the rise in the cost of incarceration over the years can be seen.

In South Africa on 30 June 1990 there were 19 151 unsentenced prisoners in detention, representing 17,9% of the total prison population. In financial terms this means an annual expenditure of R13 375 million calculated at an average detention cost of R6 860,00 per prisoner per year, based on the cost structure of the 1989/1990 financial year (*White Paper 1991:8*).

The high cost of awaiting trial prisoners is an enormous burden to the state. The current cost of imprisonment is estimated at R88, 00 per prisoner. Based on June 2001 figures of awaiting trial prisoners, this suggests that the state is spending over R4.5 million a day to hold those awaiting trial (*ISS Crime Index 2001:2*).

In South Africa by 30 September 2002, there was a total of 52 965 people in prisons as awaiting-trial prisoners. About 17 489 people who are presently kept in prisons could not afford to pay bail amounts from as little as R50, 00. Not only do they lose their employment or schooling whilst in prison, the cost to the state is enormous. At R94, 16 per day per prisoner (2002 figures), these awaiting trial prisoners are costing the taxpayer almost R2 million per day to be kept behind bars. The social cost of locking up those persons, who are all in law presumed to be innocent, and of whom about 35% only will be convicted, is inestimable (*Judicial Inspectorate of Prisons 2003:1*). Below is the graphic representation of the average prison population for the years 1995/6 to 2001/2.

Average Prison Population for 95/96 to 2002/03 Financial Year

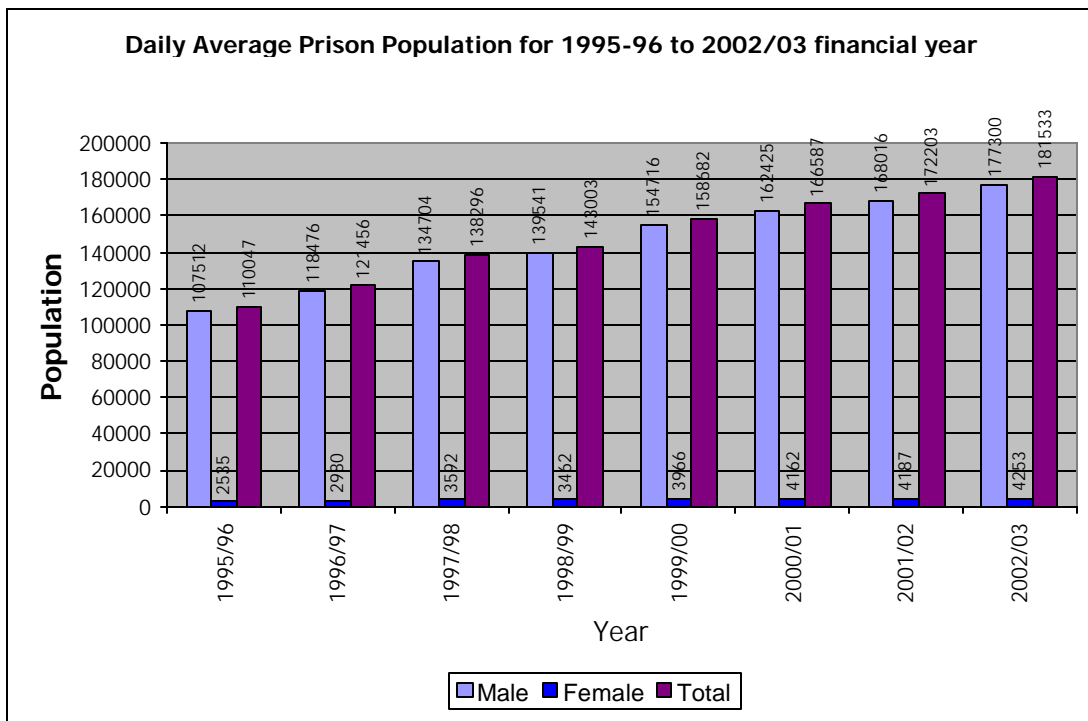


FIGURE 5

Source: Department of Correctional Services 2002-2003

This overcrowding is costing the state R18-million a day. There are no more funds available for building more prisons; alternative methods of sentencing must be sought. We do not need more prisons; we need fewer prisoners *Skosana (2003:1)*.

In consideration of the enormous costs involved in building new prisons, which amounts to about R200 000 per prisoner, the answer is not merely to build more prisons. The number of awaiting-trial prisoners in relation to sentenced prisoners is totally unacceptable and must be reduced (*Judicial Inspectorate of Prisons 2001:12*). Besides the state meeting the costs of the

incarceration of the individual, social services have to be arranged for their dependents until such time the offender is released and re-employed.

Since violent crimes however create the greatest single concern in the community, it is unavoidable that the State creates and maintains the necessary means effectively to keep violent offenders out of the community, in other words, to detain them in prison. Similarly, it is also logical that less serious offenders should rather be kept out of prison in order to utilize the limited prison accommodation for those criminal elements that can, in the interests of the proper protection of the community, not be dealt with other than by imprisonment.

Thus, due to overcrowding, resources that might have been devoted to prisoner programs, mental health and drug treatment services; are being spent on creating bed-space because of the enormous increase in the number of prisoners.

3.8 RESUMÉ

The rate of incarceration in South Africa continues to remain extremely above that of most other countries such as, Nigeria and the United Kingdom. Overcrowding is the major problem facing the Department of Correctional Services. In South Africa 4 out of every 1000 South Africans are in prison. This is among the countries with the highest prisoner numbers per population in the world (*Judicial Inspectorate of Prisons Annual Report 2002/3:26*).

There are various reasons for the resultant overcrowding in prisons and one of the main problem stems from the criminal justice system as a whole. The overwhelming number of cases flooding the courts has created a tremendous backlog and large numbers of accused are being remanded in custody to prisons already overcrowded.

Overcrowding in prisons is a serious problem that hinders the department's ability to achieve its goals of safe custody and rehabilitation. It adds to the security and safety problems of staff and inmates. It concentrates the minds of administrators on the mundane operational tasks of transportation, feeding and bedding. More importantly it undermines internal social control, creates high potential for conflict and can negatively influence the relationship between staff and inmates (*Neser and Takoulas 1995:2*).

Overcrowding not only results in violation of the human rights of offenders, but also in the over-extension of staff and the creation of conditions that undermine rehabilitation (*Department of Correctional Services Annual Report: 2001-2002*). The chronic overcrowding of South African prisons remains a most important inhibiting factor with regards to performance. Apart from the effect that the overcrowded conditions have on the physical and mental well being of staff members and offenders, it also seriously hampers the presentation of treatment and development programmes that are aimed at effecting rehabilitation. Addressing this is one of the most daunting challenges that the Department of Correctional Services faces.

The challenges prisoners now face in order both to survive the prison experience and, eventually, reintegrate into the free world upon release have intensified. Some of the most serious trends are with regards to the unprecedented increases in the rate of incarceration, the size of the prison population and the widespread overcrowding that has occurred as a result.

Imprisonment presents certain unavoidable consequences of a negative or dysfunctional nature that affect the prisoner during his institutionalisation and hamper his re-absorption into society. Imprisonment is furthermore a financial burden upon the State. An alternative to this form of punishment has to be implemented in earnest, in order for the legislation to overcome the problems associated with imprisonment and overcrowding.

Prison accommodation must be used effectively through the selective application of imprisonment and as an incapacitating measure. Prison should be reserved only for the most serious of cases and should only be used as a last resort.

Although imprisonment fulfils an important social function it offers only temporary relief. Thus overcrowding adversely affects living conditions jeopardizes prisoner safety, compromises prison management, and greatly limits the prisoners access to meaningful programming.

The Government has to address the rights of awaiting-trial detainees that are compromised by backlogs in court cases, the length of their remand period, and the conditions that they have to endure in prisons.

It is maintained by *Stinchcomb and Fox (1999:235)* that there is some doubt that the public in general is truly as punitive as advocates of the justice model would like to believe. Although there is certainly considerable support for strict sentencing practices, society has not completely lost faith in the potential of rehabilitation. Overcrowding is a serious problem for which no straightforward and acceptable solutions have been found. Some possibilities to the overcrowding 'pandemic' will be presented in chapter six and seven of this thesis.

CHAPTER FOUR

PROBLEMS WITH OVERCROWDING: MAJOR CHALLENGES CONFRONTED

4.1 INTRODUCTION

A criminal justice system which is strong and effective, and which enshrines the norms and values set out in international human rights instruments is a cornerstone in any democracy. The various ways to strengthen the criminal justice system and to make it more effective in preventing crime are attained by increasing the access to justice and involving more people in the criminal justice process.

Human rights are those rights that all people are or should be entitled to regardless of race, gender, for example, the right to a fair trial in a court of law, education and access to medical care and religion (*Morodi 2003:3*). The blockages in the criminal justice system contribute significantly to the current problem of overcrowding in prisons. This in turn results in other problems such as human rights abuses, difficulties in managing incarcerated offenders, and the escalation and spread of contagious diseases (*Masuku 2001:1*).

The Bill of Rights accommodates the constitutional rights of those regarded as offenders who are incarcerated in the state penal institutions. It further forbids torture and draconian, inhumane, or degrading forms of treatment and provides the right to be free from all forms of violence. In reality some

members of the criminal justice system, it is alleged, do physically torture, beat and subject prisoners to all forms of prison ill treatment which in certain instances have led to death of inmates (*Morodi 2003:8*). Besides this, there are numerous other problems faced by inmates in the prison environment, overcrowding being of major concern. This has a resultant effect on the following which will be discussed in detail in this chapter of the thesis:

- Physical conditions that are deplorable and fall short of international standards;
- The rampant spread of HIV/AIDS and other diseases;
- Lack of resources to educate and treat inmates;
- Conditions that encourage gangsterism and gang-related activities;
- Misconduct, criminality and corruption within the prison; and
- The low morale of prison members.

Therefore, prisons have become more difficult places in which to adjust and survive over the last decade. Some would argue that achieving a long-term impact is exactly what corrections are supposed to accomplish- so that the offender might think twice before reengaging in criminal activities. However, their images of a newfound respect for authority, greater self-control, and resolve to remain law-abiding often conflict with reality. More likely, the result of lengthy confinement is a deep sense of frustration, isolation, and embitterment-hardly feelings that are conducive to effective reintegration into society (*Stinchcomb and Fox 1999: 362-363*).

The detrimental effects of the physical environment prisoners have to endure year after year cannot be underestimated. Conditions, especially overcrowding, are such that it is nearly impossible to create an environment conducive to preparing someone for life outside prison. The strain on resources is enormous and one cannot expect to see good citizens emerging from an environment that cannot take care of the basic needs of prisoners (Muntingh 2002:4).

Protection of the human rights of citizens is the single most important role of a democratic state. This is of paramount importance in South Africa for society endeavours to build a popular culture of human rights in lieu of an historically-rooted culture of violence and intolerance. The three essential principles covered by the *Standard Minimum Rules for the Treatment of Prisoners* are (South African Human Rights Commission 1998:4):

- All prisoners shall be treated with respect due to their inherent dignity and value as human beings;
- There shall be no discrimination on the grounds of, inter alia, race, sex, religion, ethnic origin; and
- The prison system is afflictive by the very fact of the removal of one's liberty and should not, therefore, result in any further derogation of one's rights except those essential for the achievement of a lawful purpose.

The gross overcrowding in the South African prisons does not support the promotion and protection of the basic human rights of prisoners.

According to the *Department of Correctional Services (2002:1)* overcrowding in prisons has its own effects. It impacts negatively on the rendering of effective rehabilitation programmes, and also on the effective safe custody of prisoners. Prisoners are incarcerated in inhumane conditions. It creates an unsafe working environment for Department of Correctional Service officials. Furthermore it negatively impacts on the maintenance of prison facilities. In order to understand the violations of human rights, as a consequence of imprisonment and overcrowding, human rights as embodied in the legislation will be examined in this chapter, as well as the rights of prisoners and the problems and challenges confronting the Department of Correctional Services. The handling of the different types of correctional offenders in corrections is also explored.

4.2 WHAT ARE HUMAN RIGHTS?

Human Rights have been defined as ‘generally accepted principles of fairness and justice’ or ‘moral rights that belong equally to all people simply because they are human beings’ (*Oliver and McQuoid-Mason 1998:2*). It is further stated that human rights belong to all people and that these rights deal with fairness, justice and equality have to be protected and promoted. These rights are applicable to prisoners as well.

4.2.1 The Rights of Prisoners

The concept of 'prisoners rights' was not often spoken of in the past as prisoners under the oppressive apartheid system were subjected to gross violations of human rights such as, hard labour for both common and political prisoners. The then perceptions were based not on rehabilitation but on punishment of offenders who had offended society and were justified to be objects of mistreatment (*Morodi 2003:1*). Furthermore, there have been excessive violations of human rights by the South African criminal justice system, which have resulted in a number of deaths of prisoners in custody.

Thus, prisoners are regarded as one of the most vulnerable groups of people in society, as every aspect of their lives is supervised and governed by their jailers. In South Africa prisons are administered by the Department of Correctional Services (*Oliver and McQuoid-Mason 1998:9*). The Constitution of the Republic of South Africa 1996, (Act 108 of 1996) as amended is also applicable to prisoners. Section 35 (2) guarantees specific rights for prisoners while incarcerated (*Department of Correctional Services Annual Report 1998:11*):

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

The recognition of a human rights and prisoner rights ethic in the legal system and correctional system is not a new phenomenon. *Kollapen (1995:74)* points

out that as far back as 1912, in the case of *Wittaker and Morant vs Roos and Batemen* (1912 AD 92 on 122), the *Honourable Justice Innes* said:

“True, the plaintiffs’ freedom has been impaired by the legal process of imprisonment, but they were entitled to demand respect for what remained. The fact that their liberty has been legally curtailed could have no excuse for a further illegal encroachment upon it.”

Gordon (1996:19) postulates that the most acceptable definition of prisoner rights is the principle of the South African Bench:

“A prisoner continues to enjoy all the civil rights of a person, save those that are taken away or interfered with by his lawfully having been sentenced to imprisonment.”

Prisoner rights are facilities to which they are entitled according to the law and which are necessary to maintain a minimum subsistence level, for example, the rights to protection of life, food, clothing, accommodation, medical services and legal representation are essential needs (*Neser 1993:305*). These rights are embodied in the Correctional Services Act No.8 of 1959, the new Correctional Services Act 111 of 1998, protected by the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as the Constitution), and enforceable in a court of law.

There are varying views and differing perceptions of the actual purpose (object) of imprisonment and whether prisoners can, in fact, claim any rights. Some members of society may regard the prisoner as an offender who should have no rights and should be punished. There are factors in prison that still violate prisoners' rights, for example the severe overcrowding in prisons.

Prison overcrowding (coupled with the transmission of diseases, HIV/AIDS and Hepatitis), corruption, gang violence, lack of educational and professional training are just some of the factors. The Constitution of the Republic of South Africa 1996 (Act 108 of 1996) as amended on the 11 October 1996, perceives prisoners' as people constituting part of society and are also entitled to certain fundamental rights as legal entities, even though they are in prison. Although the Constitution and Correctional Services Act 111 of 1998 guarantees certain basic human rights and prisoner rights, this guarantee is by no means absolute. A distinction has to be made with regards the concepts 'rights', 'privileges' and 'concessions' (*Neser 1993:303*):

- **Rights:** Prisoner's rights are amenities to which they are legally entitled. These are essential for the maintenance of a minimum level of existence: for example, the rights to protection of life, food, clothing; accommodation, medical services and legal representation are essential needs. These rights are protected legally and are enforceable in a court.
- **Privileges:** Prisoner's privileges are amenities to which they are not entitled and which are accorded them as a favour at the

discretion of the commissioner: for example, the use of the telephone, access to writing material and music.

- **Concessions:** Concessions also fall within the discretion of the commissioner and may be described as opportunities for development by means of which prisoners may improve their quality of life, for example, 'late nights' for study purposes or library facilities. The reduction of a sentence and the provisional release of a prisoner before completion of sentence may equally well be regarded as concessions.

It is clear from both the Act on Correctional Services (No 8 of 1959) and the Prison Regulations that a sentenced prisoner in South Africa, is deprived of extensive civil rights: to mention a few, the right to liberty, freedom, equality freedom of movement, speech and the freedom to participate in sport and recreation (discussed in detail in chapter three of this thesis). The infringement of these rights is compounded by the rapidly increasing prisoner population and makes the implementation of the Correctional Services Act (Act No 111 of 1998), that guarantees the rights and treatment of those detained in prison, a daunting task for the Department of Correctional Services. The rapid increase in the prison population, as has been discussed in chapter three of this thesis, leads to the unsatisfactory overcrowded conditions in South Africa's prisons.

4.2.2 The Correctional Services Act 111 of 1998 and the Rights of the Prisoner

The Correctional Services Act, Act 111 of 1998, was passed in November 1998. The fundamental philosophy of the Act is the protection and promotion of human rights in correctional services. This serves as the principal piece of legislation for correctional officials. The Department of Correctional Services' aim is to ensure the safe custody and rehabilitation of offenders. There are specific rules and codes of conduct, which prisoners are obliged to obey. Any violation thereof is dealt with by the Department's code of conduct regulation system.

The Correctional Services Act 111 of 1998 makes provision for a correctional system in which the rights and obligations of sentenced and unsentenced prisoners will be cared for. Amongst others, the Correctional Services Act 111 of 1998 deals with:

- Ensuring the decent detention and personal (human) development of the prisoner;
- The custody of all prisoners in decent conditions;
- The approach to safe custody and the requirements put to the prisoner as well as the steps to ensure safe custody; and
- The minimum rights of prisoners entrenched in this Act may not be tampered with and may not be restricted for disciplinary or any other reasons.

The Correctional Services Act 111 of 1998 recognises that certain rights are so fundamental that they cannot be affected in any circumstances. Any

restrictions or duties imposed on prisoners to maintain security and good order must be commensurate with their purpose or objective and must not affect the prisoner unnecessarily or unreasonably ((*Oliver and McQuoid-Mason 1998:75*)

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The Department of Correctional Services and the Constitution recognise the basic or fundamental human rights of prisoners but, as stated above, give no guarantee that these will be fully realised. There are some factors that directly infringe on certain basic rights of prisoners, such as decent detention and personal privacy, and these are prison overcrowding and gang violence.

4.3 THE BILL OF RIGHTS

The Bill of Rights is an important component of the Constitution, of the Republic of South Africa Act 108 of 1996, and has been incorporated into chapter two of the Constitution. The purpose of the Bill of Rights is to protect the individual against abuses of the authority of the State. Sometimes a country draws up a list of human rights that have legal status, and are legally enforceable. This list of legally enforceable rights is called the Bill of Rights (*Oliver and McQuoid-Mason 1998:17*)

The guideline of the existence of certain necessary human rights occurs in the majority of political viewpoints worldwide. According to *Van der Walldt and Helmbold (1995:55)*, the international community has attempted to give shape

to the idea that every offender has certain basic needs that ought to be entrenched as rights. Human rights have, therefore, become part of modern international politics and international law.

The 1996 Constitution of the Republic of South Africa, Act 108 of 1996, provides people living in South Africa with the protection of a Bill of Rights. Human rights bills of other countries, the Universal Declaration of Human Rights 1948 and international documentation protecting the rights of people, influenced the Bill of Rights. All the laws governing South Africa have to be in line with the Bill of Rights.

4.3.1 Why is the Bill of Rights Important to Correctional Services Officials?

Due to the position of power that correctional officials hold it is imperative that they comprehend the rights contained in the Bill of Rights. Correctional Services officials have a difficult and finely balanced duty: on the one hand they have to keep prisoners in custody and maintain order and discipline in their prisons, while on the other hand they must respect and protect the fundamental rights of the prisoners (*Oliver and McQuoid-Mason 1998:25*).

By the same token *Morodi (2003:4)* is of the opinion that for the realisation of prisoners rights, especially, the right to be heard pertaining to the general treatment of prisoners by the prison staff, in state penal institutions, the role of the prison head is crucial. He further states that it seems the rights of

prisoners are more protected than those of law abiding citizens as it does make a fundamental difference when it comes to the manner in which they are being handled and treated in prisons forgetting the purpose of their sentence, of setting the score regarding the crime committed.

The author is of the opinion that although this statement may be true in terms of the protection of prisoner's rights, it must be borne in mind that these offenders are human beings and ought to be treated in a humane manner. Upon release, the offenders have to re-integrate into society as 'normal' citizens. Therefore, if the offender were treated inhumanely then this would affect his rehabilitation and consequently may lead to recidivism. Thus this cycle will only perpetuate the overcrowding of prisons.

4.3.2 The Operation of the Bill of Rights

The Bill of Rights incorporates the all-important *Standard Minimum Rules for the Treatment of Prisoners, adopted in 1957* (discussed in chapter three of this thesis). Central to the Constitution of the Republic of South Africa Act 108 of 1996 is the Bill of Rights, "which is not a vague and altruistic wish list of ideals and aspirations". It is a user-friendly instrument for the protection and observance of human rights including those of offenders (*Morodi 2003:2*).

The rights described in the Bill of Rights are intended to govern the relationship between the state and the citizen. The legislative authority, as well as the executive and administrative authorities has an obligation to obey the Bill of Rights (*Van der Waldt and Helmbold 1995:56*). If the government of

the day unlawfully contravenes a provision of the Bill of Rights, the Constitutional Court may declare such an action null and void. All administrative acts and decisions of the government may be tested against the Bill.

Some examples of rights contained in the Bill of Rights that are relevant to Correctional Services are:

- The right to equality and quality before the law (section 9)
- The right to dignity (section 10)
- The right to life (section 11)
- The right to freedom and security of the person (section 12)
- The right to privacy (section 14)
- The right to freedom of religion, expression and belief (section 15)
- The right to freedom of association (section 18) and movement (section 21)
- The right to a healthy environment (section 24)
- The right to health care, food, water and social security (section 27)
- The right to education (section 29)
- The right of access to the courts (section 34)
- The right to conditions of detention that is consistent with human dignity (section 35) (*Oliver and McQuoid-Mason 1998:17*).

The Bill of Rights protects offenders against unlawful action on the part of the state. It is a manner of ensuring that the state is restrained from infringing certain constitutional rights, for example, healthcare and dignity. Some of the above listed rights relevant to Correctional Services will be discussed.

4.3.2.1 The Right to Equality and Non-Discrimination

Section 9 of the Constitution (Act 108 of 1996) states that everybody has the right to equality and non-discrimination, which includes the following aspects:

- Everyone, including the prisoner, is equal before the law and has the right to equal protection and benefit of the law.
- Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect categories of persons, disadvantaged by unfair discrimination, may be taken.
- The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The right to equality and non-discrimination is one of the most fundamental rights. A person's right to be treated equally and not to be discriminated against should not be limited or affected if they are imprisoned (*Oliver and*

McQuoid-Mason 1998:31). The South African Human Rights Commission (SAHRC) (1998:34) found that there were considerable differences in the living conditions and facilities on offer in the women's prisons as compared to that of the male. Notably, most prisons for women lacked special facilities especially for those women prisoners confined with their babies. It was also found at Thohoyandou Prison that women were dressed in old ragged clothes, as they had not been provided with any decent dresses or shoes. This clearly goes against the guidelines of the Bill of Rights.

4.3.2.2 The Right to Human Dignity

According to section 10 of the Constitution (Act 108 of 1996), everyone has the right to dignity, which includes:

- The inherent dignity and the right to have their dignity respected and protected.

Whatever the purpose or reason for the imprisonment of an offender, the maintenance of the prisoner's right to dignity is essential if there is to be any meaningful application of human rights in the prison context. It is an international principle that the negative effects of imprisonment should be minimised as far as possible. Living conditions in prison are important for a prisoner's sense of worth and dignity. Standards of accommodation, personal hygiene, bedding and clothing play an important role in influencing the

prisoner's mental and physical well-being (*Oliver and McQuoid-Mason 1998:34*).

The Jali Commission Hearings revealed that inhumane conditions are being experienced at the St Albans Prison outside Port Elizabeth. Shocking evidence emerged on how prisoners, as a result of overcrowding, were locked in ablution blocks. Manager of St Albans Prison *Mr Richard Marcus (SABC 2000:1)* stated that gangsterism, which resulted in many assaults of both prison officials and prisoners, was rife. These assaults were difficult to prove and police investigation never resulted in anything.

The *SAHRC (1998:13)*, found that although the Constitution guarantees prisoners the right to conditions of detention that are consistent with human dignity, the conditions in most of the prisons in their view, fall short of this constitutional obligation. They also stated that majority of the prisons were severely overcrowded and in a serious state of disrepair, not only did they pose a health hazard but also contributed to the high rate of escapes. These inhumane conditions in which prisoners are accommodated contribute, to a very large extent, to the criminality found in the majority of prisons.

Although there has been an international pressure on the treatment of prisoners and progressive steps taken in the South African Constitution Act 108 of 1996, there is a continuous trend for prisoners to suffer cruel and inhumane treatment, even death in prison. The South African Prisoners' Organisation for Human Rights (SAPOHR) maintains that conditions in

prisons are inhumane and undermined human dignity as enshrined in South Africa's Constitution Act 108 of 1996 (*iafrica.com 2003:1-2*).

Those in free society might argue that by stripping the offender of human dignity, imprisonment will make the type of lasting, negative impression that will serve as a strong deterrent to recidivism. On the contrary, instead of making them determined to avoid another prison term, incarceration may leave many inmates accustomed to prison life and resigned to the inevitability of returning to it (*Stinchcomb and Fox 1999:363*).

It could be debated (*Oliver and McQuoid-Mason 1998:41*), that extreme living conditions in prison such as having to eat next to a toilet; forced sodomy; a visitor to the prison having to strip in front of many correctional officials before being allowed to visit; the way people communicate with each other, and some forms of discipline and punishment could constitute cruel, inhumane and degrading treatment or punishment. Any form of torture would also constitute cruel, inhuman and degrading punishment and would detrimentally affect the prisoner's physical as well as psychological integrity. Thus overcrowding which leads to the atrocious conditions under which the prisoner has to live, could be considered as inhumane and degrading punishment.

The imposition of draconian, inhumane or degrading punishment which involves housing inmates in a dark prison cell(s) as a mechanism for discipline or internal offences committed constitutes serious illicit act (crime) against humanity (*Morodi 2003:8*). The South African Prisoners' Organisation

for Human Rights (SAPOHR) stated that (*iafrica.com 2003:1*) it would take the government to court for violating prisoners' rights unless it urgently addressed overcrowded prison conditions.

4.3.2.3 The Right to Freedom and Security of the Person

According to section 12 (1) of the Constitution (Act 108 of 1996), everyone has the right to freedom, and security which includes the right:

- Not to be deprived of freedom arbitrarily or without just cause;
- Not to be detained without trial;
- To be free from all forms of violence from either public or private sources;
- Not to be tortured in any way; and
- Not to be treated or punished in a cruel, inhumane or degrading way.

The *Amnesty International Annual Report (1998:3)*, reports that the statutory Human Rights Commission investigated a number of serious incidents of torture and ill treatment of prisoners. In one incident, warders at Helderstroom Maximum Prison allegedly beat, kicked, punched and used electric shields on more than 50 prisoners when moving them from communal to isolation cells. In an incident at Pollsmoor Maximum Prison in May, 150 warders recruited from different prisons allegedly assaulted prisoners with batons, fists and

pistols during a search for weapons. A ministerial inquiry found, among other things, that 155 sustained injuries requiring medical attention, and that the prison doctor failed to provide medical care for many of them.

By the same token President Nelson Mandela (*DCS Draft Green Paper 2003*) said at the official launch of the re-training and human rights project in Kroonstad in 1998 that secure prisons are essential to making the justice system an effective weapon against crime. When prisoners, convicted or awaiting trial, are entrusted in the care of the Department, they must know and the public must know that they will remain there until they are legally discharged. The full contribution, which prisons can make towards a permanent reduction in the country's crime-rate, lies also in the way in which prison officials treat prisoners. It cannot be emphasised enough, the importance of both professionalism and respect for human beings.

The Department of Correctional Services is obliged to provide a safe environment for prisoners in prisons. The use of force as a means of restoring order can only be justified in extreme circumstances, when order has broken down and all other interventions have failed (*DCS Draft Green Paper 2003*). The security measures to which offenders and detainees are subject should be the minimum that is needed to ensure their secure custody, and the safety of other prisoners.

South African prisons have a history of harsh and brutal punishments in comparison to international standards (discussed in chapter two of this

thesis). Punishment cells with minimal facilities, prohibition of access to reading material, arbitrary removal of 'privileges', collective punishment for group misbehaviour, isolation cells and straitjackets are used as punishment for a range of offences. There is often an unacceptable level of discretion exercised by prison guards in determining the living conditions of prisoners under their supervision (*Oliver and McQuoid-Mason 1998:41*).

According to the Constitution Act 108 of 1996, the freedom and security of the person, includes the right to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhumane or degrading way; but in the context of serious overcrowding, these freedoms are very difficult to secure for offenders (*DCS Draft Green Paper 2003*). Although the Department is obliged to ensure that the prisoner is safe from violation of these rights in reality this is far from being realised.

4.3.2.4 The Right to Privacy

According to section 14 of the Constitution (Act 108 of 1996), everyone has the right to privacy, which includes the right not to have:

- Their person or home searched;
- Their property searched;
- Their possessions seized; or
- The privacy of their communications infringed.

The very nature of imprisonment is that it severely restricts a person's right to privacy through having to share a cell, conditions of overcrowding, constant

supervision and searches by prison authorities. Furthermore prisoners are forced to live communally with people not of their choosing, and live their lives in accordance with a strict prison administration (*Oliver and McQuoid-Mason 1998:46*).

It was further stated by *McQuoid-Mason and Dada (1999:71)* that:

“People detained by the police or prison authorities in prisons, police lock-ups or any other place, retain their basic Common Law and Constitutional personality rights except for their right to liberty and a qualified right to privacy. These rights include the right to bodily security, reputation, liberty and privacy. A prisoner or detainee may not be deprived of sleep, exercise, clothing and the right to wash or go to the toilet. Furthermore, prisoners and detainees may not be assaulted or tortured.”

On the hand, it is contended by *Nxumalo (1997:234)*, that a convicted person is considered by the courts to have a limited expectation of privacy when incarcerated.

4.3.2.5 Freedom of Religion, Belief and Opinion

In terms of section 15 (1) of the Constitution (Act 108 of 1996), everyone has the right to freedom of conscience, religion, thought, belief and opinion. Section (2) of the Constitution (Act 108 of 1996), states that religious observances may be conducted at state or state-aided institutions, provided that:

- Those observances follow rules made by the appropriate public authorities;
- They are conducted on an equal basis; and
- Attendance at them is free and voluntary.

A fundamental right acknowledged by the South African Bill of Rights and the Standard Minimum Rules is the right to the freedom of religion, belief and opinion. However, because of, the diversity of the South African culture and the presence of so many different religions (such as Christianity, Buddhism, Hinduism and African traditional religions), it is difficult for the Department to accommodate the various beliefs in the prison context, let alone in an overcrowded one.

4.3.2.6 Right to Healthcare, Food, Water and Social Security

Section 27 (1) of the Constitution (Act 108 of 1996), everyone (including the prisoner) has the right to have access to:

- Healthcare services;
- Sufficient food and water; and

- Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

The Department of Correctional Services is obliged to provide health care to prisoners. This implies that the health care should be consistent with that provided by the state to other citizens. The provision of food, water and basic healthcare is thus the basic minimum that the State is compelled to provide to inmates. The findings of the *SAHRC (1998:14)*, is that the most common complaint of prisoners was that the food ranged from poorly prepared or inedible, to too little or rotten. They also complained that dinner is normally served at 14h00 and no provision is made for evenings by which time everyone is hungry again.

South Africa is a country in which socio-economic conditions give rise to a high prevalence of communicable diseases, both in the sense of a majority of the population that has a lower than desirable nutrition level and hence is vulnerable to infection, but also in the sense of cramped and inadequate living conditions that tend to fester communicable diseases (*DCS Draft Green Paper 2003*). This document further states that the crime patterns in South Africa indicate that a large proportion of the prison population come from these very communities. Thus the rate of infection with communicable diseases of prisoners entering the Department is higher than the national average. The overcrowding level in prisons exacerbates this situation.

The Statement from the Heads of Government at the 4th Baltic Sea States Summit on the Threat of Communicable Diseases, issued at St Petersburg on the 10 June 2002, states that overcrowded prisons with infected inmates and with poor hygiene and sanitation are a dominant threat in the field of communicable diseases in the region. Prison health must be a priority (*DCS Draft Green Paper 2003*).

The overpopulation of prisons has a negative effect on the provision of an adequate standard of healthcare to prisoners. Tuberculosis (TB) and asthma are the most frequent medical complaints and are clearly related to the overcrowded conditions in prisons. The effects of overcrowding on prisoners can be detrimental to their health. Social services should be available to prisoners upon release to ensure the successful re-integration into the community. While due consideration should be given to such prisoners rights, they are being realised at a costly exercise when taxpayers money has to be used (*Morodi 2003:6*).

Thus prisoners may not have access to satisfactory medical care in prison, for various reasons including inadequately trained staff, inadequate facilities, conflict between the control and caring roles, moral and value judgements about what prisoners should be entitled to, and inadequate funding of health services (*World Health Organisation (WHO) 2001:2*).

Therefore overcrowding remains the core cause of the health problems and the root cause of overcrowding in the totally unacceptable number of awaiting-trial prisoners.

4.3.2.7 The Right to Education

In terms of section 29 (1) of the Constitution (Act 108 of 1996), everyone has the right:

- To a basic education, including adult basic education; and
- To further education, which the state, through reasonable measures, must make progressively available and accessible.

The purpose of education and training is the enhancement and development of educational levels and the improvement of skills of prisoners in order to facilitate their reintegration into the community. The right to education is not a privilege but a prerogative of the prisoner.

The findings of the *SAHRC (1998:21)* showed that although educational facilities existed in some prisons (such as Northend Prison and Brits Prison), in the majority of the prisons the provision for education was almost non-existent within the prison services. Complaints included the lack of educational facilities, insufficient library material, lack of study materials and too few qualified teachers. Coupled with the provision of education is the acquisition of adequate skills, which very often is the key to successful rehabilitation. The problem of recidivism in the South African prison system is aggravated by the reality that prisons have simply been unable to prepare prisoners meaningfully for release or to cope with the outside world (*SAHRC*

1998:25). Overcrowding of the prison facilities means that this directly affects the deliverance of the educational right to the prisoners.

4.3.2.8 Arrested, Detained and Accused Persons

In terms of section 35 (2) of the Constitution of the Republic of South Africa (Act 108 of 1996), provides that everyone who is detained, including every sentenced prisoner has the right:

- To be informed without delay of the reason for detention;
- To a lawyer of their own choice and to consult with that lawyer, and to be informed of this right without delay;
- To be provided with a lawyer by the state at public expense if it would otherwise lead to fundamental injustice, and to be informed of this right without delay;
- To personally dispute the legitimacy of the detention before a court and to be released should the detention be illegal;
- To conditions of detention which take human dignity into account, including at least exercise and the provision, at public expense, of adequate accommodation, food, reading matter and medical treatment;
- To contact, and to be visited by, that person's
 - Spouse or life partner
 - Next of kin
 - Spiritual adviser of his or her own choice

- Medical practitioner of his or her own choice.

This section deals mainly with the rights of awaiting-trial or unsentenced prisoners. These are a special class of prisoners and should be treated differently and in a less restrictive way than sentenced prisoners, as in terms of the law they are still innocent. However, the reality is that often the conditions for awaiting trial prisoners are more onerous than for sentenced prisoners (*Oliver and McQuoid-Mason 1998:60*).

The findings of the *SAHRC (1998:32)* revealed that there were numerous and repeated complaints from awaiting trial prisoners of spending up to two years or more in detention, of serious overcrowding and little or no provision for recreational facilities. An increase in the number of awaiting-trial prisoners has contributed to the problem of overcrowding. Some of the aspects listed above, have already been discussed in this chapter.

In South Africa the majority of the prison population are not represented by a lawyer due to economic realities. Assistance is normally requested by many prisoners from organisations such as *Lawyers for Human Rights*, the *National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO)* and the *Legal Resource Centre*. Prisoners complained that their requests to such organisations have been confiscated or censored. This is clearly an infringement of their rights as all unsentenced prisoners have the right to consult their legal advisors without interference (*Oliver and McQuoid-Mason 1998:60*).

In order to survive in prison basic needs of the prisoners must be met. Food, water, and basic healthcare provision are the basic minimum that the State is obliged to provide to prisoners. The Standard Minimum Rules (discussed in chapter three of this thesis) provides for a higher standard than just the basic minimum. Food should be varied, nutritional and sufficient. The findings of the *SAHRC (1998:14)*, revealed that at the Durban Westville Prison, prisoners complained that the food was inadequate, half-cooked, rotten, unhygienic and sometimes contained lice. Due to the serious overcrowding in prison (such as at Klerksdorp, Newcastle and Empangeni), there are no dining hall facilities for prisoners, and the process of feeding prisoners takes up to six hours to be completed. These are just some of the violations of basic human rights, which are exacerbated due to overcrowding.

The Correctional Services Act 111 of 1998 creates mechanisms to guarantee proper accountability and oversight of the prison system. Apart from the National Council (a body of persons outside the Correctional Services who develop policy regarding the correctional system and the sentencing process), the Correctional Services Act 111 of 1998 creates two new fundamental bodies: the Judicial Inspectorate and the Independent Prison Visitor, which are responsible with ensuring that the Department of Correctional Services functions effectively and humanely (*Oliver and McQuoid-Mason 1998:83*).

4.4 THE HUMAN RIGHTS COMMISSION

According to Section 184 (1) of the Constitution (Act 108 of 1996), the Human Rights Commission must:

- Promote respect for human rights and a culture of human dignity;
- Promote the protection, development and attainment of human rights; and
- Monitor and assess whether human rights are being observed.

Section 184 (2) of the Constitution (Act 108 of 1996), states that the Human Rights Commission has the power:

- To investigate and report on the observance of human rights;
- To take steps to secure appropriate redress where human rights have been violated; and
- To carry out research into and education on human rights.

In addition, section 184 (3) of the Constitution (Act 108 of 1996), states that, the Human Rights Commission also has the task of questioning governmental bodies to ascertain how they have helped people to achieve socio-economic rights such as the right to housing, healthcare, food, water, social security, education and the environment.

The South African Human Rights Commission received large numbers of complaints from prisoners since its inception in October 1995. In 1996 the Human Rights Commission carried out a national inquiry into human rights in

prisons. The decision to undertake the enquiry were based on the following reasons (*Pityana 1998:3*):

“The prison population in South Africa was so disproportionately high that the maintenance of prison services was a major drain on national resources. Something needed to be done to address the culture of crime in prisons and the excessive recidivism, which characterises the prison system. The history of South Africa was that the people most affected by a dysfunctional and malfunctioning prison system were those who had also been victims of apartheid. It was important both to take account of the legacy of apartheid that is responsible for the swelling prison population and to take steps to develop a different calibre of prison system that would be consistent with the new Constitution and with international norms and standards.”

It was found by the Human Rights Commission that prisoners had genuine grievances about their conditions (as discussed above sections of the Bill Of Rights). There were also insufficient warders to handle the number of prisoners. The poor conditions were a contributing factor in causing prisoners to become increasingly aggressive and abusive towards warders. Furthermore, rehabilitation programmes were non-existent in most of the prisons in the country. This explains the high rate of criminal activities such as gangsterism, availability of weapons, drugs and other illegal substances. The

conditions under which juveniles are kept in most prisons do not create the basis for their rehabilitation. Due to the problem of overcrowding, the requirement for separation of juveniles from adult prisoners is not always conformed to. The increase in the number of awaiting-trial prisoners has led to serious overcrowding. Many juveniles complained that their section was overcrowded, dark and dirty (*SAHRC 1998:31-33*).

4.5 THE JUDICIAL INSPECTORATE

The Judicial Inspectorate is an independent office under the control of the Inspecting Judge. The Correctional Services Act No.8 of 1959 was amended, to provide for the establishment of the Judicial Inspectorate on 20 February 1997 by proclamation of the Correctional Services Amendment Act No.102 of 1997. This legislation was further amended on 19 February 1999 by proclamation of sections 85 to 94 of the Correctional Services Act No.111 of 1998.

4.5.1 Objectives of the Judicial Inspectorate

Section 85(2) of the Correctional Services Act No 111 of 1998 states that:

“The objective of the Judicial Inspectorate is to facilitate the inspection of prisons in order that the Inspecting Judge may report on the **treatment** of prisoners in prisons and **on**

conditions and any corrupt or dishonest practices in prisons.”

Thus the function of the Inspecting Judge is to inspect prisons so as to report on the treatment of prisoners and conditions in prisons. It is not the function of the Inspecting Judge to deal with complaints of individual prisoners. The Inspecting Judge may make any enquiry and hold any investigation in order to carry out a proper inspection and to submit a report to the Minister of Correctional Services (*Oliver and McQuoid-Mason 1998:83*).

In understanding the objectives of the Judicial Inspectorate, three factors need to be highlighted at the outset. Firstly, the Inspectorate is an entirely independent statutory body and should not be regarded as an arm of the Department of Correctional Services. Secondly, provisions of the Correctional Services Act 111 of 1998 relation to the establishment, the objectives and the purposes of the Inspectorate must be interpreted against the background of the new philosophy concerning the administration of prisons and the management of prisoners in South Africa. Thirdly, neither the Judicial Inspectorate nor the Inspecting Judge has any disciplinary powers in respect of Correctional Officials or prisoners (*Judicial Inspectorate 2002:1*).

The new philosophy of the Department of Correctional Services is illustrated in the provisions of the Correctional Services Act 111 of 1998. Section (2) of the Act 111 of 1998 states that, “the purpose of the correctional system is to contribute to maintaining and protecting a just, peaceful and safe society by:

- Enforcing sentences of the courts;
- Detaining all prisoners in safe custody whilst ensuring their human dignity; and
- Promoting the social responsibility and human development of all prisoners and persons who are subjected to community corrections” (*Judicial Inspectorate 2002:1*).

The above highlights the significance of human dignity and the development and social responsibility of the prisoner. The Correctional system is trying to move away from its standpoint of a punitive system to one which recognises that most offenders sentenced to prison will return to society, thus their treatment should be in such a way that it does not hamper personal growth and development for community reintegration and render an opportunity for further criminality (*Morodi 2003:10*). The overpopulated prison system makes the task of accomplishing these objectives exceedingly complicated.

4.5.2 Independent Prison Visitors

Section 92 (1) of the Correctional Services Act 111 of 1998, allows the Inspecting Judge to appoint Independent Prison Visitors for the various

prisons throughout South Africa. The main purpose or function of the Independent Prison Visitors, as set out in section 93 of the Correctional Services Act 111 of 1998, is to deal with the complaints of prisoners by:

- Regular visits
- Interviewing prisoners in private
- Recording complaints in an official diary and monitoring the manner in which they have been dealt with and
- Discussing complaints with the Head of Prison, or the relevant subordinate correctional official, with a view to resolving the issues internally.

The underlying purpose of the Correctional Services Act 111 of 1998, in providing for the appointment of laypersons as Independent Prison Visitors, is to stimulate the community's interest and involvement in correctional matters and promote public confidence in the treatment of prisoners and conditions in South African prisons (*Annual Report Judicial Inspectorate of Prisons 2000:10*).

4.5.3 Complaints of Prisoners

Prison is an unnatural environment where people with diverse personalities are placed together. It is therefore understandable that the uncertainty

amongst prisoners, which stems from imprisonment, will lead to a situation in which many complaints will arise (*Annual Report Judicial Inspectorate of Prisons 2001/2002:16-17*). A means of addressing prisoner complaints is regarded as an important measure in the promotion of a human rights culture in prisons, thus trying to ensure that a peaceful and satisfied prison population can be maintained.

With most of the prisons in South Africa severely overcrowded and because of the unnatural environment in which people find themselves when placed in prison, it is understandable that there are many complaints from prisoners (*Annual Report Judicial Inspectorate 2002/2003:12*). It is further postulated that the speedy resolution of such complaints by the authorities is important in reducing the high-tension levels that exist among prisoners. The resolution of complaints also provides a mechanism to monitor the fair and just treatment of prisoners, promoting a human rights culture without which meaningful rehabilitation cannot take place.

4.5.3.1 Number and Nature of Complaints

In 2002 the Independent Prison Visitors, paid 7 147 visits to prisons, privately consulted with 58 907 prisoners and received 190167 complaints from prisoners. The complaints ranged from minor to serious matters (*Annual Report Judicial Inspectorate 2002/2003:13*). The table below indicates the number and nature of complaints according to the different provinces.

Number and Nature of Prisoner Complaints received by IPVs – 2002

COMPLAINTS	Eastern Cape	Free State	Gauteng	Kw a- Zulu Natal	Limpopo	Mpumalanga	North West	Northern Cape	Western Cape	Totals
Assaults	501	704	839	1962	69	333	560	334	982	6284
Bail/Appeal	933	2306	6079	3683	1071	1089	688	707	1412	17968
Conditions	662	1805	3209	2746	166	186	955	990	2777	13496
Deaths	46	199	202	77	15	177	43	10	50	819
Food	430	1902	2031	3141	131	248	810	272	1056	10021
Health Care	1191	2468	3472	3492	465	527	2014	905	3230	17764
Hunger Strikes	52	72	133	47	28	24	47	67	123	593
Mechanical Restraints	46	61	22	1	30	0	133	3	6	302
Other	2252	7858	16955	14755	1360	4293	3883	4215	10248	65819
Parole	765	985	3723	1240	301	370	593	316	1378	9671
Segregation	173	195	18	85	40	1	77	1	173	763
Solitary Confinement	82	844	568	459	44	74	299	24	337	2731
Transfers	1677	6314	7740	5359	380	1130	1926	1127	5342	30995
Treatment	717	1836	3578	2356	89	329	977	950	2112	12941
Totals	9524	27549	48569	39403	4189	8781	13005	9921	29226	190167

TABLE 15

Source: Judicial Inspectorate of Prisons

From the statistics obtained the number and nature of complaints received from prisoners, problem areas can be identified. It can be ascertained from the figures above that the most common complaint in all provinces was that of transfers, mainly to be closer to their families. The second most common

complaint was of bails and appeals. This was received from prisoners who had been granted bail but who were unable to pay the amount fixed by the court, in some cases as little as R50.00, due to poverty and as a result remain in prison for months until their cases are finalised (contributing to the increase in the prison population and thus, the overcrowded conditions) (*Annual Report Judicial Inspectorate 2002/2003:13*). Further expansion of this aspect will be dealt with later in this chapter.

With regards to the conditions in prisons, a total of 13 496 complaints were received. 12 941 complaints were received concerning the treatment received in prison. If one combines the conditions and treatment the total reaches is 26 473, making it the second highest complaint, thus going against the humane treatment and detention of prisoners in prison.

Besides transfers, conditions and treatment, a high number of complaints concerned health care. Overcrowding of prisons and the understaffing of doctors and nurses are the main concerns (*Annual Report Judicial Inspectorate of Prisons 2002/2003:18*).

4.6 CHALLENGES CONFRONTED BY PRISONS

Overcrowding exists in most prisons. The general effect of prison overcrowding magnifies the negative effects of prison life. Crowded prisons have increased violence, gangs, escapes, deaths, sexual assaults, as well as

more medical complaints, both physical and mental. Crowded conditions also lead to greater contact among inmates, resulting in aggressive and at times violent behaviour (*Reid 1997:553*). At the same time their own capacity to manage these risks is severely constrained.

Prisons generally accumulate a number of unsuitable living conditions within their walls, among which are inadequate hygiene and ventilation, overcrowding and promiscuity. Overcrowding in prisons, particularly in awaiting-trial detention centres, is a common occurrence, and conditions have been reported of prisoners having less than one square meter per person of floor space. Very often there are no budgets for the maintenance and repairs. Tensions resulting from overcrowding and having to live together in unsuitable surroundings also breed violence between prisoners (*World Health Organisation (WHO) 2001:1-2*).

Furthermore it is stated by *WHO (2001:2)* that, into this unhealthy environment are introduced the most underprivileged members of society. Prisoners most often come from disadvantaged and marginalized social groups, such as the urban poor, ethnic minorities, recent immigrants and injecting drug users. Malnutrition, unhealthy living conditions and lack of access to basic medical care are common to these groups.

In addition, overcrowding leads to an escalation and spread of contagious diseases, and becomes the breeding ground for various sorts of infections. These may be airborne, such as tuberculosis, or transmissible due to conditions of promiscuity or unhealthy lifestyles, such as sexually transmitted

infections or diseases due to intravenous drug use within the penal institution (*WHO 2001:2*). Of special concern is the epidemic of HIV/AIDS, which has drawn awareness to the frightening health situation in many prison systems.

4.6.1 HIV/AIDS in Prisons

In addition to overcrowding, another major challenge facing the Department of Correctional Services is the control of communicable diseases and viruses, particularly HIV/AIDS and tuberculosis (TB). The current problem of overcrowding facilitates the easy spread of communicable diseases among inmates. This problem is highlighted by the substantial increase in the recorded number of 'natural' deaths in prisons since 1996. Between 1996 and 2000 the number of natural deaths increased by 415% (*Masuku 2001:3*). Graphically illustrated is the increase of natural deaths for the years 1996 to 2002.

Natural Deaths and Releases on Medical Grounds 1996 –2002

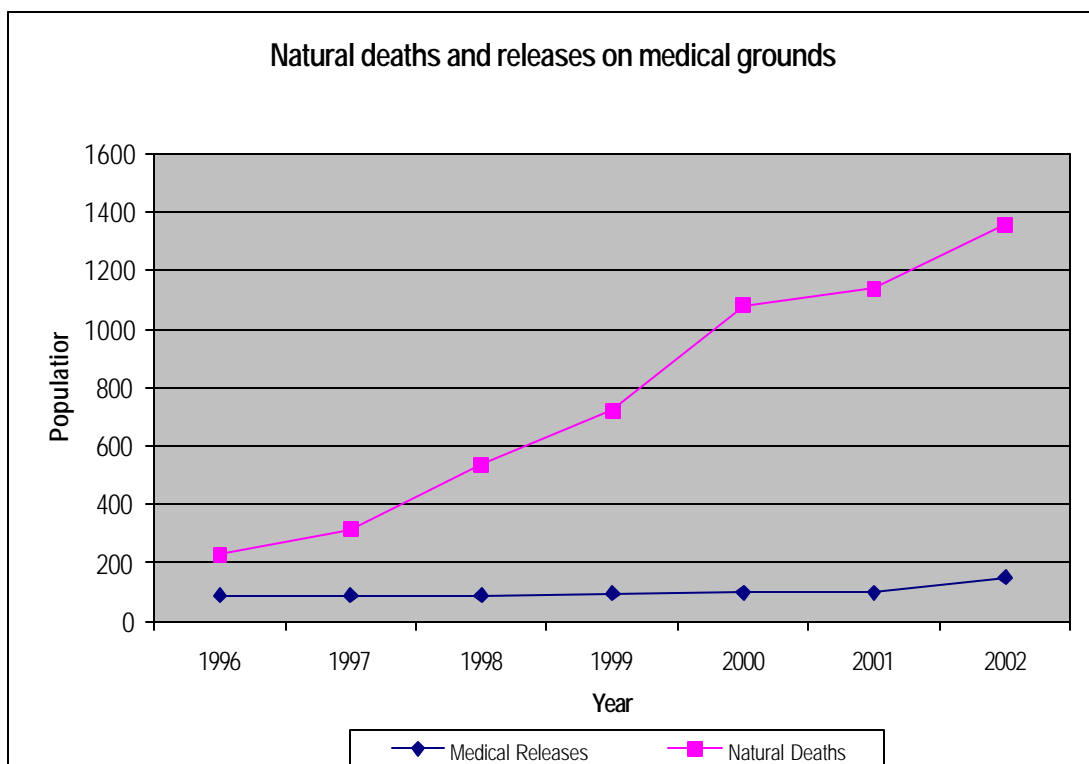


FIGURE 6

Source: Judicial Inspectorate of Prisons 2002/2003

In South Africa natural deaths in prisons appear to be mostly caused by Aids-related illnesses, as the number of registered cases of HIV/AIDS has been on the increase. Over a two-year period from January 1998 to December 1999, the number of registered HIV/AIDS cases increased by 108%. There was a 35% increase between January 1998 and January 1999, and a 53% increase between January and December 1999 (*Annual Report JIP 2002/2003:20*). In 2002 there were 1389 'natural' deaths in prison.

Judge Fagan (2002:1), when briefing the National Assembly's correctional services committee said that:

"HIV-positive prisoners leaving prison are more likely to spread the disease due to unhealthy conditions inside prisons. It should be noted that while the number of unnatural deaths in prisons, such as those due to violence, remained low and absolutely 'rock-steady', the number of natural deaths was rapidly increasing. Almost all of these, 1169, were AIDS-related. The conditions in the overcrowded prisons were 'not conducive to longevity of those who are HIV-positive'. Lack of fresh air, lack of exercise and high stress levels are some of the factors shortening inmates' lives."

The debate on the prevalence of HIV/AIDS not only provides gruesome statistics regarding the scourge in prisons but also seems to imply a criminal dereliction of duty by Correctional Services with grave consequences for society in the medium to long term (*Jacobs 2003:1*). There is a Correctional Services policy on HIV/AIDS and most prisons reported having prisoners with HIV/AIDS. However, the policy is not always effectively managed or understood.

Although prisoners living with HIV/AIDS are not isolated and in some prisons receive counselling, there is no uniformity regarding the application of DCS policy. The provision of condoms and availability or quality of treatment for

prisoners living with HIV/AIDS varies according to the prison investigated (SAHRC 1998:20). AIDS is a special problem because the age group that is at the highest risk, ages twenty to thirty-nine, is the age group in which most persons in the correctional system fall. Furthermore, this population has a high rate of intravenous drug use, another critical method of transmitting the disease. Thus, many prisoners as well as offenders on probation and parole are at high risk of HIV or have already contracted the virus (Reid 1997:575).

Goyer (2003:11) in her publication *HIV/AIDS in Prison* states that:

“There are approximately 175000 prisoners incarcerated in South African prisons at any given time. However, this does not mean that 17500 criminals are locked away, isolated from public, and unable to impact on the lives of those in the general community. Over 40% of prisoners are incarcerated for less than one year; only 2 % are serving life sentences. On average, 25000 People are released from South Africa’s prisons and jails each month. This translates into 30 0000 former prisoners returning to the community each year. And they bring their illnesses, infections, and/or disease with them. The greatest concern should not be directed at the risk of HIV transmission inside of prison, but the potential impact of prisoners on HIV transmission outside of prison.”

Goyer goes on further to state that the prevention of HIV transmission in prison has more to do with improving prison conditions in general than with specifically addressing HIV. She adds that overcrowding, corruption, and gangs are the primary culprits behind rape, assault and violence in prisons, and this environment is horrifying even without the risk of HIV infection.

By the same token *Hlela (2002:3)* is of the opinion that the chances of a person sent to a South African prison contracting HIV soon after admission are said to be high. Recently convicted and awaiting-trial prisoners are likely to be assaulted, and coerced into sex; the latter category may include innocent people who cannot afford bail. Short-term imprisonment may therefore literally be a death sentence.

4.6.1.1 High-risk behaviour in Prison contributing to HIV/AIDS

Prisoners are often exposed to hygienic conditions of the most basic kind and suffer from inadequate fresh air, space and opportunities for exercise. Many of the people who are incarcerated in prisons are already in poor health, and the majority will come into contact with other unhealthy prisoners in overcrowded conditions (*World Health Organisation 2001:1*).

According to *Morodi (2003:6)* the prison population throughout the world has been exposed to dreadful diseases of incurable nature such as HIV/AIDS and other related illnesses like tuberculosis, commonly known as TB, for a number of reasons such as deprivation of conjugal rights and as a result of

overcrowding in prison cells predominately male. The prison conditions render an opportunity for prisoners to practice sodomy towards their fellow inmates who have resumed the roles of 'wives' in return for protection against other inmates posing a serious threat to them.

People who are among the most likely to contract HIV are the same people who are most likely to go to prison: young, unemployed, un-or under-educated, black men. This is due to the fact that many of the socio-economic factors, which result in high-risk behaviours for contracting HIV, are the same factors, which lead to criminal activity and incarceration (*Goyer 2003:5*). *Goyer* further states that high behaviours for the transmission of HIV include homosexual activity, intravenous (IV) drug use, and the use of contaminated cutting instruments.

Conditions of overcrowding, stress and malnutrition (factors discussed above), compromise health and safety and have the effect of worsening the overall health of all prisoners, especially those living with HIV or AIDS. The victimisation of the younger, weaker prisoners is a direct result of the power of gangs, facilitated by corruption within the Department. Gang activity also increases the incidence of tattooing and violence between prisoners, creating the hazard of HIV transmission.

4.6.1.1.1 High-Risk Sexual Behaviour

According to *Judge Fagan (2002:1)* about 6000 of the 10000 prisoners released monthly from South African jails are HIV-positive. Conditions in overcrowded prisons are not conducive to the longevity of those who are HIV-positive. In addition to the number of prisoners who are HIV positive before they arrive in prison, there is also an as yet undetermined portion of inmates who will contract HIV while incarcerated. The prison environment creates many situations of high-risk behaviour for HIV transmission. The incidence of forced, coerced, and consensual sodomy is a reality of prison life, and is considerably increased by overcrowding and gang activity (*ISS Monograph No 64 2001:5*). It is further postulated that this type of sexual intercourse carries the highest risk of HIV infection, particularly in cases of rape. Forced anal intercourse is more likely to result in rectal tearing, which increases the likelihood of HIV transmission as the virus has a greater probability of entering the bloodstream.

Harvey (2002:3) contends that any form of sexual violence results in much trauma and suffering on the part of the victim. Being a prisoner does not change the traumatic effects of sexual violence on a victim. Male rape in prison is a complex issue, which takes various forms and can be attributed to a number of causes. Any form of sexual contact with another person that involves coercion or lacks mutual consent is abuse, even though the degree of physical force applied may vary.

Harvey (2002:4) is also of the opinion that ongoing sexual abuse occurs in a variety of ways:

“Some prisoners form ‘protective’ sexual partnerships to avoid victimization. To escape being abused by many, they ‘choose’ to have one partner who might protect them from abuse from others most of the time. The motivation to exchange sex for protection often includes fear and stems from coercion, and as such constitutes a traumatic experience. Many prison staff dismiss claims of sexual violence arising from these protective pairings.”

Rape is not an isolated event in prison; it is part of a larger phenomenon, the ranking of prisoners in a hierarchy by their fighting ability and manliness. It is unavoidable then that a youth in an adult penitentiary at some point will have to attack or kill, or else he most certainly will become a punk. If he cannot protect himself, someone else will (*Kupers in Harvey 2002:3*). By the same token the Rape Crisis workers who explored the dynamics of rape in prisons, found that the magnitude of this ‘silent epidemic’ of rape and other forms of sexual violence in prison has emerged.

Harvey (2002:2) confirmed that the Rape Crisis intervention at Pollsmoor Prison revealed the following:

- Rape and other forms of sexual violence are part of the prison culture in South Africa;
- Survivors of rape and other forms of sexual violence in prison require trauma counselling;
- Efforts must be made to break the culture of rape in prison;
- Rape in prison impacts directly on sexual violence outside the prison; the cycle of victim-perpetrator violence ensues from untreated rape of male prisoners; and
- The sexual needs of prisoners must be dealt with realistically and humanely by the Department of Correctional Services, especially given the current HIV/AIDS pandemic.

HIV transmission is also increased by the presence of untreated sexually transmitted infections (STI's). Some STI's, such as herpes and syphilis, result in genital sores. Breaks in the skin in the genital region also increase the likelihood of HIV transmission. The prisoner population has a higher incidence of STI's and is less likely to have access to treatment facilities. Thus, prisoners are more likely to have untreated STI's than the general population and therefore are also at greater risk for transmitting and contracting HIV (*ISS Monograph No 64 September 2001:5*).

The conditions in prison cause HIV infection to progress more rapidly, which means that prisoners will have a higher probability of infecting others when

they are reintegrated back into the community (*ISS Monograph 64 September 2001:5*). By the same token even if prisoners do not contract HIV while in prison, there is a substantial number of HIV positive prisoners released into the community each year. Prisoners usually come from communities that suffer a great deal from poverty, unemployment, and crime. These are also the communities that are hardest hit by HIV/AIDS. This means that areas, which already have a higher proportion of HIV positive people, also have a higher proportion of people who have been sent to prison. When people are released from prison and return to these struggling areas, the effect will be an even greater increase in HIV infection.

Conditions in prison are such that HIV easily takes advantage of its victims. Although, in theory, prisoners have access to medical care, in reality there is a massive shortage of medical staff because of the overpopulation problem. Prisons are also said to be a breeding ground for opportunistic diseases, which tend to shorten the progression from initial HIV infection to full-blown AIDS (*Hlela 2002:2*).

AIDS is the leading cause of death in prison, not only in South Africa but in countries such as the United States as well (*ISS Monograph No 66 2001:6*). The number of deaths in prison has increased more than five fold since 1995, and continues to escalate. The Judicial Inspectorate has projected that in the year 2010; nearly 45000 prisoners will die while incarcerated. The table below shows the actual and projected infection rate for black men aged 20 to 34 in South Africa. With the data listed below, it can be estimated that the current HIV infection rate in South African prisons is at least 30%.

**Actual and Projected HIV/AIDS infection Rate among Black Men aged
20 - 34 years in South Africa**

Year	HIV	AIDS	Deaths	Total Population
1990	12850	72	91	3255922
1991	30211	199	230	3339520
1992	61496	485	515	3423389
1993	111993	1040	1038	3507257
1994	186732	2023	1929	3590827
1995	287594	3647	3347	3673561
1996	409965	6150	5455	3753681
1997	550438	9749	8436	3830120
1998	703113	14719	12474	3903094
1999	860539	21289	17710	3968540
2000	1015344	29594	24201	4028443
2001	1154768	39627	31858	4082041
2002	1272768	51108	40447	4128828
2003	1357546	63623	49559	4168309
2004	1415132	76420	58708	4199688
2005	1455565	88870	67436	4220274
2006	1487198	100469	75356	4221927
2007	1508105	110635	82108	4317582
2008	1529197	118991	87566	4412300
2009	1548607	125586	91776	4506930
2010	1567427	130439	94828	4601932

TABLE 16

Source: MetLife Doyle Model, Scenario 225, published in 2000

HIV prevalence amongst prisoners in South Africa can only be estimated using demographic data provided by the Department of Correctional Services and applying it to projections from antenatal clinic data in the general community (Goyer 2003:29). Given what is known about the high-risk behaviour of prisoners prior to their incarceration, the high risk profile of the prisoner demographic, and the risk of transmission inside prison, most researchers agree that HIV prevalence in South African prisons is expected to be twice that of the prevalence amongst the same age and gender in the general population (Goyer 2003:30).

Moreover, Goyer (2003:26) states that, alarmed by the increasing number of natural deaths reported in prisons and aware of the limitations of DCS statistics, the Judicial Inspectorate conducted its own study in 1999. Examining post-mortem reports, the study determined that 90% of deaths in custody are from AIDS-related causes. Using figures from the previous five years and assuming the escalation would continue, the study projected that by 2010, 45 000 prisoners will die whilst incarcerated.

The study predicted that natural deaths in prisons would increase 43% from 737 in 1999 to 1056 natural deaths in custody in 2000. The actual figure was higher than expected, as natural deaths in prisons increased 48% to 1087 during 2000 (*Judicial Inspectorate of Prisons 2000*).

The table below represents the projected HIV prevalence in South African Prisons by Goyer (2003:30).

Projected HIV prevalence in the South African Prison Population

YEAR	2000	2001	2002	2003	2004
Prisoners Male	34.3%	38.2%	41.4%	43.5%	45.2%
Prisoners Female	34.4%	38.3%	41.3%	43.8%	45.3%
Total Prison Population	34.3%	38.2%	41.4%	43.5%	45.2%

TABLE 17

Source: Goyer 2003

4.6.1.1.2 Homosexual Behaviour

The degree of sexual activity in prisons is difficult to determine because studies must rely on self-reporting, which is distorted by embarrassment or fear of reprisal. Sex is prohibited in most prison systems, leading inmates to deny their involvement in sexual activity. Sex in prison usually takes place in situations of violence or intimidation, thus both perpetrators and victims are disinclined to discuss its occurrence. Finally, sex in prison usually takes the form of homosexual intercourse, which carries persistent social stigma. Consensual homosexual intercourse is not tolerated by the prison sub-culture, which also contributes to the under-reporting of sexual activity in the prison environment (Goyer 2003:17).

In a study conducted in Malawi in 1999 (*Goyer 2003:18*) on HIV/AIDS in prisons, it was found that most prisoners and prison officers conceded that homosexual behaviour was the most likely form of transmission of HIV in prison. *Jolofani in Goyer (2003:19)* points out that according to the study, respondents estimated that 10% to 60% of prisoners participate in homosexual activity at least once and about one third of these have habitual sex with other prisoners. The impact of overcrowding was recognised by most respondents, in that most homosexual activity was reported to take place where up to 43 prisoners are kept in one cell. Some prisoners explained that a shortage of blankets would lead to prisoners sharing blankets and that sex would also occur in these situations.

Thus the author is of the opinion that overcrowding in prisons creates the opportunity for the increase of homosexual behaviour.

Likewise, prisoners and wardens explained that only a small portion of prisoners who participate in homosexual activity inside the prison are homosexuals outside of prison, while the rest engage in homosexual activity only because of their situation inside the prison (*Goyer 2003:19*).

Goyer further postulates that those who consistently serve as the receptive partner are often described as 'very needy' as explained:

“They are usually recently detained, either juveniles or young adults, who have no blankets, soap, plates or food. They have no relatives from the outside to help them and care for them, they are in physical need and confused by their recent detention and they turn to somebody to care for them. The ones they usually turn to are those who have outside supplies. The relationship between them was described as similar to that between a poor prostitute and a rich client.”

Furthermore the section for the health and physical care of the Department of Correctional Services found that the occurrence of sodomy is very difficult to identify. Prisoners do not want to reveal their sexual orientation. The issue of reporting lies with the custodial staff, who is with prisoners most of the time. This statement points to the ignorance or lack of willingness to acknowledge the sexual practices within prisons.

4.6.2 Tuberculosis in Prisons

The transmission of tuberculosis (TB), within the prison system is often a driving force behind a country's pandemic. Some of the major causes of this are due to overcrowding, poor ventilation, and often, poor coordination between public health workers and corrections facility personnel. Inmates also sometimes see illness as an advantageous thing if it will lead to a transfer to better conditions in a hospital ward.

The level of TB in prisons has been reported, by the *Tuberculosis: Strategy and Operations, Monitoring and Evaluation (n.d.:1)*, to be up to 100 times higher than that of the civilian population. It has also been reported that the cases of TB in prisons may account for up to 25% of a country's burden of TB. Some of the main contributing factors, as discussed before, are late diagnosis, inadequate treatment, overcrowding, poor ventilation and repeated prisoner transfers encourage the transmission of TB infection. HIV infection and other pathology more common in prisons (for example, malnutrition, substance abuse), encourage the development of active disease and further transmission of infection.

Prisoners are generally unlocked for breakfast around 7 a.m. and are locked up again at 3 p.m. This means that a typical cell contains 50 people who spend 18 hours each day in close proximity to each other with no ventilation or air circulation. There are no statistics available on the full extent of TB in South African prisons, but given the conditions of overcrowding there is every reason to believe that the disease affects the prison population to an alarming degree (*Goyer 2003:34*).

Prison conditions are conducive to the spread of TB. The current ad hoc approach to health care in prisons will not control the spread of this epidemic and places both prisoners and staff at risk. The lack of a comprehensive response also carries with it the added danger of multiple drug resistant TB (MDRTB) (*Goyer 2003:66*). An Amnesty International report found that in Russia conditions in penitentiaries and pre-trial detention centres

continued to amount to cruel, inhumane or degrading treatment. The Procurator General expressed concern at serious overcrowding and revealed that about 2000 people had died of TB in prison in 1996, a death rate of ten times the rate in the general population *Stern in (Goyer 2003:21)*.

4.6.3. Drugs and the Contamination of Needles in Prisons

On 14 October 2003 the author visited the Medium B section of the Westville Prison. Dr Govender, a detective, exhibited various weapons that were made by inmates in prison. It was amazing that the inmates could make tattooing instruments from basic items, such as, a pen, wires and a needle. Homemade weapons in prisons, in most instances, are made of metal plates.

Marquez (2002:1) contends that South Africa's prisons have become a breeding ground for HIV. He further postulates that prisoners now represent one of the hardest-hit segments of a country plagued by the disease. South African prisoners, crammed into cells, share mattresses, tattoo needles and dirty razors. Diseases associated with AIDS, tuberculosis, for instance, flourish in the packed and poorly vented cells. Other STDs, which feed the spread of HIV, are rampant. Due to weaker immune systems, prisoners are more contagious and have a reduced resistance to the virus. Those already infected fall ill and die more quickly once in prison.

Many prisoners share tattoo needles and razors without them being sterilised. Tattooing forms an important part of the prison sub-culture. One of

the many health and safety hazards associated with this is the transmission of HIV. The risk of transmission is greater if a tool is used to puncture the skin, becomes contaminated with HIV positive blood, and is then immediately used on another prisoner (*Goyer 2003:31*).

4.6.4 The Contribution of Gangs

Prison gangs in South Africa are unique in that they have been in existence for over 100 years and their organisation is nationwide. Gangsterism is a problem in most prisons and is especially so in maximum-security sections. Beyond their general organization into a separate subculture, inmates also unite through gangs.

By the same token it can be maintained that along with the presence of gangs, is a level of prison violence that violates the safety of other prisoners. It evident in many ways-gang supported fights, assault and murder; forced sexual activity or rape; intimidation and coerced favours and the complicity of or the turning of a blind eye by correctional officials in relation to these activities (*DCS Draft Green Paper 2003*).

Prison gangs polarize the population along racial, ethnic, and religious lines. In addition to their involvement in corrupt activities, gangs present a serious alarm for order and safety as a result of their collective violence (*Stinchcomb and Fox 1999:399*). Furthermore it is stated that in response to the dehumanising nature of institutional conditions, the inmate subculture serves

to protect personal identity and autonomy. Through this subculture, inmates reinforce values, attitudes, and standards of conduct that are in direct contrast to those of the administration. Newly arriving prisoners are quickly initiated into the inmate code and sized-up according to how well they fit into the inmate subculture.

Prison gangs are involved in the dealing of alcohol, dagga, drugs and home made weapons. Sodomy is also a particular feature of gang activity in prison and the use of 'wyfies' is common practice among gang members (*SAHRC 1998:36*). Both juveniles as well as other prisoners complain of enforced sodomy as well as the practise of using food and other commodities as a way of inducing consent.

South African prison gangs are using HIV infection as punishment, ordering infected members to rape disobedient inmates in a ritual known as 'slow puncture'. According to *Morris (CDC News 2002:1)*, Director for the Judicial Inspectorate of Prisons confirmed that the new practice first came to light recently. One person, or sometimes several would carry out the rape. They gave him a 'slow puncture', meaning he will die over a period of time.

The psychology of a prisoner is often one of helplessness and insecurity that gang membership helps to alleviate (*ISS Monograph No 64 2001*). Therefore in overcrowded and understaffed conditions, the loss of order or control by the management creates a power vacuum that gang structures readily fill. In many areas, outside gangs flourish in prison, as many outside gangs are

involved in criminal activity, resulting in a high proportion of members being in prison. In South African prisons, the prevalent gangs do not operate outside of prison, and members of the same gang from outside of the prison may join rival gangs inside prison. Once in prison, however, loyalty to the prison gangs takes priority over membership in outside of street gangs.

The power of the 26s and 28s gangs inside South African prisons pervades nearly every issue related to HIV/AIDS in prisons (*Goyer 2003:36*). It is further stated by Goyer that many high-risk behaviours are directly related to gang activity. Membership in both gangs frequently includes tattooing, and it is not uncommon for more than one inmate to be tattooed at a time using the same needle. Violent behaviour between prisoners that leads to bleeding is also a product of gang activity. Prisoners may be required to attack another prisoner and draw blood in order to be initiated into a gang.

In addition gangs are extremely powerful in the communal cells during lock-up times. Gang operation involves extensive use of violence, including sexual violence. In general, gangs in South African prisons are a major obstacle to efforts in the transformation and demilitarisation of the prison culture. Gang rule impacts negatively on attempts to rehabilitate prisoners, and as a result also on the communities to which prisoners return when released (*Flanders-Thomas et al 2002:1*).

Communal cells not only encourage gang formation but they destroy access to privacy or to the individualisation of the living space. The lack of privacy is an important element in breaking individuals and reducing them to faceless numbers. Each gang draws on its own oral tradition and bears its distinctive colourful (but mostly imaginary) uniforms, tattoos, flags, salutes and other military paraphernalia (*Haysom 1981:3*).

Reports from Mafikeng Prison shows that gangsterism is prevalent in the prison and is blamed for the incidents of violence and sexual assaults in prison. Drugs, weapons and alcohol are freely available and smuggled into prison by members. Many inmates are also coerced into performing sexual acts and if they try to refuse they are forcefully sodomised (*SAHRC 1998:36*). Therefore it can be seen that much of the gang activity: reduction of individuality, lack of sufficient supervision by authorities, can be related directly to the overcrowded conditions experienced by inmates in prison.

4.6.5 Corruption within Correctional Institutions

The Department of Correctional Services is weighed down by endemic corruption that interferes with its ability to meet its legal objection. Many senior staff members have been implicated in corruption, which is believed to extend throughout the prison system (*Disse1 2002:6*). According to *Mr Ben Skosana (2002:1)*, National Correctional Services Minister, underpaid prison officials, overcrowding and poor training are largely to blame for bribery and corruption in South African prisons.

As part of his national road show, which arose following the Grootvlei prison scandal in which warders were filmed taking bribes, selling drugs, pimping prisoners and having sex with juveniles. *Skosana (2002:1)* said that:

“In many cases staff neutralise their behaviour by employing various motive rationalisations such as ‘I deserve it’ or ‘this place is unfair’. The road show aims to seek solutions to prison corruption and restore confidence in prison officials. Hands on management could defeat corruption. Anyone who is found collaborating with any corrupt and criminal elements both inside and outside the system needs to be exposed”

Judge Thabani Jali appointed the Jali Commission to investigate allegations of corruption, misadministration, violence and intimidation in the Department. According to Judge Jali (*Dispatch Media 2002:1*), corruption and misadministration in South Africa’s Prisons and the Department of Correctional Services are turning out to be much more widespread than initially thought. Briefing the National Assembly’s Correctional Services committee on the commission’s work thus far *Judge Jali (Dispatch Media 2002:1)* said that disciplinary inquiries and appeal procedures were of particular concern. These were shown to be at best hopelessly inadequate or staffed by incompetent people, but at worst as being clearly manipulated, abused or stage managed to serve and protect certain individuals with improper agendas.

On the 5 July 2002 President Thabo Mbeki signed a proclamation in terms of S2 (1) of the Special Investigating Units and Special Tribunals Act of 1996. The proclamation authorized the Special Investigating Unit to investigate, with regard to the Department of Correctional Services, any (*Media Statement 2002:1*):

- Serious mal-administration in connection with the affairs of the Department;
- Improper or unlawful conduct by officials of the Department;
- Unlawful appropriation or expenditure of public money or property;
- Unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property;
- Intentional or negligent loss of public money or damage to public property;
- Corruption in connection with the affairs of the Department;
- or
- Unlawful or improper conduct by any person, which has caused, or may cause serious harm to the interests of the public or any category thereof.

The Jali Commission of Inquiry into South African prisons has changed the face of the country's jails. A report by the South African Broadcasting Corporation (*SABC 2000:1*) states that many times after people who were found on the wrong side of the law are tried and sentenced, communities tend to forget about them. They get locked up and nobody knows what happens

once they are jailed. The emergence of the commission, however, changed all that. It allowed people into the prison walls and gave an idea of what it is like being in prison.

Evidence presented to the Commission was that at the Westville prison warders murder inmates; and corruption, nepotism and drug dealing is rife (*SABC 2000:1*). The Departmental investigations revealed that negligence, lack of management involvement in the management of prisons (that is, checking and control, supervision etc) and corruption contributed to escape.

4.6.6 Escapes from Prison

Despite the drastic reduction of the number of escapes from 1997 to date, the Department of Correctional Services continues to address the causes of escapes, in order to prevent recurrence (*Mti 2002:1*). According to the *Media Statement by the Department of Correctional Services (2002:1)*, the number of prisoners who escaped from prisons is as follows:

No. of Escapes from Prison 1997-2001

YEAR	NO OF ESCAPS	ESCAPES FROM PRISON
1997	989	407
1998	498	186
1999	459	213
2000	250	91
2001	205	87

TABLE 18

Source: Department of Correctional Services.

From the figures above and the table below, it can be seen that there is a fluctuation in the number of escapes from prison. In 2001 the Department of Correctional Services set itself a target of zero escapes from prison and a reduction of 50% on escapes from outside prisons (from hospitals, courts, work teams and during escort), based on the performance of escapes from the previous year. Although there was a reduction in the number of escapes there were many areas that hampered the performance in this regard. Some of these were staff shortages, negligence by officials and overpopulation. By prisoners being housed in overcrowded facilities, it not only affects the performance and morale of the prisoners, but also has similar effects on administration and staff morale. Massive overcrowding of prisons makes the effective supervision and control over prisoners very difficult. Low morale amongst officers consequently brings about low discipline amongst prison officers and prisoners alike.

The table below represents the Department of Correctional Services comparative escape statistics:

Comparative Escape Statistics for 2001/02 and 2002/03

Escape category	1 April 2001 to 31 March 2003	1 April 2002 to 31 March 2003	Decrease/ Increase	% Decrease/ Increase
From prison	114	187	+ 73	+ 64%
From work team (departmental officials)	59	50	- 9	- 15%
From work team (Institutions hiring offenders for labour)	33	23	- 10	- 30%
From public hospitals	18	16	- 2	- 11%
From courts	5	3	- 2	- 40%
During escorts	4	2	- 2	- 50%
Total	233	281	+ 48	+ 21%

TABLE 19

Source: Department of Correctional Services

On 18 May 2004, 50 awaiting-trial prisoners escaped from the Westville Prison after overpowering a policeman and a prison warder. This jailbreak was the biggest in the history of South Africa. Of the 50, four prisoners gave themselves up to police, and three of the men told police investigators that they were forced to escape (*Daily News* 2004:3). In April 2004 16 prisoners awaiting-trial for armed robbery escaped from Nongoma in Zululand- only one has been rearrested.

Thus, negligence by officials continued to be a major cause of escapes whilst the overpopulation of prisons also aggravates the situation as officials feel that they are overworked, and are therefore de-motivated. In an effort to deal with this situation various strategies were adopted and measures put in place. These measures focus mainly on aspects such as (*DCS Annual Report 2002/2003*):

- Involvement of managers at all levels in monitoring and ensuring adherence to policies and procedures;
- Strict disciplinary action against negligent officials; and
- Various initiatives aimed at reducing overpopulation.

Long sentences can also contribute to dissatisfaction, frustration, desperation and lack of optimism regarding the future. These feelings can give rise to problematic behaviour and escapes (*Neser 1993:215*). In South African prisons the *Air Force* gang is particularly involved in escapes. This gang is not interested in conditions inside prison. Their aim is to escape from prison. Members of this gang are involved in allegedly very daring escape attempts. Sometimes a gang member has no other choice but to attempt an escape. Thus from the factors discussed, there are certain predisposing circumstances that can make corrective institutions susceptible to escapes, violence diseases, etc.

4.7 PREDISPOSING CONDITIONS TO PROBLEMS AND CHALLENGES

However, from the factors discussed above, HIV/AIDS, violence, gangs, corruption and escapes, various factors in prison can either reinforce or reduce the potential for its occurrence. In other words, there are certain predisposing conditions that can make a penal institution vulnerable to the above (*Stinchcomb and Fox 1999:386*):

- **Environmental stressors:** regimentation, personal deprivations, freedom limitations, boredom, idleness, brutality, racial conflicts and gangs.
- **Substandard facilities:** overcrowded living quarters, depersonalised surroundings, poor or monotonous food, and inadequate plumbing, heating, lighting or ventilation.
- **Inappropriate staffing:** insufficient numbers of staff to provide basic services, as well as inadequate management, security and supervision.
- **Public apathy:** indifference, punitive attitudes, singular focus on incapacitation, and lack of concern for treatment-prompting feelings of alienation as inmates see themselves increasingly ostracized from society.
- **Criminal justice and social inadequacies:** perceptions of sentencing disparities, subjective parole decisions, inequitable treatment by the criminal justice system and discriminatory public policies.

In addition, it can be postulated that the environment in which inmates are secluded from the outside, subservient to the staff, restrained by the rules, subjected to the power of other prisoners, socialized into the prison subculture, exposed to diseases and silenced by the lack of public concern, all create conditions of hopelessness, dissatisfaction, estrangement which are considered as fertile breeding grounds. Although all of the above predisposing conditions are contributing factors to the problems and challenges that face penal institutions, the author is of the opinion that the severe overcrowding of these institutions not only disrupts the rehabilitation efforts of the system but also threatens the control of prison institutions, thereby burdening the system.

As stated previously, problems, which exist in conventional society, are mirrored and often magnified inside prison. Women, children, geriatric offenders, mentally and physically challenged offenders, all constitute special categories of the prison population that require particular attention.

4.8 THE HANDLING OF DIFFERENT CATEGORIES OF OFFENDERS IN CORRECTIONS

The negative effects of incarceration discussed above can be so profound for healthy males, who, within correctional institutions, represent the majority of inmates, the impact can be even more daunting for those who are different in some respect from the rest of the inmate population. Furthermore, the difficulty of adjusting to imprisonment and the various impediments to readjusting upon release is no easy task for the offender. Undergoing these

transitions can be exceptionally difficult for inmates with special needs, from childbearing females to those who are elderly, physically or mentally disabled, alcoholic, drug-addicted, or AIDS-infected (*Stinchomb and Fox 1999:453*). Moreover, the (*DCS Draft Green Paper 2003*) states that:

“International experience is that prisons have tended to consider all prisoners as homogenous. This has resulted in prisons being organised in the interests of the majority, usually adult male prisoners from the main ethnic, cultural and religious grouping in the country. Special consideration needs to be given to the various groups of prisoners who are not part of this perceived homogenous majority. This is particularly true in a country of South Africa’s diversity, but it is also true due to gender differences in society, due to age differences and due to groupings who have special needs due to disabilities.”

These special groups of the correctional population present special problems and challenges, which will be discussed in this chapter.

4.8.1 Children in Detention

In terms of the South African Constitution (Act 108 of 1996) and the Correctional Services Act (Act 111 of 1998), a child is a person under the age of 18 years. Section 28 of the South African Constitution embodies the following with regards to the detention of children:

“Every child has the right:

- Not to be detained except as a measure of last resort, in which case, in addition to the rights a enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - Kept separately from detained persons over the age of 18 years; and
 - Treated in a manner, and kept in conditions, that take account of the children’s age;
- To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.”

Despite measures to remove children from the Criminal Justice System, there are still instances where children are sent to prison as awaiting-trial persons and sentenced offenders. Young offenders in custody remain a major concern to the Department (*DCS Annual Report 2002/2003:50*).

The table below indicates the number of young offenders between the ages of 14 and 17 years who were in prison as at 31 March 2003.

Young Offenders in Custody as at 31 March 2003

Ages	Unsentenced	Sentenced	Total
14 Years	177	44	221
15 Years	383	140	523
16 Years	885	513	1398
17 Years	1209	1098	2307
TOTAL	2654	1795	4449

TABLE 20

Source: Department of Correctional Services

As depicted above the total number of sentenced and unsentenced young offenders for the year ending 31 March 2003 is 4449, represents the soaring number of juveniles in the justice system.

The following tables indicates the trends over the last 3 years with regards to unsentenced and sentenced juveniles in custody between the ages 14 and 17 years old (*DCS Annual Report 2002/2003:51*).

Unsentenced Juveniles in Custody: 31 March 2001- 2003

Ages	2001	2002	2003
14 Years	126	166	177
15 Years	380	370	383
16 Years	729	790	885
17 Years	851	985	1209
All Ages	2086	2311	2654

TABLE 21

Source: Department of Correctional Services

Sentenced Juveniles In Custody: 31 March 2001-2003

Ages	2001	2002	2003
14 Years	33	29	44
15 Years	150	172	140
16 Years	479	514	513
17 Years	1028	1067	1098
All Ages	1690	1782	1795

TABLE 22

Source: Department of Correctional Services

From the tables indicated, it is evident that the number of sentenced and unsentenced juveniles has increased over the three-year period. In 2001 there were 2086 unsentenced juveniles (ages 14-17) in custody as opposed to 2003 when there were 2654. This represents an increase of 568 juveniles. Delays in the sentencing of juveniles can be attributed to the backlog in the justice system. This contributes to overcrowding. The analysis of the number of sentenced juveniles in custody, 2001-2003, shows that there was a marginal increase of 105 juveniles. Many of the hundreds of thousands of prisoners in correctional institutions on the caseload of probation and parole officers had their first contact with the law as juveniles. It therefore stands to reason that much of the hope for reducing overpopulated adult correctional populations rests with the juvenile justice system (*Stinchcomb and Fox 1999:450*).

The reality in South African prisons, found by the *SAHRC (1998:30)*, is that in most instances juveniles are housed in separate, overcrowded facilities. At the Juvenile Prison in Rustenburg, the juvenile section of the prison is badly overcrowded with three inmates occupying a single cell. Although educational facilities and even schools are available at some prisons, overcrowding makes it difficult for them to concentrate on their studies.

4.8.2 Youth In Detention

The new youth policy approved by the Department in March 2001 is shaped by the broader national youth policy of 1997, the Constitution of the Republic of South Africa Act 108 of 1996 and the Correctional Services Act 111 of 1998. It is aimed at service delivery and correction of youth aged between 18 and 25 years. Young people, in trouble with the law, even after serving lengthy sentences, still have the chance of accomplishing something of their lives (*DCS Draft Green Paper 2003*).

The sentencing of young offenders is an even more complex process than sentencing of adult offenders. Special considerations are involved, none perhaps more so than simply the fact that there is a measure of sympathy for the immaturity and impetuosity which is so characteristic of the youth in general (*Terblanche 1999:375*).

Juvenile facilities vary from province to province. Just as in the adult system, crowding has become a pervasive problem in juvenile confinement. The majority of juveniles held in long-term confinement are housed in overtaxed facilities, making them more dangerous for both prisoners and staff (*Snyder and Sickmund in Stinchomb and Fox 1999:531*). Stinchcomb further states that crowding is also related to security deficiencies, to the extent that it diminishes the ability to 'adequately separate predators from victims'. Suicidal behaviour likewise remains a serious problem.

Juveniles in confinement are committing suicide at roughly double the rate of young people in the general population. Furthermore substantial and widespread deficiencies' in juvenile facilities were found in terms of:

- Crowding
- Security
- Suicide prevention
- Health screenings and appraisals.

Whether public or private correctional facilities, there are *increasingly crowded* juvenile correctional facilities-where residents are disproportionately minority youths, where status offenders may be mingled with delinquents, and where underpaid staff are required to meet the needs of those ranging from drug abusers to depressed runaways. Worst of all, because they are overshadowed by a crowding crisis in adult prisons that has dominated the

public agenda, it is difficult to generate concern about their predicament (*Stinchomb and Fox 1999:530*). Furthermore in terms of the conditions in which they are confined, it is important to be vigilant with juveniles, “because juveniles are a population that is politically powerless; socially rejected and easily exploited” (*Shicor and Bartollas 1990:297*).

The tables below indicate the number of offenders in custody per age category on 31 March 2003 (*DCS Annual Report 2002/2003: 47*).

Age Categories: Unsentenced Persons in Prison: 31 March 2003

Gender	Below 18 Yrs	18 to 21 Yrs	21 to 25 Yrs	Above 25 Yrs	Total
Female	81	249	325	728	1383
Male	2586	11720	16098	26357	56761
All Genders	2667	11969	16423	27085	58144

TABLE 23

Source: Department of Correctional Services

Age categories: Sentenced Offenders in Custody: 31 March 2003

Gender	Below 18 Yrs	18 to 21 Yrs	21 to 25 Yrs	Above 25 Yrs	Total
Female	38	255	550	2327	3170
Male	1763	13453	31554	81664	128434
All Genders	1801	13708	32104	83991	131604

TABLE 24

Source: Department of Correctional Services

The incarceration of young offenders is of great consideration to the Department of Correctional Services. A large proportion of the youth are still accommodated in adult prisons. The effect of institutional confinement (from lack of privacy to resentment of authority) can be greater for youth, who are confined in the midst of their emotional and physical growth.

The awaiting trial period for youth remains one of the biggest problems within the criminal justice system. Moreover with the increasing number of awaiting trialists at most prisons, conditions progressively deteriorate. Detainees are crammed into cells with nothing to do for the day. There are also many youth who live in equally unacceptable conditions. The rate of overcrowding amongst unsentenced prisoners in some correctional institutions is close to 200% and increasing. Trial postponements and the setting of high bail that many cannot afford, contribute to the large numbers (*SAHRC 1998:33*).

4.8.3 Women In Detention

International experience is echoed in South Africa where women correctional clients constitute only a small proportion of the incarcerated population. This small number has both disadvantages and advantages for women prisoners- on the whole they do not face the same degree of overcrowding as men correctional clients; but as there are fewer women prisons, they are often forced to be further away from their families than men (*DCS Draft Green*

Paper 2003). Women in confinement face many of the same debilitating effects of imprisonment as men.

By the same token *Stinchcomb and Fox (1999:456)*, maintain that female offenders rate are beginning to appear more often in police reports. Although the rate of imprisonment for males is more than 16 times higher than that of females, the number of women serving time has increased considerably in recent years.

The Department is responsible for the sound physical, social and mental care as well as the development of infants and young children who stay with their mothers in prison. In terms of the Correctional Services Act, 1998 (Act No 111 of 1998) the child of a female offender may be allowed to remain with the mother up to the age of 5 years (*DCS Annual Report 2002/2003:49*). Incarcerated mothers of small children who are not in prison with their mothers require particular access to their mothers as a necessary step in the reduction of the negative effect of the separation from their mother that may result and furthermore to prepare for the eventual release of the mother (*DCS Draft Green Paper 2003*).

Despite the fact that conditions of imprisonment have come a long way from the mistreatment and abuses of historical origins, they still have a long way to go in many respects (*Stinchcomb and Fox 1999:463*). In addition it is stated in the *DCS Draft Green Paper (2003)* that the training facilities offered to women tend to be a smaller amount of resources due to the lower number of women prisoners. This is in contrast to the principle of equality before the law and

non-discrimination on the basis of gender or sex, and the stereotypical approach to training (such as sewing and typing) that has categorised the Department in the past. Furthermore, international experience has also conveyed that women are a category amongst whom there is immense potential for successful rehabilitation through alternative sentences. Since the majority of the female's sentences to incarceration in South Africa are serving short- term sentences, this can be applicable to the South African situation (*DCS Draft Green Paper 2003*).

4.8.4 Offenders with Disabilities

Correctional clients with special needs and requirements have traditionally not been given high priority from government in general. To some extent, the lack of correctional services for such inmates reflects similar shortcomings in the community at large. Once removed from the mass of society through incarceration, they become an even lower public priority, essentially, a minority within a minority (*Stinchcomb and Fox 1999:454*).

In addition Stinchcomb further postulates, some are subject to victimization by other inmates in a subculture where the weak are quickly overcome by the strong. Some simply languish in a system hard pressed to meet basic necessities of conventional inmates, much less divert scarce resources to special needs. It is an unfortunate irony that in many cases, attention is largely directed towards them reactively in proportion to the growth of their

numbers, rather than proactively in an effort to prevent their numbers from growing.

4.8.5 The Physically Impaired in Detention

On the 31 March 2002 there were 353 disabled prisoners in custody in South African prisons, seven of which were female (*DCS Annual Report 2001/2002:72*). The needs of physically impaired offenders differ substantially from the requirements of those who are psychologically damaged, but in both cases, correctional systems are likely to be ill equipped to meet them (*Stinchcomb and Fox 1999:489*).

In South Africa a draft policy for disabled prisoners was developed in consultation with external role-players including non-governmental organisations. The policy should reflect both the equality of rights of the disabled in detention with others, and the particular needs that disabled prisoners have (*DCS Draft Green Paper 2003*). Disabled inmates need to be protected from other inmates.

Like all special populations in the correctional system, the management of disabled inmates or physically challenged inmates, presents a continuous challenge. Although the number of disabled prisoners is few, their requirements are great and the system must be equipped to accommodate them.

4.8.6 Offenders with Mental Disorders

By its very nature incarceration can have a damaging effect on both the physical and mental well being of prisoners. Ideally prisons should not house mentally ill offenders and that they should rather be diverted to institutions with the necessary knowledge to deal with them. Within correctional institutions, the developmentally disabled represent special problems, since they are slower in adjusting and learning what is expected of them. There are many others incarcerated who are not legally designated 'insane' but suffer from various forms of mental illnesses. Correctional facilities are generally ill equipped to meet their needs (*Stinchcomb and Fox 1999: 495*).

However, some inmates are neurotic or have personality problems, which increase tension in prison. Others have serious psychological disorders which may have escaped earlier diagnosis (at trial) or which did not provide a legal basis for the reduction of criminal responsibility. A fair number of offenders develop psychiatric symptoms while in prison (*Schmallegger 1997:513*)

A far greater danger for them than lack of treatment is their potential for being victimized in prison. Not only are they subject to verbal ridicule and physical abuse by other inmates, but also to conceal their deficiencies, they rarely participate in rehabilitation programs. Staff who are not sensitive to the

developmentally disabled can therefore mistakenly assume that an inmate is being defiant when actually; the person could not mentally comprehend the officer's instructions *West in (Stinchcomb and Fox 1999:483)*. By the same token it is maintained that Correctional officials in the prison environment must be trained in recognition of signs of mental illness, and should be under strict duty to report it immediately to the head of a prison of an offender appears to be mentally ill (*DCS Draft Green Paper 2003*). As the author has stated before, overcrowded conditions mean that already stretched warders overlook abusive or potentially abusive situations.

4.8.7 Offenders Serving Long or Life Sentences

As determinate sentencing and just deserts model take greater hold, and more and more criminals are sentenced to longer prison terms, there will be increasing numbers of older prisoners among the general prison population (*Schmallegger 1997:511*). By the same token it is maintained by the *DCS Draft Green Paper (2003)* that the percentage of aged offenders in South African correctional institutions is likely to increase due to the increase in the proportion of those incarcerated for long term sentences, while there are also those that are sentenced when already senior citizens.

Since 1992, sentences of more than 25 years became more common, and sentences of up to 40 years' imprisonment are readily imposed for very serious crimes (*Terblanche 1999:253*). While the physically impaired are still a small proportion of the correctional population, the elderly represent a rapidly

expanding group. *Stinchcomb and Fox (1999:495)* states that along with the overall aging of the population in general, longer prison sentences are resulting in greater numbers of older inmates. As this trend continues, corrections will be faced with meeting their unique requirements in terms of everything from housing assignments to dietary restrictions, recreational provisions, and rehabilitative programs.

According to *Schmallegger (1997:511)* the 'greying' of America's prison population is due to a number of causes:

- Increasing crime among those over 50 years;
- The gradual aging of the society from which prisoners come;
- A trend toward longer sentences, especially for violent offenders with previous records; and
- The gradual accumulation of older habitual offenders in prison.

Moreover, *Terblanche (1999:254)* postulates that there are two main reasons for the imposition of longer sentences in South Africa:

- With the abolition of the death penalty those crimes, which previously would have resulted in the imposition of the death penalty, will now be punished with long terms of imprisonment. Many of these sentences will be life imprisonment; and

- A second reason for the imposition of longer sentences is the courts' reaction to what is perceived to be an increased occurrence of violent crime.

This situation poses particular challenges to the Department, as the provision of a structured day of activity and rehabilitation/correction to people over such extended periods of time is resource sapping. Given that this category of offenders also tends to be inclined towards aggression, the consequences of inactivity for management of the Correctional Centre and for the management of the person pose a risk to secure, safe and orderly prison management (*DCS Draft Green Paper 2003*).

Thus in the light of trends towards longer sentences, prison populations are getting older, there is a need for special accommodations in prison for the elderly and sick, who require therapy, medication and wider cell doors for wheelchairs. Meeting these needs is costly (*Stinchcomb and Fox 1999:492*). Besides the cost of more and more older offenders being confined behind bars, an increasingly greater concern is that the longer prison sentences results in larger numbers of older inmates, thus compounding the problem of overcrowding in correctional institutions.

4.8.8 The Detention of First Offenders

Prisoners who have committed an offence for the first time, especially for less serious crime, should as far as possible be accommodated separately from

repeat correctional offenders for generally they have the best possible opportunity for rehabilitation. Especially for first-time offenders, interaction with the institutional population itself reinforces negative values (*Stinchcomb and Fox 1999:535*). It is further stated that virtually everyone is subjected to the negative impact of institutional confinement, but it is especially so for the first offenders to adapt and survive the prison experience when coming into contact with the combined detrimental effects of the repressive institutional atmosphere and the pre-existing problems of the offenders themselves.

Separation of first time offenders, especially juveniles should be implemented during the awaiting-trial phase and should become an important part of the manner in which the criminal justice system in South Africa treats first 'offenders'.

There is little doubt that the coercive nature of imprisonment does much to shape inmate responses to it. There are also certain attitudes and values rampant among the population that influence behaviour. To some degree, these represent traits that may have brought offenders into contact with the law outside, although these traits could be further developed by the institutional environment (*Stinchcomb and Fox 1999:372-373*).

Given the extent of overcrowding and the limitations on resources at the Department of Correctional Services disposal, the bias in resource and accommodation allocation should be towards first offence prisoner. Where this category of first offence coincides with young age of an offender,

particular prioritization of service delivery, rehabilitation, corrective intervention and resource allocation should be made (*DCS Draft Green Paper 2003*).

4.9 RESUMÉ

Almost six years after the April 1994 election the Judicial Inspectorate of Prisons, the independent office which oversees the treatment of prisoners mainly through the Independent Prison Visitors (IPVs) it appoints, found that conditions in prisons fell far short of the stated aims with regards to basic human rights. Most offenders are eventually released from prison into the community. Sometimes, an individual entering prison to await trial for a minor offence might return to the community a 'hardened criminal' (more aggressive and prone to violence and crime), having been affected by the violence associated with gang rule in prison. It is often said that South African prisons are a breeding ground for criminals because of the inhumane conditions and violence rife in prisons (*Flanders-Thomas et al 2002:2*).

From the facts discussed in this chapter of the thesis, there are various implications for prison conditions. Prisons are overpopulated and understaffed. Of paramount importance is the fact that a high percentage of offenders go to prisons; they may go to prison more than once, and, consequently, they may see the insides of more than one prison. The majority of the prisons in South Africa are affected by the problems of overcrowding, a lack of sufficient educational and recreational opportunities and insufficient incentives for work. Prisoners living under such crowded conditions with little

opportunity for a constructive engagement of their time make ideal targets for recruitment into gangs and involvement in illegal activities. The lack of sufficient work and training opportunities especially amongst long term prisoners condemns them to an idle and unproductive existence with all the negative consequences that go with it (*SAHRC 1998:61*). The problem is not the existence of gangs per se but rather the extent that the activity of the gangs has affected the orderly operation of the institution.

According to the Bill of Rights everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity. Thus although the Constitution of the Republic of South Africa Act 108 of 1996 guarantees every sentenced prisoner the right to conditions of detention that are consistent with human dignity, including the provision, at state expense, of adequate accommodation, the conditions at the majority of prisons fall short of this constitutional obligation (*SAHRC 1998:13*). The majority of prisons are overcrowded and in a serious state of disrepair that they not only pose a health hazard but also contribute to a high rate of escapes.

In addition *Morodi (2003:10)* states that the respect for constitutional rights especially for prisoners remains a key factor towards the treatment of inmates within the context 'human dignity'. It should be noted that in order for the rights of prisoners to be observed, it is incumbent upon prisoners to respect the rights of fellow inmates. Facilities in which inmates are housed should

meet the international minimum standard as prescribed regarding the treatment of offenders.

Closer analysis of the various judgments of the Constitutional Court and the Supreme Court of Appeal on laws that impact on prison overcrowding indicates however, that the courts have not drawn the link between these laws and the unsatisfactory prison conditions they produce (*Van Zyl Smit in Dixon and van der Spuy 2004*).

To some extent, this 'wearing-down' process of imprisonment affects everyone. Those who are younger, more emotionally vulnerable, and confined for longer periods of time in institutions, will be particularly susceptible. Despite this, even among the physically strong and emotionally healthy, few escape the long-lasting influence of incarceration (*Stinchcomb and Fox 1999:371*).

Overcrowding disrupts the rehabilitation and programs of prisoners creating problems for the prison administration in providing the limited treatment available. Maintenance of discipline becomes difficult with a low inmate-officer ratio resulting in a low morale among prison officers as well. In some instances it could result in the prison officer having to work under insecure conditions. Thus overcrowded prisons provide explosive settings where trivial issues could spiral into major problems. Therefore, institutional staff must

ensure that conditions in the institution offer a reasonable level of control over potentially dangerous individuals who might harm others (*Henderson and Phillips 1991:13*).

South Africa is a country in which socio-economic conditions give rise to a high prevalence of communicable disease, both in the sense that majority of the population has a lower than desirable nutrition level and hence is vulnerable to infection, but also in the sense of cramped and inadequate living conditions that tend to foster communicable diseases. The crime patterns in South Africa indicate that a large proportion of the prison population come from these communities. Thus it can be expected that the rate of infection with communicable diseases of correctional clients entering the Department is higher than the national average. The overcrowding level in prisons exacerbates this situation (*DCS Draft Green Paper 2003*).

The conditions inside prison can contribute, in varying degrees, to the risk for HIV transmission, the progression of HIV, and the deterioration in health of a person with full-blown AIDS. While overcrowding, gangs, drugs, and violence are realities of prison life in every country, specific aspects of these issues as they are manifested in South African prisons will have different impacts on prisoners already infected or at risk for contracting HIV/AIDS (*Goyer 2003:33*). Those with HIV infection are appearing more frequently within institutional populations. Due to the spread of AIDS throughout society, the spread of AIDS is on the increase among inmates, particularly since those convicted of drug offences are likely to be sentenced to prison or jail terms.

Due to their 'minority' status among institutional populations, the needs of special offenders have not often been a high priority. Regardless of what types of treatment programs are available or how non-punitive the facility's orientation is, there is little doubt that juvenile institutions produce significant negative effects. Females are more likely to suffer from the frustration of being both separated from and unable to care for their children. In fact, regardless of the nature of their needs, those with special requirements have not traditionally received high priority from government in general.

Thus it can be postulated that some of the worst human rights abuses stems from the problems associated with overcrowding, and overcrowding can be regarded as one of the main challenges facing the Department of Correctional Services.

CHAPTER FIVE

ALTERNATIVES TO IMPRISONMENT

5.1 INTRODUCTION

Of paramount concern to the Department of Correctional Services in South Africa, is the severe overcrowding of prisons. Since the early part of this decade, South Africa has been investigating alternative methods of punishment and criminal justice. Like many other countries in the world, (such as the United Kingdom and America), South Africa is faced with an ever-increasing number of offenders being held in overcrowded prisons (*Disse/ 1997:1*). The debate about alternatives to prison is a familiar one. Imprisonment gives rise to certain unfavourable conditions, for example, the spread of diseases, violence and psychological distress, which are detrimental to both the offender and the interest of the public, as discussed in chapter four of this thesis. The present penal system with its horrendous prison population is not conducive to the improvement of the offender. Alternatives to imprisonment are constantly being sought of which the wider use of community-orientated punishments is just one example.

In striving towards greater competence and a more effective service to the community, the Department of Correctional Services did a critical investigation in respect of its mission and mandate. At the same time it made a study of the penological systems, which are applied in various countries abroad, for example America and Australia. In conjunction with this and in reaction to the Government's call for a more cost-effective public service, an in-depth study was undertaken into the increasing prison population and associated escalating detention costs (*White Paper Department of Correctional Services 1991:5*).

The extent of the South African prison population is being questioned and criticized more and more by knowledgeable and even well meaning persons and countries. The lack of sufficient alternatives to imprisonment manifests itself in overpopulation of prisons with negative implications, which results in:

- Mass handling of individual needs;
- A reduction in rehabilitation programmes;
- The earlier release of criminal elements;
- Pressure on the Treasury for the supplementation and extension of personnel;
- An increase in capital expenditure for the creation of prison accommodation to eliminate backlogs;
- Negative behavioural patterns in prisons; and
- An increasing burden on the Treasury for the support of the families and dependants of prisoners (*White Paper 1991:8*).

Many South African prisons are currently encroaching on fundamental rights of prisoners through overcrowding. Crowding is the most obvious problem of the penal system and has considerable consequences, if left unchecked (as discussed in chapters three and four of this thesis). Incarceration by itself is only short-term refuge, whilst protection over the long term is best achieved by successfully reintegrating the offender into society. The use of imprisonment has had little impact in terms of reducing or controlling crime. The expected consequence of increasing incarceration rates is, prison crowding, which could be regarded as an insult to civilised society (*Neser and Takoulas 1995:1*).

As opposed to imprisonment, community-based corrections, under which a person resides in his own community and maintains normal social relationships while under the control and guidance of a probation officer, has access to rehabilitative resources and services; is considered a more efficient, economic, and humane move towards the treatment of the offender.

Alternative methods of justice, for example, compensation and restitution, have been attempted through the formal justice system. However, new systems are being developed which aim to keep offenders out of the criminal justice system, looking instead to the community to resolve the problems. Such developments are occurring within the restorative justice framework, which maintains that justice should promote healing of the individual and of society (*Dissel 1997:1*).

New programs making use of community approaches to corrections as alternatives to incarceration, and also as a means of facilitating reintegration of the offender back into the community following release from an institution, can be more successful and less costly to society. Moreover in society there will always be a need for secure custody for certain types of dangerous offenders. What is being advocated is essentially a reduction of criminal justice processing for those offenders, who could probably be treated as well, if not better, in ways less costly to the state, with fewer negative implications; thus lightening the load for the criminal justice system and hence reducing the overcrowding in corrections.

Alternative sanctions include many different initiatives, such as victim-offender reconciliation programmes, restitution and compensation, day fines, community service, electronic monitoring, intensive supervision programmes and boot camps. These initiatives are not cheaper options of punishment because they require community involvement. On the contrary, such initiatives need a high number of trained personnel, as well as established administrative departments (*ISS Correcting Corrections Monograph No 29 1998:3*).

This chapter examines the penal objectives and imprisonment, as well as the different alternative sentences to imprisonment available to the criminal justice system.

5.2 PURPOSE OF IMPRISONMENT

Prisons represent the last resort for a criminal justice system, which has exhausted all other alternatives. Although a first-time offender may be sent to prison for a serious offence, the majority of prison inmates have had previous experience with the criminal justice system (*Stinchcomb and Fox 1999:217*). Some offenders have been afforded a 'second chance' through probation; others have served prior time. Whatever the offender's prior experience, it was obviously unsuccessful in changing long-term behaviour leaving the prison to attempt to accomplish what other sanctions failed to achieve. By the same token (*Sanders 1983:430*), believes that the philosophies behind punishment and imprisonment have changed over time, and different societies have varying conceptions, not only of what is proper punishment, but also what is an adequate prison.

Goffman in Abadinsky (1997:202) refers to the prison as a *total institution*:

"a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life."

Abadinsky (1997:202) further postulates that these institutions have a penchant to mould persons into compliant and often shapeless forms to maintain discipline and a sound working order, or for less utilitarian reasons.

The prison provides a tedious uniformity that leaves little room for self-assertion and decision-making, the requisites for living in the free community.

According to *Terblanche (1999:240)* the purposes of imprisonment are said to be mainly threefold:

- To punish the offender;
- To prevent further crime; and
- To rehabilitate the prisoner.

By the implementation of imprisonment, society is 'protected' from these offenders for a limited period. Eventually the offender is released into society, and has to be reintegrated into society as a law-abiding citizen. Thus the White Paper on the Policy of the Department of Correctional Services in a New South Africa (1994), states that the goal of correctional services is to provide facilities, opportunities, services and conditions of incarceration that would be conducive to the rehabilitation and improvement of offenders. Unfortunately, due to the overcrowding problem, the reformation of the offender is hampered by the lack of appropriate facilities.

Kaiser in Van Zyl Smit (1992:101) explains that the formulation of the purpose of imprisonment facilitates the orientation towards the primary ideas of prison legislation and at the same time contains standards for the exercise of discretion by prison officials and for the judicial control of administrative decisions.

The Correctional Services Act, Act 8 of 1959 refers to the key functions, which relate directly to the purposes of imprisonment. Sections 2 (2)(a) and (b) provide that the Department shall be:

- To ensure that every prisoner lawfully detained in any prison be kept therein in safe custody until lawfully discharged or removed there from;
- As far as practicable, to apply such treatment to convicted prisoners, as may lead to their reformation and rehabilitation and to train them in habits of industry and labour.

Furthermore, imprisonment as a form of punishment has been provided for by successive legislatures, and the current provision therefore being contained in section 276 of the Criminal Procedure Act, No. 51 of 1977.

Thus penologists, criminologists, sociologists, etc have long debated the purposes of punishment. There is no doubt that sentencing officers often impose imprisonment intending it to be a retributive punishment and that the persons serving it perceive it as punitive. However, the purpose of the imposition of the sentence of imprisonment cannot simply be regarded as a guide to how the sentence should be implemented. While the various parts of the criminal justice system are related, it does not follow that they must have indistinguishable purposes merely because a sentence of imprisonment aims at punishment (*Van Zyl Smit 1992:103*).

5.3 PENAL OBJECTIVES AND IMPRISONMENT

The views of the public with regards the appropriate response to crime forms the basis for identifying the purpose of corrections, that is what corrections is supposed to be accomplishing. According to *Stinchcomb and Fox (1999:45)*, there is such a diversity of viewpoints over what should be done with law violators that it is impossible to identify any one mission or goal of corrections. At different times, correction has been charged with fulfilling society's demand for retribution, deterrence, incapacitation, rehabilitation, and reintegration.

By the same token *Morodi (2003:1)* believes that the concept 'prisoners rights' was not often spoken of in the past as prisoners under the oppressive apartheid system were subjected to gross violations of human rights such as, hard labour for both common and political prisoners. The then perceptions about prisoners were based not on rehabilitation but on punishment to offenders who have wronged society and deserve to be objects of ill treatment.

In addition treatment of convicted persons to imprisonment regardless of the sentence duration or length, implies that the type of treatment prisoners get in prison must be in such a way that it creates in such prisoners the will for conformity (law-abiding) and self supporting lives after their release. If the treatment of convicts remains within human rights context as intended the outcomes should be twofold, namely; the establishment of prisoners' self

respect and the development of the sense of accountability and responsibility towards the broader society they harmed (*Palmer 1991:825*).

The penal theories as objectives of punishment have also served as traditional moral justifications for punishment. These theories are influenced by the culture of the group from which they emanate, i.e. by the reigning opinions, philosophies, religious beliefs, scientific theories, etc., of the group concerned.

Increasing attention is being given to the personality and background of the criminal, rather than to the mere form of the crime. Although the idea of punishing particular crimes with a view to deterrence is still important, and although the concept of repairing injuries to the communal sense of justice cannot be ignored, punishment in the present era is directed towards the criminal himself; towards improving him and taking care of his future (rehabilitation), to a much greater extent than in the past. However, under existing conditions, as mentioned in chapter four of this thesis, rehabilitation is a difficult, if not impossible, aim to achieve.

5.3.1 Retribution and Imprisonment

One of the oldest reactions to the commission of a wrong is the belief that criminals deserve to be punished as repayment for their misdeeds. In the past imprisonment had a very strong retributive character since the offender was sent to prison for punishment. The modern view, viz. that the offender is sentenced to imprisonment as punishment and, in certain cases, for treatment

shifted the emphasis from retribution to other objectives, for example, protection of the community and the rehabilitation of the offender. The aim of retribution, however, remains an underlying motive in the punishment of the offender, which also includes imprisonment (*Neser et al 1993-2001:71*).

In *S v Mafu* 1992 2 SACR 494 (A) 497 b-d, Harms AJA declared, referring to the dictionary meaning of retribution:

“ [It] may be useful to recall that retribution in this context means requital for evil done...”

By the same token, the Viljoen Commission of Inquiry into the Penal System of the Republic of South Africa 1976, asserts the following view of retribution: retribution means, in essence, that act of requiting or paying in return for evil. In the criminal justice system it means the act of inflicting upon the convicted person, by means of the sentence, loss or suffering as punishment. *Stinchcomb and Fox (1999:48)* believes that as the public has become increasingly fearful of violent crime, frustrated over inability to control it, and concerned that criminals are not receiving their ‘just deserts’, retribution has again gained in popularity. Proponents of this view uphold that offenders freely decide on engaging in criminal activities and should therefore be punished in order to ‘pay their debt’ to society.

Similarly *Neser et al (1993-2001:72)*, contends that if the principle is accepted that retribution is just deserts or suffering, then expression can be given to this objective within the framework of imprisonment in the sense that not only the

type and length of punishment can be coupled with the gravity of the offence or the suffering that the offender deserves, but also to a certain degree also with administrative aspects such as the prisoner's classification, assignment, the institution that he is incarcerated in etc.

Furthermore, imprisonment does not only encompass the physical suffering of the offender, but also the mental anguish that accompanies it. The mental suffering experienced by the offender forms part of any term of imprisonment, although this may differ according to the length of sentence, the offender's personality, the institution, etc. *Haney (n.d.:8)*, believes that increased sentence length and a greatly expanded scope of incarceration results in more prisoners experiencing the psychological pains of imprisonment for longer periods of time, many persons being caught in a web of incarceration who ordinarily would not have been (e.g. drug offenders).

The major component of the psychological suffering associated with imprisonment is to be found in or results from the isolation of the offender from the community at large, and from the deprivation of the offender's individual freedom. Imprisonment provides the offender with the opportunity for atonement and repentance. *Heijder in Naser et al (1993-2001:72)* acknowledges that imprisonment enables the offender to repay the state and the community for the harm that was caused. Acceptance of imprisonment as retribution for his crime can bring the offender to the realization that he acted wrongly and awaken in him a feeling of repentance.

If there is absence of psychological pain or suffering from imprisonment, in other words, if imprisonment is deprived of all retribution or unpleasantness, law-abiding citizens may feel that there is no point in their obeying the laws of the land and furthermore it may result in the loss of confidence by the community in the legal system (*Neser et al 1993-2001:72*).

5.3.2 Deterrence and Imprisonment

The underlying philosophy in the context of deterrence is to make the effects of the crime so unpleasant that the offender and potential offender will be deterred from committing a crime. Making the punishment as unpleasant as possible for the offender is no longer one of the considerations of imprisonment. The prisoner is therefore not sent to prison *for* punishment but *as* punishment (*Neser et al 1993-2001:73*). However, this cannot justify the unacceptable conditions prevailing in South African prisons today.

The extent to which either convicted or potential law violators are deterred by severe punishments is virtually impossible to determine precisely, because only those who are *not* deterred become clients of the criminal justice system. That does not necessarily mean that the goal of deterrence is sought exclusively through harsh sentencing practices. More recently, 'shock' incarceration and even 'shock' parole have been experimented with to determine whether the shock of brief imprisonment might assist in deterring future law violations (*Stinchomb and Fox 1999:50*).

It is also indicated, *Terblanche (1999:240)*, that the major institutions of criminal punishment in the Western world, the prison and the jail, are designed and operated to restrain those under their control. All the other objectives of incarceration are supplementary to the basic structure of the modern prison and jail; incapacitation is central...[incapacitation] has been the major motive of incarceration for many decades but has received scant attention in criminology, in criminal law, or in jurisprudence.

Terblanche (1999:240) further postulates that imprisonment prevents crime mainly through incapacitation. The fundamental philosophy in the case of deterrence is to make the effects of the wrongful deed (the punishment of or retribution for the crime) so unpleasant that the offender and potential offender will be deterred from committing a crime. As mentioned above, making the punishment as unpleasant as possible for the offender is no longer one of the considerations of imprisonment. As stated previously, the prisoner is therefore not sent to prison *for* punishment but *as* punishment.

Where individual deterrence, the deterrence of the offender who is himself undergoing punishment is concerned, one cannot deny that the deprivation of freedom, which is coupled with imprisonment, is unpleasant to the prisoner. Although this is a relative matter which depends on many factors, e.g. the composition of the offender's personality, his social background, the length of the sentence, etc., this amounts to the fact that imprisonment will have no deterrent value to some prisoners, but such unpleasantness ought to have

some deterrent effect on the average individual undergoing imprisonment (Neser et al 1993-2001:74).

In addition, as regards the deterrent value of imprisonment in general, it is a fact that social disapproval or the social stigma attached to it is an important factor. Where the offender has little or no part in the spiritual and material welfare of his community, imprisonment plays a less significant role.

Thus the question posed by *Terblanche (1999:185)* is:

“To what extent, if any, the nature and amount of the sentence which is imposed in a particular case *will add* to the deterrent factor which is already inherent in the whole trial process?”

What has therefore contributed to the reduced deterrent value of this form of punishment is not only the fact that imprisonment has been deprived of its punitive character and the fact that the offender no longer goes to prison for punishment, but also the uncertainty that the offender, due to the existence of a wide variety of alternatives to imprisonment, will definitely end up in prison. Thus imprisonment is justified by the value of its consequences, namely the prevention of crime, and crime must be prohibited in order to protect society (Neser et al 1993-2001:73-74).

5.3.3 Protection of the community and Imprisonment

Imprisonment as a form of punishment used today is the most popular, especially for serious crimes. An important question unavoidably arises: how effective is the protection it offers the community?

Imprisonment can protect the community. Since the deprivation of freedom is a serious loss to the civilized person, it can be alleged that, imprisonment constitutes a reasonably serious deterrent at least to a large part of the community. The deterrent effect on criminals and potential criminals offers protection to the community. However, this kind of protection is inadequate since not all criminals are deterred by the existence of imprisonment (*Neser et al 1993-2001:74*). Imprisonment offers short-term protection in that the physical detention restrains the criminal. Within the limits of possible escapes, imprisonment therefore offers physical and economic protection to the community, at least during the period of confinement.

On the other hand, *Morodi (2003:3)* asserts that the purpose and justification of a prison penalty upon offenders as a mechanism polarising prisoners freedom is a measure taken by the state as a component of its moral obligation in protecting society against crime. This end can only be realised, if the period of imprisonment is used in ensuring, that upon their release they return to the society not only willing but also able to benefit as law abiding and self-supporting citizens.

The community may be protected by the permanent or temporary removal of the offender and by his rehabilitation. The rehabilitation of the offender during his term of imprisonment, offers protection of the community in the long-term.

On the other hand *Muntingh (2002:2)*, believes that at least 95% of all prisoners are eventually released back into the community to continue with their lives again. It is further stated that the widespread thinking is that taking away the prisoner's liberty and isolating him or her from the qualities of life outside prison; individuality, control, decision-making, dignity, creativity and variety, will act as a deterrent against crime. Society continues to incarcerate people for their wrongdoings in the belief that they deserve the pain of such deprivation, which will make better people of them. The question arises, "Is the rationale in this thinking constructive, or is there perhaps a more sinister, less humane reason for imprisoning people? Is imprisonment merely a way of getting people off the streets, incapacitating them and hiding them from the rest of society's gaze?" (*Muntingh 2002:2*).

On the other hand one could argue that the imprisonment of an offender does not really protect society because of overcrowding the community receives back a possibly less healthy person (due to the spread of diseases discussed in chapter four of this thesis) and a psychologically more damaged individual (abuse, gangs, etc also discussed in chapter four of this thesis).

5.3.4 Rehabilitation and Imprisonment

The aspect under deliberation here is the extent to which imprisonment makes provision for the realization of rehabilitation as an objective of punishment. Imprisonment (emphasis is placed on long-term imprisonment), offers three kinds of opportunity for the realization of the rehabilitative objective of punishment (*Neser et al 1993-2001:75*). Firstly, this form of punishment can help the offender in the realisation that he acted wrongfully and cause him to accept punishment as the logical consequence of his act. Important considerations in this process are the self-evaluation on the part of the offender, the cultivation of the desire to improve himself and the intention to follow a different system of values.

Secondly, imprisonment furthers the possibility of treating the offender, and thus contributing to his rehabilitation. However, treatment at the expense of the role of the offender should play in his rehabilitation should be guarded against.

Thirdly, within the framework of imprisonment a favourable, dignified environment can be created that can help to persuade the offender to develop a positive, receptive attitude towards treatment. Given the present overcrowded prison situation in South Africa, the creation of this environment for the rehabilitation of the offender is unlikely to be achieved, unless there is a drastic decrease in the prison population (*Neser et al 1993-2001:75*).

The resultant process of rehabilitation combines correction of offending behaviour, human development and the promotion of social responsibility and

values. The (*DCS Draft Green Paper 2003*) asserts that rehabilitation should be viewed not merely as strategy to preventing crime, rather as a holistic phenomenon incorporating and encouraging social responsibility, social justice, active participation in democratic activities, empowerment with life and other skills, and contribution to making South Africa a better place to live in.

The department of Correctional Services further states in its *Draft Green Paper (2003)* that the mission statement of the Department, developed in 2002, is the placing of rehabilitation at the centre of all Departmental activities in partnership with external stakeholders, through:

- The integrated application and direction of all Departmental resources to focus on the correction of offending behaviour, the promotion of social responsibility and the overall development of the person under correction;
- The cost effective provision of correctional facilities that will promote security, correction, care and development services within an enabling human rights environment;
- Progressive and ethical management and staff practices within which every correctional official performs an effective correcting and encouraging role.

Similarly, *Conklin (1995:501)* believes that the goal of institutional treatment is to change prisoners' disposition and observable behaviour positively so that they can adjust to the community in a socially acceptable way.

According to *Terblanche (1999:240)* Section 2(2) (b) of the Correctional Services Act, Act 8 of 1959, contains as one of the Department of Correctional Services' main functions is as far as practicable, to apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation and to train them in habits of industry and labour.

By the same token *Van Zyl Smit (1992:104)* cites the case of *Goldberg v Minister of Prisons Wessels ACJ* where he explained that: [t]he Legislature recognized that, although imprisonment is primarily imposed as punishment for criminal conduct, the public interest (and that of the prisoner) are best served by applying such treatment to prisoners as is calculated to result in their reformation and rehabilitation, so as to increase the likelihood that, upon their discharge, they will become useful and law-abiding members of the community.

Although the above may be the objective of imprisonment towards the rehabilitation of the offender, the *SAHRC (1998:25-29)* reported that prisons have not been able to prepare prisoners meaningfully for release or to survive upon re-entry into normal life or to make a living. The prison population in South African prisons is so disproportionately high that the maintenance of prison services is a major depletion of resources, both financial and human. Even though rehabilitation of the offender is a way of avoiding recidivism, the overcrowding of penal institutions actually hinders this realization.

Although it is realized that rehabilitation cannot take place in isolation and that it cannot be left solely to the offender himself, the quarantine concomitant with imprisonment can in many cases have a beneficial effect with respect to the rehabilitation process. Within the Departmental environment, rehabilitation is best facilitated through a holistic sentence planning process that engages the offender on all levels- social, moral, spiritual, work, educational/intellectual, mental; and is premised on the approach that every human being is capable of change and transformation if offered the opportunity and resources (*DCS Draft Green Paper 2003*).

Two contrasting views are held concerning the possibility of reforming the offender within the framework of imprisonment. On the one hand, there is the view that rehabilitation or reform is applicable only to offenders who have been sentenced to imprisonment (*Rabie and Strauss 1981:14*). On the other, the idea is propagated that prison is not the most suitable place for the rehabilitation of offenders, and this does not imply that rehabilitation in the prison set up is impossible-just that due to conditions of overcrowding it becomes very difficult. In the past, when a greater belief in the rehabilitative value of imprisonment existed, it was alleged that rehabilitation is not possible with short-term imprisonment, because reform work (which is supposed to take some time) is not possible during a short sentence (*Terblanche 1999:242*).

Rehabilitation should remain the objective of sentencing, not only as a means of helping offenders but also as a means of long term crime prevention and

safety and security of the community. That is why the participation of the community in rehabilitation is so crucial to the communication of behavioural standards and the fortification of human bonds with the prisoners in preparation for their reintegration into society (*Skosana 2003:1*).

Thus, the author is of the opinion that although the rehabilitation of the offender is regarded as the most important aspect in the prevention of recidivism, given the current prison conditions (discussed in chapter three of this thesis), and the detrimental effects of overcrowding of prisons (discussed in chapter four of this thesis), this cannot be accomplished, especially with short-term prisoners, first offenders and juveniles. Community based criminal justice can include treatment and other rehabilitative activities and, at the same time the offender may be allowed to remain employed, housed and connected to established support systems.

Terblanche (1999:189) expresses the view that imprisonment has almost no potential of achieving the rehabilitation of the offender and despite many references in the past to rehabilitation in connection with long prison sentences, a number of important judgments have recently held that, especially in the case of really serious crime where long terms of imprisonment are imposed, rehabilitation becomes a minor consideration. Although the belief that a prison sentence can rehabilitate an offender has largely been discredited, courts have found renewed faith in rehabilitation with the advent of correctional supervision. This theory envisages *inter alia* the re-orientation, re-education or reformation of an offender towards self-

improvement, self-upliftment, better self-control, more acceptance of responsibility towards self and others and if necessary, a change in personality and an altered life style so that the offender may become law-abiding.

Paul (2002:3), a prisoner at Pollsmoor Prison who participated in conflict resolution programmes run by the Centre for Conflict Resolution at the prison states that:

“More than 80% of prisoners return to Pollsmoor Prison after being released. They return to the ‘college of knowledge’ as it is popularly known amongst inmates, persisting in a life of crime. The solution should lie in restoring the prisoner’s sense of positive identity and enhancing self-esteem- in other words, promoting restoration, rehabilitation and development. This will sow the seeds to develop a sense of pride, create purpose in life and build belief in a positive future worth living for and working towards. Achieving this, even on a very small scale, will create the positive role models so desperately needed to inspire and sustain the rehabilitation process among prisoners.”

He further states that the prison provides the ideal classroom to end the cycle of violence in South Africa, for the prisoners are captive and one of the most valuable resources, that is, time is in abundance. Due to the country's violent and unjust past, many people have been scarred for life and end up in prison.

These injured people need urgent restoration. *Paul (2002:3)* postulates that the healing process should include:

- Trauma counselling to teach prisoners how to deal with painful memories of the past. Such counselling will enable them to come to terms with their hidden fears and to confront the unresolved issues that influence their negative choices and aggressive behaviour;
- Drug rehabilitation in the form of medical intervention and intensive counselling must be provided to counter the deep-rooted problem of substance abuse among prisoners...If the drug problem in South African prisons is not aggressively combated, the cycle of crime will not be broken;
- Family support in the process of prisoner restoration is essential. Where possible families of prisoners must be regularly involved in a prisoner's healing process.

He further states that trade training and certification is important in providing the basics for future employment and viable work opportunities upon release. These efforts should be intensified together with the training for life skills. However the (*SAHRC 1998:25*) found that only a negligible proportion of the prison population are beneficiaries of training and that the rehabilitation of offenders is a grave problem within Correctional Services. Overcrowded penal institutions, instead of rehabilitating, encourage criminal activities such as gangsterism, availability of weapons, drugs and other illegal substances. Prisons rehabilitate relatively few offenders. The vast majority of offenders

pass through the “revolving doors” repeatedly. “Warehousing” of offenders in institutions where the culture within rewards violence, meanness, deceit, manipulation and denial. Most offenders return to the community as individuals who are then even more antisocial than before they were incarcerated (*Marty Price 2000:3*).

Thus imprisonment as a form of punishment makes provision in two ways for the realization of the objective of rehabilitation, namely through certain intrinsic qualities peculiar to punishment, and through the possibilities it creates for the treatment of the offender.

5.4 WHY IS OVERCROWDING IN PRISONS CONSIDERED SUCH A SERIOUS PROBLEM?

Prisons in South Africa remain grossly overcrowded. Severe overcrowding adversely affects all aspects of incarceration (*Amnesty International November 2003:7*):

- It compromises the safety and security of staff and prisoners;
- It worsens conditions of confinement and reduces access to basic hygiene;
- It affects the delivery and implementation of rehabilitation, work and education programmes;
- It limits access to health care and worsens mental health;
- It weakens family ties already disrupted through imprisonment, as access to visiting rights are curtailed and

as incarceration in stressful conditions impacts adversely on prisoners' mental and physical health;

- It decreases pressures on staff thereby aggravating and further threatening professional integrity;
- There may be increases in levels of inmate-on-inmate assaults and self-harm and suicide;
- Since all of the above can be expected to impact on recidivism, overcrowding challenges the ability of the prison system to prevent re-offending and threatens the functioning of the entire criminal justice system.

Prison overcrowding affects the fundamental nature of correctional institutions. Reformative treatment, humanity, decency and justice remain largely unrealised ambitions, despite the Statement of Purpose and words about vision, goals and values. The ambitions for improvement, and even the most basic requirement, the maintenance of order, are vulnerable to the pressures arising from overcrowding (*Godfrey 1996:15*). The statement of mission of the Department of Correctional Services in South Africa (*DCS Annual Report 2003*) will be considered in the light of Godfrey's remark:

Vision: Delivering correctional services with integrity and commitment to excellence.

Mission: To deliver a professional Correctional Service in partnership with stakeholders by providing:

- Incarceration of offenders under conditions consistent with human dignity;
- Rehabilitation and reintegration programmes;
- Proper provision of persons under community corrections; and
- Procurement and acquisition of adequate resources, which enable effective response to challenges by means of progressive management, trained personnel, sound work ethics, performance management and good governance.

5.4.1 Implications of Overcrowding

As discussed in chapters three and four of this thesis, there are various consequences as a result of imprisonment. *Sparks in Naser et al (2001:166)* provides three crisis categories that are the outcomes of prison overcrowding:

- **The material crisis:** This indicates a shortage of resources for providing for the needs of prisoners and maintaining standards of imprisonment. Examples include appalling living conditions for prisoners: a lack of privacy, high temperatures in cells, noise levels, general irritations and arguments about the use of limited space, the spread of diseases and mental illness.
- **The order crisis:** Prison overcrowding undermines the internal social control, creates high stress levels and a potential for conflicts among the prisoners and has a harmful effect on the

relationships between warders and prisoners (*Welch 1996:131*).

Overcrowding makes it more difficult for the staff to accomplish their tasks since it generates an unfavourable prisoner-staff relationship, for staff that is pressured feel threatened more easily. Moreover they have problems with controlling prisoners in overcrowded sections; the situation further undermines the development of a healthy morale and creates a high staff turnover.

- **The goal crisis:** This crisis relates to rendering services to realise the primary objectives of correctional institutions. Overcrowded prison conditions promote, for example, idleness because of a lack of sufficient work programmes. The effective operation of development services such as educational and training programmes are scaled down and the safe custody of prisoners is hampered.

Thus given the crisis, which is created by overcrowding, the question that arises is whether correctional institutions can still operate their mission statement under these conditions, or whether alternatives to imprisonment should be explored more vehemently.

5.4.2 The Search for Alternatives to Imprisonment

In South Africa, correctional institutions are accommodating many more prisoners than their optimal capacity (discussed in chapter three of this

thesis). Correctional services are supposed to encourage a sound ethic and provide prisoners with the skills necessary to return to society.

However under the current conditions of overcrowding, an effective correctional service cannot be expected. Overcrowding of correctional institutions results in the deterioration of the prison environment. Due to the unfavourable consequences linked to imprisonment to both the offender and to society and whether the objectives of imprisonment can be realised, the search for alternatives has been recommended.

Community-based corrections recognises the importance of working with the offender within his home community, or near it where his ties with family and friends can be used to advantage in his rehabilitation.

5.5 COMMUNITY ORIENTATED PUNISHMENT

Community-service as an alternative to imprisonment, is an example of a non-custodial or community-orientated type of punishment. Community-based penology is the area of specialization that is concerned with the study of the community and the sentenced offender. Attention is given to community punishments as alternatives to imprisonment, that is, to their definition, historical development, types, implementation and evaluation and also to a comparison between systems in different countries (*Cilliers and Naser 1992:21*).

5.5.1 Fashioning Alternative Sentences

Just because a sentence may avoid or shorten otherwise long periods of incarceration, does not make it a good alternative or intermediate sanction, unless the only criterion used is prison avoidance. In many cases, even alternative sentences that avoid incarceration initially may only set up offenders to still longer sentences in the future if they fail to, among other objectives, address the offenders' criminogenic behaviours (*Klein 1997:140*). He further states that if it is not absolutely necessary to safeguard the community, specific victim or vindicate social norms, long-term incarceration is extremely wasteful of precious state resources. Although many may take momentary pleasure when a judge pronounces a long sentence against an offender who has done something odious, their pleasure might be dulled if the judge also spelled out the consequences of that same sentence. What would the reaction be, for example, to the following sentence? 'In order to sentence an offender to 30 years for being a habitual thief (or third-time felon), the state will have to deny 30 poor young men and women tuition at the state university' (*Klein 1997:141*). Thus the cost of incarceration is tremendous.

Alternative sentences may contain differing sentencing components that address various sentencing goals. In fashioning alternative sentences, defence attorneys, prosecutors, probation officers, and judges must consider the following five factors (*Klein 1997:142*):

- The offender;
- The offence;
- The victim;
- The community at large; and
- The individual court environment (Each sentence establishes a precedent the court must live with for years).

Therefore in the implementation of a sentence, cognisance must be taken of the above factors for the commission of a crime is not only the violation of a law, but also the violation of people and associations. The imposition of justice involves the victim, the offender, and society.

5.5.2 Community Corrections

The post-1994 Department of Correctional Services inherited a prison system that was filled to capacity with inmates. Overcrowding in prisons represents a real threat to the safety and security of both the prison and the community. One of the ways in which the Department sought to resolve the problem of overcrowding in prisons and thus increase safety and security in prisons was to introduce the concept of community corrections (*Department of Correctional Services 1999:12*).

Community corrections, also called community-based corrections, is a sentencing style that represents a movement away from traditional confinement options and an increased dependence upon correctional

resources which are available in the community. It is the use of a range of court-ordered programmatic sanctions permitting convicted offenders to remain in the community under conditional supervision as an alternative to active prison sentences. Community corrections include a wide variety of sentencing options such as probation, parole and electronic monitoring (*Schmallegger 1997:403*).

The aim of community correction programmes implemented by the Department of Correctional Services, is to exercise supervision and control over offenders and persons who have been sentenced to or placed under correctional and parole supervision in the community, the two basic alternatives to incarceration. These alternatives fall under the umbrella of community corrections. The programme comprises a single sub-programme, Correctional and Parole Supervision, which is responsible for managing persons under community corrections. This entails the managing of cases and monitoring of compliance with the conditions set for probationers, parolees, day parolees, awaiting-trial persons and prisoners on temporary leave (*DCS Annual Report: 2002/2003*:).

Key Outputs, Indicators and Targets of The Sub-Programme Correctional and Parole Supervision

Sub-programme	Output	Output Measure/indicator	Target	Actual
Correctional and Parole Supervision	Supervision and control over offenders in the system of Community correction	Daily average probationer and parolee population	67 200	71 560
	Tracing of absconders	Number of absconders traced	7935	5412

TABLE 25

Source: DCS 2002/2003

The number of people under the authority of Community corrections escalated from a daily average of 55 556 in 1998/1999 to 71 560 in 2002/2003.

5.5.2.1 Problems Associated with Community Corrections

The single biggest problem experienced with regards to the system of community corrections is that probationers, parolees and awaiting-trial persons who are taken up in the system can practically abscond from the system due to the fact that supervision is not on a 24-hour basis. Another challenge faced by the Department is the tracing of these absconders and bringing them to book (*Department of Correctional Services 2002/2003:74*).

Number of Absconders from Community Corrections 2000 - 2003

Period	No. Of Absconded Persons	No. Of Absconders Traced *
1 April 2000 to 31 March 2001	5912	7036
1 April 2001 to 31 March 2002	13367	5413
1 April 2002 to 31 March 2003	6747	4598

TABLE 26

Source: DCS Annual Report 2002/2003

The table above indicates the number of persons absconded from the system of community corrections with an indication of the number of absconders

traced per year. ^{*}(Absconders traced in a particular year do not only include persons that absconded during that particular year).

Thus from table 26, it can be seen that the number of absconders is exceedingly high. From April 2001 to March 2002 there were 13367 absconders of which only 5413 were traced. This means that there were 7954 absconders at large in the community.

In addition, there is a shortage of staff within community corrections services. Community corrections personnel cannot manage with the volume of work available. High caseloads are brought about by the fact that there are few monitoring officials and the demand and capacity is soaring (*Ntuli and Dlula [n.d.]:257*).

One way of overcoming the above problems is to implement the programme of electronic monitoring. In this way the number of staff needed would be decreased because the offender will be monitored from a central point. Thus in South Africa the inherent flaw in the existing programme of community corrections, is the lack of supervision and the absence of electronic support systems, which contributes to the success of the community corrections programme in other countries for example, the USA and the UK (discussed further in chapter six of this thesis).

The implementation of electronic monitoring will instil in both the community and the courts confidence in the system of community corrections. More

offenders can be diverted from institutions and consequently reduce the overcrowding.

5.5.2.2 Cost Implications of Community Corrections

The move to implement more community-based corrections will in due course reduce the need for maximum-security institutions. The majority of the prison population can be rehabilitated in less restrictive penal institutions or under supervision in the community. A small number of facilities will be required for those offenders considered being dangerous and least responsive to correctional treatment.

In South Africa, community corrections as a community-based alternative are more cost-effective than incarceration (*Neser 1993:432*). The cost of keeping an adult offender in a penal institution is excessive. Not only is there loss of earning by the inmate, but the cost to taxpayers if his family goes on support and the loss of taxes he would pay adds to the total cost of incarceration in an institution.

5.5.3 The Purpose of Community-Based Alternatives

There are many forms of community-based alternatives to incarceration, for example, probation, parole, correctional supervision, etc. The aspect that they all have in common however, is a belief that prison is not the best way to deal

with many offenders, especially those who pose a low or manageable risk of re-offending (*Resource Material Series No.61 [n.d.]:324*).

It is further stated that there are various purposes of community-based alternatives among which are:

- To reduce overcrowding in prisons and prevent escalation of detention cost;
- To ensure public safety and security through effective supervision and control over offenders who serve their sentences in the community;
- To prevent or reduce offender stigmatisation;
- To enhance rehabilitation and reintegration of offenders into the community in order to strengthen their ability to live peacefully with others in the community setting;
- To permit the offender to contribute towards his or her family in particular and to society by working instead of being confined in prison;
- To avoid an escalation in deviant behaviour when new offenders are mixed with hardened criminals; and
- To monitor and supervise offenders in order to ensure compliance with court-ordered conditions and programme requirements (*Resource Material Series No.61 [n.d.]:324*).

5.6 IS A COMMUNITY SERVICE SENTENCE A PUNISHMENT?

A pertinent question is whether a community service sentence can be considered to be a punishment (*Neser and Cilliers 1989-1991:5*). Sentences to carry out community service are subject to the fundamental philosophy of just punishment and also to those objectives of punishment that were discussed in chapter three of this thesis.

5.6.1 Community Service Sentences and Retribution

Retribution is an indispensable component in sentencing and sensible community service can do justice to this. One of the basic doctrines of retribution is that this justification of punishment brings about the reestablishment of the imbalance resulting from the violation of a law. The *Krugel Working Group (1984:32)* indicates that this retributive objective could be accomplished by the implementation of community service.

Community sentence should be used in such a manner so as to include justifiable penance: for example, a person who dumps rubbish in an unauthorised place may be sentenced to help remove rubbish, or a person who causes the injury of another human being while driving under the influence of alcohol may be asked to perform community work at an

outpatients section of a hospital (*Neser and Cilliers 1989-1991:8*). An important consideration to be noted is that these community sentences should relate to the nature and seriousness of the crime. The suffering imposed on the offender by the sentence should not be out of proportion to the suffering caused by the crime.

5.6.2 Community Service and the Protection of the Community

When a crime is committed and a sentence is imposed, the community is entitled to claim that its interests be taken into consideration and that it be protected by punishment. Therefore the question that arises is whether the community is not being exposed to needless danger if a community service sentence allows the offender to remain in the community.

Section 297(1)(a) of the Criminal Procedure Act 51 of 1977, provides for the community service as a condition of imposing a suspended sentence. The proverbial sword is thus suspended over the offender's head, and this, together with the fact that a community service is a sentence, which is accompanied by effective supervision, provides the community with a reasonable degree of protection (*Neser and Cilliers 1989-1991:6*).

Moreover *Neser and Cilliers (1989-1991:6)* state that an important part of the system is proper selection of offenders for community service before sentencing. Thus if an offender does not comply with conditions of community service, referral back to the courts is an alternative. Another implication of

protecting the community is that in some way the community must be compensated for the wrong associated with the crime, and a sentence of community service meets this obligation.

The *Viljoen Commission (1976:110)* offered the opinion that compensation could be successfully used in cases of loss of means (theft) as in cases of pain and suffering (assault). A sentence of this nature not only answers the feeling of retribution in the offenders and the community but also serves as a rehabilitory, deterrent and preventive purpose. If it is within the means of the offender an order for compensation in these cases may provide far greater satisfaction than an order for the offender to pay a monetary figure in the form of a fine to the State. Furthermore it may be even more effective than to award compensation under section 300 of the Criminal Procedure Act, Act 51 of 1977 in which case the order is not backed by another threatened punishment (imprisonment) (*Cilliers and Neser 1992:263*).

5.6.3 Community Service and Deterrence

In this instance the punishment (as an unpleasant consequence of or retribution for the crime) is executed in the community (the community service is related to the crime and to the sector of the community within which the crime was committed), and should thus have a definite deterrent effect on the offender as well as on the potential offender (*Neser and Cilliers 1989-1991:7*).

If the offender is expected to perform community service in the area, which he resides, the humiliation of this may be so profound that the offender refrains

from further crime. Thus the community in which the crime occurred must figure prominently in the community sentencing (*Klein 1997:145*).

5.6.4 Community Service and Rehabilitation

The element of rendering beneficial community service to the community implies that the community accepts the offender. An offence by and large denotes a disregard by the offender of the interests of the community, and community service may help the offender to develop a better understanding of and attitude towards the community's need (*Neser and Cilliers 1989-1991:6*). Thus test of rehabilitation can be found in the successful reintegration of the offender in the community.

Community service sentences do not only indicate prejudiced absorption with the problem's of the offender, but also takes into contemplation the crime committed and the interests of the community. The fact that the offender's positive assistance is necessary is in itself therapeutic, while positive community service can furthermore contribute to his sense of worth. Of paramount importance is that the nature of community service performed must be of assistance to the offender and contribute to the restoration of the interests of the community if the commission of the crime negatively affects the community (*Neser and Cilliers 1989-1991:6*).

5.7 OFFICIAL ALTERNATIVE SENTENCES IN THE REDUCTION OF OVERCROWDING

Imprisonment should be imposed for the more severe crimes, and for those criminals who offend regularly and are not deterred by other forms of punishment. It can be imposed for most crimes, but generally those crimes should be of a serious nature. In practice, imprisonment is less ideal than it is often made out to be. Due to the fact that imprisonment is such a stalwart, other sentences have widely become known as *alternatives* to imprisonment. These alternatives are, of course, clearly punishment in their own right and exist independently of imprisonment (*Terblanche 1999: 239*).

By the same token *Stinchcomb and Fox (1999:129)* states that over the past two decades, community-based alternatives have come to imply excessive leniency-‘coddling criminals’, ‘wrist slapping’, ‘being soft on crime’; quite the opposite of the public’s demands for ‘just deserts.’ In fact, programs that are used to be called ‘alternatives to incarceration’ are now labelled ‘intermediate sanctions or punishments,’ presumably because society does not interpret ‘alternatives to incarceration’ as sufficiently punitive. It is further postulated that overcrowding has forced a reconsideration of priorities, calling attention to the need to reserve costly prison beds for truly violent, hard-core, chronic offenders.

Community-based approaches assume greater significance in achieving the goals of the justice system. This does not mean that community corrections are a panacea for solving the crime problem. But even if a community-based

approach does not do anything to improve offenders, at least it is not doing anything to worsen them. It is highly unlikely that the same could be said of incarceration (*Stinchcomb and Fox 1999:139*).

Hahn in Abadinsky (1997:202) asserts that the spending of years in confined quarters, perhaps as small as eight by ten feet, in a setting dominated by a toilet and a possibly criminally aggressive cell-mate, can hardly be considered conducive to encourage socially acceptable behaviour upon release.

On the one hand there is a sizable proportion of offenders whose crimes are so violent and whose behaviour so uncontrollable that prison is the only feasible option. Moreover there are others who are harmed more than helped by incarceration and therefore an alternative to incarceration should be implemented. Various alternatives will be discussed.

5.7.1 Community-Based Sentences

Community-based alternatives to imprisonment represent one of the most important developments in sentencing in the last few decades. Their development reflects the prison system's failure to rehabilitate offenders, the costs associated with building and maintaining prisons and changing community attitudes to sanctions (*Discussion Paper 33 1996:1*). It is further stated that community-based sentences are distinguishable according to:

- The degree of State intervention which they involve; and

- The extent to which they envisage community participation.

If community service is intended as an alternative to imprisonment, then the following questions presents themselves:

- Why is there a need to institute such an alternative? and
- Is imprisonment inadequate as a form of punishment?

As discussed in chapter three and four of this thesis, the author reiterates that there are various problems associated with the imprisonment of an offender. Thus an alternative to imprisonment stems directly from the recognition that imprisonment should be avoided. Even as community-based alternatives to incarceration have expanded, prison populations have steadily increased (*Stinchcomb and Fox 1999:217*).

5.7.1.1 Historical Development Of Community Service

Alternative forms of punishment to the usual penalties such as imprisonment, fines and suspended sentences, have up until now been used on a small scale in South Africa. Since the beginning of the eighties a start has been made in South Africa to investigate community-based forms of punishment and placing these alternative penalty options on the Statute Book (*White Paper 1991:21*).

Community Service Orders (CSO) as a sentencing option was initiated at the Cape Town branch of the National Institute of Crime Prevention and

Reintegration of Offenders (NICRO) in 1980. Prior to that, the types of alternative sentences (i.e. sentences other than imprisonment) available to the courts were very restricted. *Muntingh (1996:1)* conducted research, which was done based on more than 1 400 cases that were assessed by NICRO, Cape Town for CSO between 1980 and 1994. He asserts that:

“South African prisons have been plagued by overcrowding for many years and this problem has not been adequately addressed. Community Service Orders was introduced as a sentencing option to firstly, in some way alleviate the pressures on the already overcrowded prisons and secondly, present magistrates with another sentencing option. Magistrates are continuously frustrated with the limited sentencing options available to them, although it must be said that the relatively recent introduction of correctional supervision has made an invaluable contribution to sentencing in South Africa.”

Overcrowding and the cost of detention have led to the introduction of community service orders in South Africa. A community service order is an order of a court that punishes offenders in the community. The court may order offenders to perform a specified number of hours of unpaid work for the benefit of the community instead of sentencing them to a term of imprisonment (*Resource Material Series No. 61 [n.d.]:328*).

In South Africa, (NICRO), which is a community based organisation and other appropriate organisations, administers the community service orders. They are also in charge of monitoring the execution of the order. The underlying principle of a community service order is to punish the offender in the community where the offence was committed, away from the prison. This enables the offender to make some compensation to the community and furthers the concept of community responsibility to offenders by involving it with correctional programmes (*Ntuli and Dhlula [n.d.]:260*).

A community service order can benefit the community because some form of reimbursement is paid by the offender, offenders benefit because they are given an opportunity to rejoin their communities as law-abiding and responsible members, the courts benefit because sentencing alternatives are provided and offenders sentenced to community service orders may be individually placed where their skills and interests can be maximized for community benefit (*Dissel and Mnyani 1995:6*). A community service order can also be a valuable alternative in cases where a monetary penalty such as a fine, restitution or compensation order is not practical due to the limited income of the offender.

Research that was carried out by *Muntingh (1996:49)* found that of the sample that was traced for re-offending, just below 26 per cent were convicted of at least one offence after they were sentenced to render community service. The “survival time” immediately after they were sentenced to perform community service was in the order of 30 months, which is substantially longer than the

“survival time” for further convictions. This indicated that the rate of recidivism was reduced by the implementation of community service.

Furthermore the Interdepartmental Working on community service was appointed in 1983 to investigate community service as an alternative sentencing option in South African Criminal Law and to institute community service orders as a meaningful and viable sentencing option (*White Paper 1991:21*). The Criminal Procedure Act 51 of 1977 was amended in 1986 to establish community service sentences as a viable sentencing option.

Section 297 (1)(a)(cc) of the Criminal Procedure Amendment Act No. 33 of 1986 provided clear guidelines regarding community service. The most essential guiding principles are:

- The server must be older than 15 years of age;
- A minimum of 50 hours of service should be performed;
- The server and the placement should be informed in writing about their respective duties and obligations;
- It is a criminal offence for the server to report for service whilst under the influence of drugs or alcohol;
- It is a criminal offence for somebody else to pretend to be a person who has been sentenced to perform community service;
- Damages resulting from the performance of community service can be claimed from the state.

According to the (*White Paper 1991: 21*), community service sentences had increased tremendously, but that they were still not being properly utilized. This could be ascribed to a lack of real community involvement and suitable placement bodies and also possibly to the fact that it was still a new sentencing option with which presiding officers were not entirely familiar.

Due to the developments on the Krugel report regarding community service sentences, the question of further forms of punishment such as correctional supervision and supervision came to the fore. Paragraphs 10.2 to 10.4 of the report of the *Krugel Working Group (1984:26-33)*, highlights the fact that in light of the Republic's overpopulated prisons, there was a need for alternatives to imprisonment and community service could be considered as such an alternative. Furthermore the Interdepartmental Working Group on the Overcrowding of Prisons, was appointed to inquire into and report on the viability and feasibility of correctional supervision as a further sentencing option (*White Paper 1991:22*).

Thus, a community service sentence is the punishment and treatment of minor offenders who are treated or punished within the community instead by way of the criminal justice system. The constant increase in prison populations requires innovative strategies of managing offenders. The introduction of community corrections in South Africa was introduced as an alternative to relieve overcrowding in prisons.

5.7.2 Correctional Supervision: A Viable Sentencing Option

Correctional supervision is a community-based sentence, which is served in the community, subject to conditions as may be determined by a court of law, such as house arrest, monitoring, community service, victim compensation, etc.

5.7.2.1 Background into Correctional Supervision

In 1990 the Minister of Justice and of Correctional Services and senior officers of the Departments of Justice and Correctional Services went overseas in order to investigate, amongst others, ways in which correctional supervision is dealt with and addressed in other countries. The *White Paper (1991:22)* postulates that:

“The implementation of community-based sentences is dependent on the community. The offender is subjected to various programmes over a period of time, for example, community service, correctional supervision and training. At the same time it affords the offender the opportunity to enhance his self-respect by being able to do something positive for the community, by being able to continue working and by being able to maintain family ties.”

According to *Terblanche (1999:329)* correctional supervision means a community based punishment to which a person is subject in accordance with

Chapter VIIIA of the Correctional Services Act No 8 of 1959, and the regulations made under that Act. On the 14 June 1991, Parliament approved the Correctional Services and Supervision Matters Act 122 of 1991; The Criminal Procedure Act 51 of 1977 as amended in 1991, included the following options (*Ntuli and Dlula [n.d.]:253-254*):

- Section 276(1)(h) of the Criminal Procedure Act 51 of 1977 empowers the magistrate to sentence an accused person to a maximum of three years and a minimum of one year correctional supervision after receiving a report from a correctional official or probation officer.
- Section 276(1)(i) of the Criminal Procedure Act 51 of 1977 authorises the court to impose a sentence of imprisonment not exceeding 5 years upon an accused person which sentence may be converted into correctional supervision by the Correctional Supervision and Parole Board, after serving at least 1/6 of the sentence.
- Section 287(4) of the Criminal Procedure Act 51 of 1977 the court may sentence an accused person to imprisonment with the option of a fine. If the offender cannot afford the fine imprisonment was the next step, which may be converted by the Correctional Supervision and Parole Board after serving at least 1/6 of the sentence.

Thus courts were provided with a sentencing option to deal effectively with offenders who posed no threat to the community (*Ntuli and Dlula [n.d.]:254*). Correctional Supervision is bound with the work of the Krugel Committee (discussed in chapter two of this thesis) for the reduction of the overcrowding of prisons. In reaction to the ever-increasing prison population, the Krugel Committee was instituted to investigate alternatives to imprisonment.

The purpose of correctional supervision has been described as to reform through punishment and to improve the offender through supervision. This fits in well with the main advantages of correctional supervision, namely, that it offers punishment of high penal value, with above average potential for reform. It, therefore, stands to reason that correctional supervision would normally be an ideal sentence if the presiding officer has it in mind to reach these goals with the sentence (*Terblanche 1999:344*).

5.7.2.2 The Implementation Of Correctional Supervision

An offender may be sentenced to correctional supervision by powers vested in judges and magistrates in the following cases:

- As an alternative to imprisonment;
- As a condition with regard to postponed sentence; and
- As a condition with regard to a suspended sentence.

Terblanche (1999:330) states that Section 84 (1) of the Correctional Services Act No 8 of 1959 is the most important provision as far as the content of correctional supervision is concerned. It reads as follows:

“84 Treatment of probationers-(1) Every probationer shall be subject to monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as may be determined by the court, the Commissioner or a parole board or prescribed by or under this Act, and to any such other form of treatment, control or supervision, including supervision by a probation officer, as the Commissioner or the parole board may determine after consultation with the social welfare authority concerned in order to realize the objects of correctional supervision.”

In order to alleviate overcrowding, a marketing drive was launched to popularise correctional supervision as an alternative sentence option with the judiciary (*DCS Annual Report 2001/2002:100*). The drive was also to enhance the placement of suitable awaiting-trial persons under the system of Community Corrections in terms of Section 62 (f), 71 and 72 of the Criminal Procedure Act, 1977 (Act No 51 of 1977). Statistics indicate an increase in community corrections population, which may be partly as a result of this drive.

During the period 1 January 2001 to 31 December 2002 (*DCS Annual Report 2001/2002:100*), a total of 4228 awaiting trial persons were placed under community corrections. Had it not been for the introduction of the relevant legislation these persons would most probably have ended in prison and faced with all the negative consequences of imprisonment and would have added to the already overcrowded prison population.

5.7.2.3 Requirements for Correctional Supervision

The minimum requirements as stipulated by the Criminal Procedure Act 51 of 1977, that an offender should comply with in order to be considered for a sentence of correctional supervision are:

- Not pose a threat to the community;
- Have a fixed, verifiable address; and
- Have a means of support or be financially independent.

5.7.2.4 The Various Forms of Correctional Supervision

Section 1 of the Criminal Procedure Act 51 of 1977 defines correctional supervision with reference to a list of provisions which, when employed, *has the effect* that the offender can find himself to be under correctional supervision. The list of provisions is as follows:

- Correctional supervision as substantive sentence;

- Correctional supervision under which a *prisoner* may be released by the parole board or the Commissioner, without involvement by the court;
- Correctional supervision which is imposed after reconsideration, by the court, of an ordinary sentence of imprisonment;
- Correctional supervision which is imposed after reconsideration by the court of a sentence of indeterminate imprisonment following the declaration of the offender as a dangerous criminal;
- Correctional supervision imposed as a condition of a suspended sentence or postponed sentencing (*Terblanche 1999:332*).

In reality there is only one form of correctional supervision, namely the substantive sentence of correctional supervision, in (1) above. None of the other 'forms' of correctional supervision differ materially from this. There are differences in the procedures through which the offender will find himself under correctional supervision (*Terblanche 1999:332*).

5.7.2.5 The Advantages of Correctional Supervision

Correctional Supervision aims to provide a means of rehabilitation within the community, thus preserving the important links, which the offender may have with his or her family or community structures. While incarceration results in a

loss of employment and the offender's inability to support his or her dependents (resulting in additional costs to the State), correctional supervision allows, or encourages the offender to be employed (*Disse* 1997:1).

By the same token *Terblanche* (1999:333) contends that the main advantages of correctional supervision are on the one hand, that it can be a sentence with a highly punitive value, yet on the other hand, have a substantial potential to promote the rehabilitation of the offender. At the same time the many disadvantages of imprisonment are absent.

Furthermore, Correctional Supervision has certain advantages to the extent that in this way offenders are kept away from prisons or other places of detention and at the same time they are enabled to remain self-sufficient and still engaged in treatment-oriented programmes. The following relates to the probationer (*Terblanche* 1999:333):

- Is not exposed to hardened criminals;
- Does not suffer the isolation and stigma attached to imprisonment;
- Prison space is not taken up;
- He can keep his employment and support his family;
- Society does not lose the skills of someone who can look after himself; and
- Costs much less than imprisonment.

Thus the greatest benefit is that the probationer is not exposed to the negative and criminal influences of imprisonment. The maintenance of family and social bonds with certain conditions is a plus factor for the system (*Neser 1993:433*). The advantages for the community and the offender are vast. The person under correctional supervision gains from the normalizing influences of the community, and is not exposed to the negative influences of hardened criminals in prison (*Robilliard [n.d.]:4*). He further argues that rehabilitation is a process based on humane principles, which allows for a greater interaction between the transgressor and the community. The isolating effect of imprisonment is avoided and the prejudice of the community towards ex-prisoners is absent. Problems such as the breaking up of family life as a result of imprisonment are eliminated.

Moreover, *Dissel and Mnyani (1995:7)* state that the additional benefit of correctional supervision is:

- The offender is not exposed to the negative influences in prison of hardened criminals, prison culture, loss of respect, and loss of income resulting in the inability to provide for the family;
- It is a more cost-effective sentence option and it lessens the pressure on available space;
- The offender can benefit to the greater extent from being in a normal environment in the community;

- The process of rehabilitation takes place within the community; and
- Essential tasks are performed free to the advantage of the community, on condition that no one makes a direct profit from the services.

Agreeing with *Dissel, Schmallegger (1997:412)*, postulates that the system has many advantages over imprisonment. The following are some of the advantages:

- Lower costs;
- Increased employment;
- Restitution;
- Community support;
- Reduced risk of Criminal Socialization;
- Increased use of community services; and
- Increased opportunity for rehabilitation.

The offender avoids the social isolation and stigmatising impact of imprisonment. Society avoids the economic impact of unproductive confinement in high-cost facilities. However, without awareness of its benefits, community corrections can easily be dismissed as a disagreeable economic compromise rather than a directed effort to control behaviour cost-effectively (*Stinchcomb and Fox1999: 130*).

Thus correctional supervision, offers a practicable solution to both overcrowding and financial constraints. It reduces the prison population in already overpopulated prisons. It is a cheaper sentencing alternative and results in extra space being made accessible in penal institutions for hardened criminals who create a genuine threat to the community.

Furthermore, it brings with it a major saving for the Department and by implication also for the taxpayer. It also promotes humane living conditions in prison since it creates more space for those in prison and it lessens the pressure of the infrastructure and services. Although correctional supervision is a creative sentencing alternative, it still follows a lengthy criminal justice procedure. The fact that new offenders do not come into contact with hardened criminals prevents an escalation in criminal behaviour and this will only enhance rehabilitation and reintegration into the community.

5.7.2.6 Problems related to the Implementation of Correctional Supervision

The implementation of correctional supervision in the reduction of the prison population is an excellent approach, but there are problems with its implementation. The following are some of the problems relating to the implementation of correctional supervision (*Dissel and Mnyani 1995:8*):

- There is a lack of community agencies to which offenders can be referred;

- Shortages of sufficient and professional staff;
- The courts find it difficult to impose this sentence on people with no proper place of residence and strong family support as they cannot always be monitored;
- Correctional Supervision officials have difficulties in monitoring probationers in rural areas, unrest areas and informal settlements;
- Lack of employment is also cited as one of the problems;
- Some of the courts are still reluctant to use correctional supervision;
- Attorneys are not always informed about correctional supervision and do not always argue for it as a sentencing option.

Similarly *Sloth-Nielsen (2003:35)* maintains that from a study conducted in Gauteng, the use of alternative sentences is currently proceeding from a low base. Apart from correctional supervision, implemented by the Department of Correctional Services, little is being done with regards to creative alternative sentencing. This is partially due to the shortage of probation officers, and delays that courts experience in obtaining pre-sentence reports. Some magistrates expressed the high caseloads of Community Corrections staff as reasons for not wanting to use correctional supervision as a sentence option.

5.7.2.7 Degrees of Correctional Supervision

A distinction is made between three grades of supervision, which differ in terms of the frequency, nature, and intensity of conditions. These grades are known as maximum, medium and minimum intensive supervision (*Neser 1993:431*). The degree of monitoring is determined by the offender's possible risk to the community. In determining the grade of supervision the following factors are taken into account:

- Current offence;
- Previous convictions;
- Length of sentence;
- Age;
- The circumstances of the victim;
- Record of non-compliance with conditions;
- Work record;
- Attitude towards punishment; and
- Home and residential circumstances.

Depending on the above factors the different grades of monitoring will be determined.

5.7.2.7.1 Maximum Intensive Monitoring

This is normally reserved for the category of probationers who:

- Have been subjected by the court to maximum supervision;
- Have a history of crime perpetration/ misconduct;
- Have an unstable work and residential record;
- Have previously violated parole conditions, escaped, failed to comply with the conditions of bail, suspension, postponement;
- Have unstable social bonds;
- Have previous failures in respect of correctional supervision;
- Where aggression, impulsiveness, alcohol/ drug abuse form part of his/ her behavioural history/ crime perpetration; or
- Have committed sexual crimes/ crimes against children and the aged.

From the above facts it can be deduced that the offender who is placed under maximum intensive monitoring has more often than not had some contact with the criminal justice system. Very strict conditions are laid down which are scrupulously enforced by the Department of Correctional Services (*White Paper 1991:17*).

5.7.2.7.2 Medium Intensive Monitoring

This is normally reserved for that category of probationers who:

- Have a reasonable stable work and/ or residential history;
- Have no or have a crime record/behavioural record which does not include physical violence, sexual offences and offences against children and the aged;
- Have reasonable stable social bonds;
- Have a job and/ or place of residence and financially independent or physically cared for.

These persons will normally be allocated to this category after having proved themselves under intensive correctional supervision. The monitoring and concessions with regard to freedom of movement is more flexible (*White Paper 1991:17*).

5.7.2.7.3 Minimum Monitoring

This is normally reserved for that category of probationers who:

- Do not conspicuously pose an actual danger to the community;
- Do not abuse alcohol or use drugs; and who

- Are physically or financially cared for.

Persons in this category are usually at the end of their term of correctional supervision. They would have already completed programmes successfully, paid compensation to the victim, maintained a stable work record and given no real indication that they would be involved in serious crime (*White Paper 1991:17*).

These categories determine the degree of restriction, which will be applicable to the probationer. Thus depending on the compliance of the offender with the conditions of correctional supervision, the degree of or intensity of supervision will be adjusted accordingly. Regular evaluation will ensure that the probationer will be regarded from a more intensive to a less intensive degree of supervision and vice versa. The probationer tries to satisfy his conditions of community service to prevent the reception of more intensive community service (*Neser 1993:430*).

5.7.2.8 The Value of the Pre-sentence Investigation Report

To assist in their decision-making, judges have traditionally relied on a pre-sentence investigation (PSI). Although plea-bargaining, mandatory minimum terms, and sentencing guidelines have reduced the need for PSIs today, they still play an important role in sentencing decisions in many jurisdictions (*Stinchcomb and Fox 1999:149*).

It is further stated by *Stinchcomb and Fox (1999:149)* that:

“The pre-sentence investigation can be a significant tool in helping a judge address various issues. In addition to aiding the court in determining the appropriate sentence, a PSI can also later help the probation officer with identifying rehabilitative options during probationary supervision. Even if the defendant is eventually sentenced to prison, the PSI can assist correctional institutions in planning classification and treatment programs, and ultimately, it can furnish the parole board with information pertinent to the offender’s possible release.”

Abadinsky (1997:105) contends that the pre-sentence investigation report has five basic purposes:

- The primary purpose is to help the court make an appropriate disposition of the case;
- It serves as the basis for a plan of probation or parole supervision and treatment;
- The pre-sentence report assists the prison personnel in their classification and treatment programs;
- If the defendant is sentenced to a correctional institution, the report will eventually serve to furnish

parole authorities with information pertinent to release planning and consideration for parole, as well as determination of any special conditions of supervision; and

- The report can serve as a source of information for research in criminal justice.

Selection and trained correctional officials are available at the courts to prepare and submit pre-sentence reports, in terms of section 276 A(a) of the Criminal Procedure Act 51 of 1977 containing sufficient information and evidence in order to enable the court to consider the feasibility of imposing correctional supervision. Staff members with qualifications in behavioural sciences or experts in behavioural/social sciences are placed at courts for the drafting of pre-sentence reports which contain basic/background information about the accused person which may assist the court in determining the suitable sentence for the person concerned.

Various areas are addressed in such reports, for example:

- The risk posed to the community by the offender;
- The possibility of effective offender-control in the community;
- Whether the offender can earn a living or can be supported; and
- The willingness of the offender to participate in appropriate treatment programmes.

In its report, the *Viljoen Commission (1976:99-102)* in paragraphs 5.1.5.1 to 5.1.5.16 devoted considerable attention to the pre-sentence investigation and emphasized the value of this measure to the court as an aid in assessing an appropriate penalty. Reliable information about the personality and background of the offender may be placed before the court via this avenue.

5.7.2.8.1 Factors Hampering the Utilization of Pre-sentence Reports

Although the pre-sentence report is crucial in assisting the court in the pursuit to find an appropriate sentence, there are various factors that impede the wider use of pre-sentence reports (*Terblanche 1999:112*):

- There is a shortage of probation officers; as a result only a limited number of reports can be produced.
- It takes time to produce a pre-sentence report. Information has to be gathered from various sources, collated and thought through by the author of the report.
- Presiding officers easily lose confidence in the value of pre-sentence reports generally when they experience a report, which is not properly researched, objective and well motivated.

Due to the above reasons, very few pre-sentence reports are obtained, thus decreasing the number of offenders who could serve their sentence within the community rather than by way of the criminal justice system.

5.7.2.9 Conditions to which Probationers may be subjected

According to the Correctional Services Act 111 of 1998, parolees or probationers are required to comply strictly with the following conditions (*Ntuli and Dlula [n.d]:255*):

5.7.2.9.1 General Conditions

Parolees and probationers are required to adhere accurately with the following conditions:

- Refrain from committing criminal offences.
- Comply with any reasonable requisition issued by the court.
- Refrain from making contact with a particular person or persons.
- Refrain from threatening a person or persons by word or action.

5.7.2.9.2 House Arrest

One of the basic conditions of correctional supervision is that the probationer will remain under house arrest during his free time, outside working hours.

Over the weekend the condition of house arrest is still applicable in order to reduce the temptation to commit crime and the association of undesirable elements. Exceptions are made for the attendance of church services when the probationer proves that he has actually attended the service (*Neser 1993:429 and Gerber 1995:140*).

Furthermore *Neser (1993:429)* states that the probationer is restricted to the magisterial district in which he lives, as an element of his house arrest. In the event of the probationer departing from the magisterial district without reason or permission of the correctional supervision official, it is regarded as a violation of conditions and appropriate measures can be taken against the probationer.

In addition, probationers are restricted from using or abusing alcohol or drugs during their term of community corrections. A correctional official may require probationers to allow a medical officer to take blood or urine samples in order to establish the presence and concentration of drugs and alcohol in the blood (*Ntuli and Dlula [n.d]:256*).

Thus the offender placed under house arrest may continue with his or her 'normal' life with a family and thereby facilitate in the reduction of prison overcrowding.

5.7.2.9.3 Monitoring

Monitoring is the basis of house arrest. By monitoring of the offender it is ensured that the offender complies with the house arrest. In order to monitor a probationer, the correctional supervisor makes a personal visit to the probationer's home at least once a week to certify that he is complying with the house arrest and other conditions (*Neser 1993:429-430*). Furthermore monitoring can also take place telephonically at the probationer's home or work.

It is essential for the effectiveness of correctional supervision that all probationers are well monitored, to ensure that they comply with the conditions of their sentences. In essence, monitoring the probationer amounts to the physical checking that he is where his conditions of sentence require him to be (*Terblanche 1999:354-355*).

5.7.2.9.4 Community Service

Community service consists of free service which is rendered by the probationer, and which should in some manner be to the advantage of the community. Community Service is, after house arrest, the most important punitive condition of correctional supervision, and generally comprises rather menial tasks such as the clearing and cleaning of public places (*Terblanche 1999:354*).

In addition, *Neser (1993:430)*, emphasises that community service should preferably be performed where the probationer lives. In this way the element

of punishment is undoubtedly brought home and the community can visibly observe that punishment has been imposed. By so doing the probationer is, to a certain extent, compensating the community for the damages caused by the criminal act.

5.7.2.9.5 Victim Compensation

The court may order the probationer to pay victim compensation. In the event of such an order, the correctional supervision officer must ensure that this becomes one of the probationer's conditions of correctional supervision (*Ntuli and Dlula [n.d]:256*). At the same token *Terblanche (1999:355)* maintains that compensation of the victim of crime is an extremely under-utilised condition of correctional supervision. Compensation is an important aid to victims of crime, and it involves the victim as a member of society in a process, which is to the benefit of the victim. It is considered a significant aspect of restorative justice, in that the state assists the victim, through the sentence of correctional supervision, in acquiring the deserved compensation.

5.7.2.9.6 Programmes

Attendance of specialized programmes aimed at the prevention of further criminality, drug and alcohol abuse, promotion of family relationships and acquisition of social skills, is necessary of the probationer (*Ntuli and Dlula [n.d]:256*). *Neser (1993:430-431)* contends that internationally it is accepted that rehabilitation can take place most efficiently in the community than in

prison. The department should implement treatment, which may lead to the improvement and rehabilitation of the sentenced prisoner. The Department of Correctional Services frequently obtains access to available treatment programmes in the community, in which it may incorporate persons under correctional supervision.

5.7.2.9.7 Other Conditions

Other conditions may include the fact that probationers must have a job and a place of residence or be physically or financially cared for and that they may not change work or place of residence without prior consultation with or approval of the Head of the Community Corrections Office. Furthermore, probationers are not allowed to commit any offence while serving the sentence of correctional supervision (*Ndebele 1996:11*).

5.7.2.10 Violation of Conditions

Section 70 of the Correctional Services Act, 1998 (Act 111 of 1998) makes provision for the handling of the non-compliance with conditions of community corrections. The application and execution of community-based sanctions is dependent on strict control and management of the system. Violation of the conditions by the probationer does not necessarily lead to the revocation of correctional supervision.

According to *Naude (1991:17)*, if the offender neglects to adhere to the conditions of his correctional supervision, the correctional officer can do any of the following:

- Warn the offender;
- Change the conditions of correctional supervision;
- Apply stricter monitoring, house arrest or increase community service;
- Have the offender arrested and incarcerated for a maximum period of 60 days after which the offender can be allowed to continue his sentence of correctional care; and
- Apply to the court to revoke the correctional supervision order and impose another more appropriate sentence.

Should the probationer be found guilty of an offence whilst he is under correctional supervision, or if it becomes evident that correctional supervision is not the desired sentencing option because of repeated misbehaviour or violation of conditions, or he poses a danger to the community, correctional supervision will normally be rescinded (*Robilliard [n.d.]:4*).

5.7.3 Fines

A fine can be defined as a sentence by the court, which orders the offender to pay a specified amount of money to the state. Fines, which are specifically provided for in section 276 (1) (f) of the Criminal Procedure Act 51 of 1977 are the most commonly imposed sentence in South Africa. They are, however,

mainly directed at the lower end of the crime severity scale (*Terblanche 1999:303*). *Terblanche* further states that fines have quite a number of advantages; they are a considerable source of revenue, do not require any expensive public resources to execute, can be fixed so that they accurately reflect the blameworthiness of the offender, and can be used to withdraw some of the profits which the offender may have made through his crime.

Imprisonment is an expensive system that has various detrimental effects (discussed in chapter four of this thesis). Used by itself as a punishment, imprisonment transfers no money to the plaintiff but costs the defendant greatly. Furthermore imprisonment does not generate any revenue for the state though it poses great costs on the defendant. Imprisonment by itself is a lose-lose situation. The use of fines as a punishment should be encouraged for the imposition of fines allows the state to generate revenue off the disutility of criminals (*Penn 2001:1*).

If a fine is imposed in order to keep the offender out of prison, the fine should be within the offender's means. Otherwise, the inevitable punishment will be imprisonment, which leads to overcrowding, and which is invariably imposed as an alternative to a fine. On the other side of the coin, if it is not the intention of the court to keep the offender out of prison, is that the fine need not be adjusted downwards to the extent that the offender will be able to pay it (*Terblanche 1999:308*). He further states that the main problem, which is experienced with a fine in South Africa, is the large number of fined offenders who cannot afford the fines imposed on them. This problem largely stems

from the fact that the sentencing courts determine a point of departure fine, where the means of the offender is not yet taken into account (*Terblanche 1999:312*).

Thus fines as an alternative to incarceration defeats its purpose when large numbers of offenders are imprisoned because they cannot pay their fines. This result in the increased population of incarcerated offenders in correctional institutions, thereby having an adverse effect on overcrowding.

5.7.4 Suspension of Sentences in the Reduction of Overcrowding

According to Section 297 (1)(b) of the Criminal Procedure Act 55 of 1977 if a person is convicted of an offence for which a minimum punishment is not prescribed, the court may 'in its discretion pass sentence but order the operation of the whole or part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order' (*Terblanche 1999:412*).

The Criminal Procedure Act 55 of 1977 further provides that:

“A magistrate may impose an imprisonment sentence upon an accused found guilty of a crime and may also suspend the execution of the sentence. The court may, when taking into consideration the age, the past record, behaviour, intelligence, education and training, health, condition of the mind, habit, occupation and environment of the offender or the nature of the offence or other extenuating circumstances, pass

judgement, if it thinks fit, that the accused is guilty, but the determination of the punishment is to be suspended and then release him or her.”

A suspended sentence is one where a specific sentence of imprisonment is imposed, but not put into immediate effect. The offender is released on specified conditions and is liable to serve the term of imprisonment in the event of breach of those conditions. The preconditions for, and operation of, suspended sentences vary according to the applicable legislation (*South African Law Reform Commission Publications 1996:11*).

The conditions upon which a sentence may be suspended are very wide including compensation, community service, good conduct or even ‘any other matter’. Community service is a favourite condition for suspension (*Van der Merwe 1991: 4-43-44*). It is further stated that:

“There is a growing interest in penology and a resultant appreciation of the problems of short-term imprisonment and of the necessity of finding a realistic alternative. It is submitted that a community-serving sentence that is related to the original crime and that could properly be supervised would be positive rather than negative and would serve more than one theory of punishment. It should have a deterrent effect, it accomplishes retribution in the good sense of the word and finally, it facilitates the rehabilitation of the offender by keeping him away from conditions in prison that are not conducive to

rehabilitation and more importantly, by giving him a greater self-and community-awareness.”

There are situations, conceivably limited in number and scope, where a suspended sentence of imprisonment would be the preferred sentencing option. A precondition of its use would be that the offence is so serious that it requires a custodial sentence to be imposed, particularly for reasons of denunciation. It would also have to be clear that the threat of imprisonment would be a sufficient specific deterrent for the individual offender, and that considerations of general deterrence are not paramount. Further, a suspended sentence would be appropriate when rehabilitation would thereby be promoted and there was no question of need to incapacitate the offender (*South African Law Reform Commission Publications 1996:12*).

One of the earliest reported judgements on the question of the purpose or effect of suspended sentences is that by Hathorn J P in *Persadh v R* (*Terblanche 1999:416*). Ordinarily [a] suspended sentence has two beneficial effects: Firstly it prevents the offender from going to goal and secondly, the effect of a suspended sentence is of very great importance in that the offender has a sentence hanging over him. If he behaves himself he will not have to serve it. On the other hand, if he does not behave himself he will have to serve it. That there is a very strong deterrent effect cannot be doubted. Therefore suspended sentences allow the offender to continue their normal activities in the community, maintaining family contacts and meeting social obligations. Offenders are also protected from possible negative effects of imprisonment and are given a chance of becoming law-abiding citizens. The

offender remains in society and rehabilitation and reintegration is expected based on the offender's character and social resources ((*Ntuli and Dhlula [n.d]: 327*).

Suspended sentences assist in the reduction of overcrowding of prisons although some view them as inappropriately lenient particularly where suspended sentences are used without careful screening.

5.7.4.1 The Conditions of Suspension

According to the Criminal Procedure Act, it is clear that legislation wanted to achieve the following main aims with conditions of suspension. The conditions are both specific and general.

The specific conditions are (*Terblanche 1999:424*):

- Compensation of the victim of the offence; restoration of the status quo;
- The rendering of service to the community;
- Rehabilitation or improvement of the accused by subjecting him to persons or authorities;
- A free discretion for the court in relation to sentencing and the conditional suspension of sentence;
- Benefit or service in place of compensation;
- Correctional Supervision;
- Submission to instruction or treatment;

- Submission to supervision by probation officer; and
- Attendance of or residence at a centre of some kind

The general conditions are (*Terblanche 1999:442*):

- Obtaining good behaviour from the accused; and
- Any other matter.

On condition that the offender does not commit any crime during the suspension period then the sentence is automatically dismissed. There is no supervision during the period of suspension. Upon the commission of a crime during the period of suspension, then the suspended sentence would be put into operation. If the offender is found guilty of an offence, the court may impose a new sentence in addition to the suspended sentence (*Ntuli and Dlula [h.d]:262*). A suspended sentence has a beneficial effect in that it reduces prison overcrowding and lessens imprisonment costs.

5.7.5 Postponement of Sentences in the Reduction of Overcrowding

In contrast to the suspension of sentences, a postponed sentence is an order made by the court, which has the character of a sentence, but is not a sentence, since the imposition of the sentence is expressly postponed. The postponement can either be conditional or unconditional (*Terblanche 1999:457*).

Section 297(1)(a) of the Criminal Procedure Act 51 of 1977 makes provision for the postponement of sentences (*Terblanche 1999:457*):

“Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion postpone for a period not exceeding five years the passing of sentence and release the person concerned on one or more conditions...and order such person to appear before the court at the expiration of the relevant period, or unconditionally, and order such a person to appear before the court, if called upon before the expiration of the relevant period.”

The possibility of postponing the passing of sentence presents a court with a device for holding a threat of punishment over an offender without actually having to implement it. If the postponement is unconditional there is no immediate sanction at all. If it is conditional the offender may be subject to conditions that amount in effect to some aspects of a sentence of community correction, while facing the possibility of an unspecified further punishment (*South African Law Commission 2000:97*).

The purposes of postponed sentencing are essentially the same as that of suspended sentences, namely individual deterrence, mitigation of sentence and rehabilitation (*Terblanche 1999:458*).

In his comments upon postponement of sentence, *Du Toit in (Van der Merwe 1991:4-50B)* mentions that this type of punishment would be particularly apt in the case of youthful offenders, first offenders and all cases where an immediately effective sentence would not serve the aims of punishment.

Thus postponed sentences were designed to avoid imprisonment and to provide the offender with an alternative. The negative consequences stemming from imprisonment are avoided through the non-imposition of a custodial sentence.

5.7.5.1 Conditional Postponement

Sentences may be postponed conditionally. All the conditions, which are applicable to the suspension of a sentence, are also applicable in the case of conditional postponement. If sentencing has been postponed conditionally the offender has to appear before the court at the expiration of the period of postponement (*Terblanche 1999:459*).

According to the *South African Law Commission (2000:98)*:

- Where a court convicts a person of any offence the court may, unless a relevant sentencing guideline has been set or guideline judgement has been given and that guideline or guideline judgement does not provide for the postponement of sentence, postpone the passing of sentence for a period not exceeding three years and release the person concerned

on condition that he or she complies with any order or combination of orders referred to in section 26(3) or (4) and order such person to appear before the court at the expiration of the relevant period.

- Where a court has postponed the passing of sentence in terms of subsection (1) and the court, whether differently constituted or not, is satisfied at the expiration of the relevant period that the person concerned has observed the conditions imposed under that subsection, the court must discharge such person without passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

5.7.5.2 Unconditional Postponement

Under section 297 (1)(a)(ii) of the Criminal Procedure Act 51 of 1977, a sentence may also be postponed unconditionally. The *South African Law Commission (2000:98)* states that:

- Where a court convicts a person of any offence the court may, unless a sentencing guideline has been set or a guideline judgement has been given and that guideline or guideline judgement does not provide for the unconditional postponement of sentence, postpone the passing of sentence for a period not exceeding three years and release the person concerned unconditionally, and order such

person to appear before the court, if called upon before the expiration of the relevant period.

- Where a court has unconditionally postponed the passing of sentence in terms of subsection (1), and the person concerned has not at the expiration of the relevant period been called upon to discharge with a caution.

5.7.5.3 Practical Guidelines for the Postponement of Sentences

According to the Criminal Procedure Act 51 of 1977 there are various guidelines with regards to the postponement of a sentence. The following are some:

- Postponement of sentence is highly desirable where the *juvenile* can be kept out of prison;
- Also the first offender may be suitably punished by making use of postponement of sentence;
- In all instances where immediate execution of a sentence will not achieve the three main aims of punishment, the postponement of sentence should be considered;
- Sometimes prevention may be so important that postponement would be undesirable where no condition is attached, and it is therefore usually suitable for minor offences or offences of a less serious nature;

- The conditions of postponement must be related to the offence in question, as well as certain and clear;
- Subsequent conduct, in the case of postponement of sentence, determines whether sentence should be imposed at all and therefore does not relate to the severity of the sentence that should be imposed.

Thus by the postponement and suspension of a sentence the overcrowding in prisons could be alleviated by reserving imprisonment for serious criminals. The negative consequences arising from incarceration are avoided through the non-imposition of a custodial sentence. The offender remains in the community and can continue with the everyday life preceding the commission of the crime.

5.7.5.4 Failure to Comply With Conditions of Postponement or Suspended Sentence

The South African Law Commission (2000:150) states that:

- If any condition imposed in terms of sections 32(1), 34(1) or (2) is not complied with, the person concerned may upon the order of the court, be arrested or detained, where the condition in question-

(i) Was imposed in terms of section 32(1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or

(ii) Was imposed in terms of section 34(1), (2) or (3), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction,

and such court, whether or not it is constituted differently than it was at the time of such postponement or suspension, may then, in the case of paragraph (i), impose any competent sentence, or, in the case of paragraph (ii), put into operation the sentence which was suspended.

- A person who has been called upon in terms of section 33(1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.

Therefore the threat of punishment always hangs over the offender. To a great extent reliance is placed upon the constant fear of imprisonment. Moreover postponement and the suspension of sentences of imprisonment not only surmount the difficulties related with custody, but also in conforming

with punishment generally, serve the interests of the offender and the community, mutually.

5.7.6 Compensation

Section 300 of the Criminal Procedure Act 51 of 1977, makes provision for the payment of compensation to certain victims of crime at the request of the prosecutor. Claims for damage or loss are limited to damage or loss of property. For purposes of determining the amount of compensation; the court may refer to the evidence and the proceedings at the trial or hear further evidence (*South African Law Commission 2000:91*).

At a substantive level, explicit attention is given to compensation for the victims of crime. Compensation and restitution are key elements of the comprehensive new sentence of community corrections, which also allows victims to benefit from other orders such as community service by the offender and victim-offender mediation (*South African Law Commission 2000:xxi*).

After conviction, and totally apart from the sentence, which the sentencing court imposes, the court may also order the offender to pay compensation to the 'injured person' under certain prescribed conditions. This procedure must be distinguished from the situation where a court imposes compensation as

part of the sentencing process, as a suspensive condition to another sentence (*Terblanche 1999:485*).

In practice, evidence relevant to compensation is often led during the criminal proceedings. Section 300(2) of the Criminal Procedure Act 51 of 1977 empowers the court to have regard to this evidence. During the inquiry the accused should be given an opportunity to challenge this evidence. The court should also investigate whether the accused can pay the amount of compensation. If the accused has no assets that can be sold in execution or if he has no income, a compensatory order cannot be enforced (*South African Law Commission 2000:93*). The Commission further states that:

“The Act, however, does not make provision for compensation to victims for injuries sustained as a result of crime nor for the payment of compensation to the family if the victim was killed. In practice South African courts seldom pay any attention to losses suffered by victims of crime. Orders for compensation will furthermore not be considered unless the complainant requests the public prosecutor to apply to the court for an order and complaints seldom make use of the provisions because they are either not present or they don't know about the provisions of the Act.”

Crime has tremendous financial impacts on victims and compensation should be considered as the normal process of sentencing. As a result the principle

of compensation may have some disadvantages. Firstly, as in the case of a fine, the more affluent offender may receive favourable treatment from the court because he is able to pay compensation (especially if he pleads that he should not be sent to prison in order to allow him to continue to earn the money with which to compensate the victim) (*Encyclopaedia Britannica* 1995:814). Secondly, such schemes do not help all victims of crime. Only those who are the victims of crimes for which the offender is caught and convicted and has the funds to pay compensation, are likely to be recompensed. Even when an offender is ordered to pay compensation, it is in instalments over a long period.

5.8 ADMINISTRATIVE STRUCTURES WITH REGARDS TO THE REDUCTION OF OVERCROWDING IN PRISONS

5.8.1 Parole

Parole refers to that portion of the sentence of imprisonment, which is served in the community in terms of section 65 of the Correctional Services Act, 1959 (Act 8 of 1959) under the control and supervision of correctional officials, subject to conditions, which have been set by the Commissioner of Correctional Services.

According to the new subsection 65 (2) of the Correctional Services Act, Act 111 of 1998, a prisoner may be released on parole on certain conditions, before his term of imprisonment has expired, provided he accepts those

conditions. Subsection 65 (4) (a) provides that no one is considered for parole before half of the term has been served, but that the period of credits may also be taken into consideration in determining the time of release (*Van der Merwe 1991: 4-54*). Section 67 of the Correctional Services Act, Act 111 of 1998, states that if the Minister of Correctional Services is of the opinion that the safety, human dignity and physical care of prisoners is being detrimentally affected, he or she can advance the parole date of any prisoner or group of prisoners. This provision attempts to deal with the severe overcrowding experienced in South African prisons (*Oliver and McQuoid-Mason 1998:73*). On the other hand, the South African public considers this early release as one of the factors contributing to the crime problem.

In South Africa the decision to release on and revoke parole is the function of the Correctional Supervision and Parole Board. The situation on release on parole in South Africa has deteriorated considerably. Not only are considerable numbers of prisoners released on 'parole' without the realistic possibility of adequate supervision, but it is also done at a much earlier stage than might have been the case had the prisons not been so over-full (*Van der Merwe 1991:4-53*).

Furthermore the parole board is always vulnerable to criticism. After all, no one supports the release of a prison inmate who subsequently commits a atrocious crime, the value of predictive hindsight. The issue, of course, is not *if* an inmate should be released but what mechanism will be used to make the release decision. Prisons are overcrowded, and virtually all inmates will

ultimately be released: facts usually overlooked in the focus on a particular crime or parolee (*Abadinsky 1997:218*).

Prisoners with sentences of six months and less can be released on parole at any time as determined by the Commissioner. Prisoners with sentences of longer than six months can generally not be released before half the sentence has been served, except that the number of credits that the prisoner has earned may bring the date at which the prisoner may be considered for parole forward. Release on parole takes place after consideration of a report by the parole board, and it lasts until the date of the end of the prisoner's imprisonment (*Terblanche 1999:262*). Furthermore he alleges that the Minister and the President can issue other early release orders. The President of South Africa may at any time authorise parole or the unconditional release of any prisoner, and may remit any part of the sentence.

It is apparent that incarceration is far from the optimal means of preparing offenders for a law-abiding lifestyle in the community. No matter how punitive the public may be in demanding imprisonment, the fact cannot be overlooked that at some point, virtually all inmates are eventually eligible for release (*Stinchcomb and Fox 1999:404*). Moreover, those in confinement are isolated from the rest of society, both physically and psychologically. They are constrained by strict rules, are constantly supervised, and are closely regulated.

If there were a marked increase in the parolee population this would have a favourable effect on the reduction of the prison population and alleviate the problems caused by overcrowding.

5.8.1.1 The Purpose of Parole

The aim of parole is to give the detainee a certain amount of freedom, to give him guidance during the transition period from detention to freedom and to fit him into society at the moment, which offers the greatest chance for his return to it so that he can again become a honourable member of the community. Furthermore, offenders for whom further detention may have adverse results and whose rehabilitation will be furthered by release on parole are given the opportunity to reinstate themselves much sooner in a free life and to survive independently (*Cilliers and Neser 1992:276*).

By the same token (*Stinchcomb and Fox 1999:404-405*) affirms that an inmate cannot be subjected to the rigidities of a tightly controlled institutional environment one day and walk confidently into the freedom of society the next without mishap. Making the transition between these two extremes is obviously not an overnight process that can occur effectively without assistance. Parole represents an effort to provide such help while maintaining some behavioural restrictions. Parole therefore involves both regulatory and rehabilitative functions.

Similarly, *Lee (2001:301)* attests to the fact that the objective of parole is to encourage offenders to take a hold of their lives in society, to reward the offenders for their efforts to change their behaviour and attitude, to maintain order in the correctional institutions, to increase the effectiveness of overall correctional services and to save the cost needed for incarcerating inmates.

Parole cannot guarantee the prevention of recidivism, but the major objective has been and continues to be *reducing recidivism (Stinchcomb and Fox 1999:409)*.

5.8.2 Electronic Monitoring

Electronic monitoring is a technological form of supervision that allows correctional officials to monitor the whereabouts of an offender. Electronic monitoring may originate at any stage of the criminal justice system. Participation in electronic monitoring may be part of an alternative to incarceration or, it may be an additional requirement for probationers or other offenders whose sentence does not involve a term of imprisonment (*Howard 2001:2*).

Similarly *Terblanche (1999:355)* maintains that in essence electronic monitoring of probationers is nothing but the monitoring of the probationer, but with the added advantage that it amounts to full-time monitoring. A probationer is monitored electronically by trying a tamper proof bracelet around his ankle, which constantly transmits a signal to a monitor device, which is linked, to his telephone line.

Electronic monitoring (EM) is used in conjunction with a variety of programs, in particular, home detention instead of jail for defendants awaiting trial and intensive community supervision. New York has initiated a pilot EM program that provides an alternative to incarceration for parole violators, who must remain confined to their homes for not less than 60 or more than 120 days (*Abadinsky 1997:431*). He further states that home confinement with electronic monitoring has proven appealing because it has the potential to satisfy the goals of imprisonment without the social and financial costs normally associated with imprisonment:

- To satisfy the demand for punishment;
- To provide a deterrent effect; and
- To provide for community protection.

Since offenders selected for the program are usually allowed to work, attend school or participate in other authorized programs at specified times, electronic monitoring is an inexpensive alternative to other forms of supervision.

Correctional supervision can be upgraded with the implementation of EM to protect the community against offenders. This will install new confidence in the system of community corrections from the perspective of the courts and the community. It will then be a viable option to divert certain offenders from prison to alleviate the overcrowding, and to free up space so that more hardened criminals could be detained for longer periods without the option of early parole (*Command security services [n.d.]:1*).

Although electronic monitoring was introduced in 1971 as a way of reducing the psychological destruction of detention and improving social integration, the sanction has changed to one providing a solution to prison overcrowding (*ISS Correcting Corrections Monograph No 29 1998:5*). It is further stated that the implementation of electronic monitoring is not without problems. These include technical failures, such as transmitter breakdown, overloading of the telephone system and incorrect reports of the offender violating rules. In addition, the use of electronic monitoring goes hand in hand with an increase in supervisory staff. The consequence is an increase in the cost to run such a programme.

Courts and communities are very concerned about the existing level of control over probationers and offenders released on bail or parole. There is a demand for a much higher level of supervision over these offenders and the effectiveness of the normal physical method of monitoring is being questioned. EM provides this higher degree of effectiveness and assurance of better overall control over these people in the community (*Eksteen 1997:41*).

5.8.3 Plea Bargaining

Plea-bargaining was introduced by the insertion of section 105A in the Criminal Procedure Act 51 of 1977 (by the Criminal Procedure Second Amendment Act 62 of 2001). Plea-bargaining is defined in the Commentary on the Criminal Procedure Act, 2001 as:

“Plea bargaining refers to the tendering of a plea of guilt on the basis that there would be some agreed advantage for the accused, for example, that there would be a reduction in sentence, or the withdrawal of other charges.”

In the criminal justice system, negotiated settlements are referred to as *plea bargaining*, an ad hoc exchange between a defendant who agrees to plead guilty to a criminal charge and a prosecutor who, explicitly or implicitly, offers leniency in return (*Abadinsky 1997:121*). In addition plea-bargaining is a process of negotiation, which usually involves the defendant, prosecutor, and defence council. From the prosecutorial perspective, plea-bargaining results in a quick conviction, without the need to commit the time and resources necessary for trial. Benefits to the accused include the possibility of reduced or combined charges, lessened defence costs, and a lower sentence than might have otherwise been anticipated (*Schmallegger 1997:308*).

5.8.3.1 Plea Bargaining and Imprisonment

In the directives issued by the National Director of Public Prosecutions in March 2002 (*Judicial Inspectorate of Prisons 2003:2*), it is stated that negotiating a plea and sentence agreement is not to be understood as meaning the bargaining away of a sentence of imprisonment for a non-custodial sentence. Where justice and/or the public interest require(s) an effective sentence of incarceration that is the stance to be taken. If those

considerations dictate a shorter term of imprisonment or an alternative sentence, the position is different.

Plea-bargaining is not a substitute for imprisonment. It may mean that the accused will face a prison sentence, however, the benefit of negotiating a sentence vs. an extended and costly trial, which may case result in a longer prison sentence, should be considered.

‘Law and order’ advocates, who generally favour harsh punishments and long jail terms, claim that plea-bargaining results in unjustifiably light sentences (*Schmallegger 1997:309*).

5.8.3.2 Advantages of Plea Bargaining

The main advantage that plea-bargaining will have in the South African context is the speed with which cases can be dealt with. Instead of being kept in prison, awaiting trial under harsh overcrowded conditions for months and years, a person may by way of plea-bargaining expedite the matter. As a result the accused may immediately get involved in rehabilitation programmes whether imprisoned or not (*Judicial Inspectorate of Prisons 2003:3*).

Furthermore overcrowding is also at its worst among awaiting trial prisoners. The advantages that plea-bargaining will have on the current awaiting trial prison population is clear and could bring the numbers down dramatically.

Thus its implementation and utilization as widely as possible should be advocated extensively.

Other advantages of plea-bargaining include:

- Receiving a lighter sentence for a less serious charge than might result from taking the case to trial and losing;
- More time and effort is required to handle a trial than a plea bargain;
- The accused pays for his defence-can save on attorneys fees;
- Depending on the charge, the defendant may get out altogether, on probation, with or without some community service obligations;
- Being charged for a crime causes stress-going to trial requires a much longer wait-causing more stress than taking a plea bargain; and
- Having a less socially stigmatising charge on one's record. Prosecutors may reduce charges that are perceived as socially offensive to less offensive charges in exchange for a guilty plea.

5.8.4 Diversion

Diversion from the judiciary system can be defined as a method of relieving the judiciary system of its load and at the same time of obviating the problem of recidivism among petty offenders. Diversion refers to the doer after he has contravened the law (*Cilliers and Neser 1992:256*). By the same token *Muntingh (2001:5)* emphasises that diversion programmes essentially try to prevent people who have offended from being imprisoned by providing alternatives to prosecution and convictions. He further contends that diversion from the criminal justice system has a dual function:

- It prevents further exposure to negative influences of the criminal justice process; and
- It attempts to avoid further offending by providing a variety of options, for example, community work sentences, referring offenders to drug and alcohol treatment programs, etc.

Similarly, *Reid (1997:585)* attests that diversion is meant to channel the offender away from criminal justice systems and into community programs that might be more beneficial than incarceration. Furthermore, for a large number of offenders, corrections do not correct due to the fact that conditions under which numerous offenders are handled, especially in institutions, are frequently a positive detriment to rehabilitation. Diversion is used most frequently in juvenile justice systems, where historically offenders have been handled with less formality than is characteristic of adult criminal court systems.

Proponents of diversion believe that criminal behaviour is more general than official statistics illustrate. In the analysis of official crime statistics, it is revealed that a considerable percentage of less serious offences entail no serious social consequences for society. Furthermore, majority of the serious offenders have become acquainted with the legal system as a result of less serious offences (*Cilliers and Naser 1992:256*). Furthermore, diversion from criminal procedure;

- Does not imply that the authorities and community regard or condone certain crimes as less shocking;
- Rests on the assumption that meaningful rehabilitation of the petty offender has more chance of success outside prison;
- Is oriented to the prevention of overloading the legal system;
- Is applicable to the less dangerous and petty offender who is a worry rather than a threat to the community and the cases that do not have to pass through the penal system in order to protect the community; and
- Implies that after diversion the offender will always be under the authority of the legal system until the conditions under which diversion was effected have been properly adhered with.

Thus, contact with the criminal justice system should be avoided as far as possible by the diversion of juveniles, first offenders and less serious offenders from the legal process (discussed further in chapter six of this

thesis). One of the solutions to overcrowding of penal institutions is to divert some of these offenders from penal institutions into other programs.

5.8.4.1 Levels of Diversion

Diversion is pertinent primarily on three levels (*Cilliers and Neser 1992:257*):

- **Diversion in the community:** (before involvement by the police). In this case individuals and groups resolve conflict situations in their own ranks without interference of the police and legal systems. This is intended essentially for juvenile and petty offenders in the community.
- **Diversion of arrestees:** (after intervention by the police). This rests on two broad aspects: *official and nonofficial diversion*. Official diversion by the police is usually attached with a formal policy and deals with petty crimes, for example, drunkenness and less serious disputes between family members. Nonofficial diversion refers to the individual discretionary action and decision of a police officer who tries to acquire informal solutions for less serious charges without an arrest.
- **Diversion from criminal trial:** The police can make an arrest or they can elect to dispose of the situation informally through a verbal warning, referral to a social service, or some other form of unofficial action. Such practices are considered *informal diversion* for while they remove the case from the justice

system; the police do not have authority to require any enforceable conditions on the defendant (*Stinchcomb and Fox 1999:132*). While arbitrators outside the criminal justice system often handle dispute resolution, the case has still been officially entered for processing. Intervention at this point represents more *formal diversion*. The defendant is accountable for assuring that the conditions established are actually fulfilled. Should compensation to the victim or the other requests of dispute resolution not be complied with, the prosecutor can consider proceeding with the initial charges (*Stinchcomb and Fox 1999:133*).

Therefore diversion avoids the stigma of a criminal record. It also takes advantage of community resources and enhances the efficiency, flexibility, and cost-effectiveness of the justice system (*Stinchcomb and Fox 1999:166*). It diverts people, especially juveniles from the criminal justice system, or prevents them from becoming entangled into the system. It further aids in the decline of the prison population thus contributing in the alleviation of prison overcrowding.

5.8.5 Amnesty

The granting of amnesty or special remission of sentence to offenders is the prerogative of the President that is vested in him in terms of Section 84(2) of the Constitution of the Republic of South Africa, 1996(Act No 108 of 1996).

The granting of amnesty or special remission of sentence is not a matter that rests with the Department of Correctional Services. If and when the President grants amnesty to offenders on special occasions, or to commemorate certain events or celebrate certain events, the Department of Correctional Services is only responsible in effectuating the President's decree in this regard (*Department of Correctional Services 2002:1*). These amnesties have failed to make a lasting impression and have received major criticism from the public.

5.8.6 Bail

The effect of bail is that the person, who is in custody, is released from custody on payment of a sum of money, with or without conditions. Section 60(4) of the Criminal Procedure Act 51 of 1977 which deals with the refusal to grant bail and the detention of the accused in custody is that it shall be in the interests of justice where one or more of the following grounds are established (*Maharaj 1999:4*):

- Where there is a likelihood that the accused if he or she were released will endanger the safety of the public or any particular person or will commit a schedule 1 offence;
- Will attempt to evade his or her trial;
- Will attempt to influence or intimidate witness or to conceal or destroy evidence;

- Will undermine or jeopardise the objectives or the proper functioning of the criminal justice system including the bail system; and
- Where in exceptional circumstances that there is the likelihood the accused will disturb the public order or undermine the public peace or security.

The office of the Inspecting Judge and the Department of Correctional Services has undertaken steps in the reduction of overcrowded prisons. In September 2000, 8451 unsentenced prisoners who were liable for a bail amount of R1000 or less were released to ease overcrowding. In February 2002, 20000 awaiting-trial prisoners were granted bail by the courts (*Sekhonyane 2002:16*). He further affirms the fact that they were granted bail, implies that the courts believed they posed no danger to the community upon their release. It is this category of prisoners that has been identified for early release from prison in order to help reduce overcrowding. This does not mean that their cases are withdrawn, but simply that they need not remain in prison where they exacerbate the overcrowding problem. They await trial outside as do many other accused that can afford to pay bail.

Despite the fact that there was a reduction in the number of prisoners, prison numbers had risen again to previous levels by the end of that year.

5.9 RESUMÉ

Community-based alternatives to incarceration were developed in an effort to deal more effectively with the offender's problems where they originated, to avoid breaking social ties, and to prevent exposure to the negative effects of custodial confinement. As prison overcrowding provided additional incentives to retain offenders under community supervision, much of what had previously been called 'community-based alternatives' became known as intermediate sanctions, reflecting more punitive attitudes and concerns that such programs assure the safety and protection of society (*Stinchcomb and Fox 1999:165*).

Furthermore *Ndebele (1996:23)* contends that community corrections are an internationally recognised concept or method, meant for dealing with those offenders who could possibly be dealt with more effectively in the community than in prison. Therefore, the prison will always be there for those offenders who are considered a danger to the safety of the community and who, during the period of incarceration, continuously show no prospects of the possibility for dealing with them effectively in the community without endangering the safety of the community.

Correctional supervision does ensure that a significant number of offenders can be dealt with in a more balanced manner. This approach goes a long way to satisfy the need to limit the growth in the prison population and to provide a more affordable system, which will be to the benefit of everybody in South Africa (*Robilliard [n.d.]:5*). It is further asserted that correctional supervision has the potential to restrict the growth pattern in the prison population and will alleviate the demand for prison accommodation. Limited prison

accommodation can be used for those criminal elements who in the interests of protecting the community cannot be dealt with otherwise than by imprisonment.

To what extent community-based alternatives will be 'sold' to the public and maintained in the face of pressure for stiffer sentences will largely determine the shape of future public policy. In this regard, such programs cannot afford to be viewed as 'freedom without responsibility' or 'sanctions without accountability.' Rather, they must be seen as involving real penalties that are as stringent as incarceration would have been (*Stinchcomb and Fox 1999:130*).

In recent years, the number of inmates sentenced to state correctional institutions has been increasing at a steady and alarming pace, causing many facilities to become severely overcrowded. The effects of crowding not only reduce the availability and quality of inmate programs and services, but they also pose serious health and safety risks. Responses to the crowding issue have ranged from expansion and new construction to 'front-end' alternatives designed to keep people out of prison, and 'back-end' approaches to release more of those already confined. Despite such efforts, the prison population continues to escalate (*Stinchcomb and Fox 1999:251*).

One of the greatest obstacles to improvement in the correctional system has been the tendency of much of the public to regard and treat it as a rug under which to sweep difficult and disagreeable people and problems.

The overcrowded conditions of the nation's prisons, will probably work to continue at least a limited use of parole. Parole provides opportunities for the reintegration of offenders into the community through the use of resources not readily available in institutional settings. Unfortunately, however, increased freedom for criminal offenders also means some degree of increased risk for other members of society. Until and unless parole solves the problems of accurate risk assessment, reduces recidivism, and adequate supervision, it will continue to be viewed with suspicion by clients and the community alike (*Schmallegger1997:426-427*).

All of the above stated community-based alternatives would enable the justice system to pursue a more balanced approach to reducing crime and its cost to society. They provide courts with more options to distinguish between serious offenders who should be removed from society and those who can be dealt with more effectively outside of prison.

Using a sentencing scheme of this sort enables magistrates and judges to maintain expensive prison cells to incapacitate violent criminals. At the same time, less restrictive community-based treatment programs and restitution-focused sentences punish non-violent offenders, while teaching them accountability for their actions heightens their chances of rehabilitation. Such an approach treats prisons as a backstop, rather than the backbone of the corrections system. Intermediate sanctions are most often used for offenders who are considered non-violent and low-risk (*Notshulwana 1997:3*).

Sekhonyane (2002:16), stresses that the current prison conditions do not allow for the rehabilitation and reintegration of the offender. The high levels of recidivism demonstrate this. Although there is no exact data available on repeat offending, the minister of Correctional Services estimates it to be around 55%. The National Institute of Crime Prevention and the Rehabilitation of Offenders (NICRO) puts this figure much higher in areas where they have operated, at 80-90%.

A significant proportion of the South African prison population is serving sentences of six months or less. In many cases they are fine defaulters who are generally a nuisance rather than a danger. Community sentences are no soft option. Conditions are strict when issued, and strict when monitored. They may be alternatives to custody, but they are certainly not alternatives to punishment. Schemes, which tackle the offending behaviour of non-violent criminals, can help break the vicious circle of crime, particularly involving young people (*McLeish1997:2*). In addition it is asserted that by cramming jails with repeat offenders at great cost to the public purse is not necessarily the answer. The aim must be to make more, and better, use of non-custodial sentences, confronting offenders with their behaviour and encouraging a law-abiding lifestyle. That is the tough approach.

These alternatives are among the varieties of programs that serve as intermediate sanctions. They are becoming increasingly attractive as society continues to explore mechanisms for dealing with prison overflow, keeping costs in line with what taxpayers will support, and providing help to those who can remain in the community without endangering public safety (*Stinchcomb*

and Fox 1999:166). Similarly it is stated by *Ntuli and Dlula ([n.d]:250)* that community-based alternatives could be used to reduce the prison population, address the problems caused by overcrowding and to enhance effective rehabilitation and successful reintegration of offenders into the community.

CHAPTER SIX

TRANSFORMATION OF THE STATUS QUO?

6.1 INTRODUCTION

Prison systems throughout the world continue to resemble a cruel choice, which is incessantly imposed by societies on themselves as poor socio-economic conditions spawn crime and criminality to indescribable proportions. The choice of some governments to place prison matters at the lowest priorities of their agenda simply because prisons incarcerate those who offended society in diverse ways of conduct is a refusal on the part of

authorities to come to terms with realities. In fact, prison has for long been viewed by the state as both a symbolic and functional answer to the crisis of control which exists outside the prison wall. Similarly, the public's general attitude and occasional interest in prisons is one of least concern, usually generated by a sensational treatment of subject in the press; otherwise, it is shockingly ignorant of the whole subject (*Skosana 2000:1*).

Encouraged by crime-weary voters, political leaders have been eagerly jumping on the get-tough bandwagon, supporting such widely acclaimed sentencing practices as 'three strikes and you're out.' While taxpayers have steadfastly acclaimed these increasingly punitive policies, the time has come to reassess just exactly whom it is who has 'struck out'. No doubt, skyrocketing inmate population figures reinforces that more offenders are now behind bars than ever before. But as a result, the taxpaying public is also 'striking out' in another respect, that is, fiscally (*Stinchcomb and Fox 1999:xv*).

Skosana (2000:2) maintains that the challenge facing the elected representatives of the people is to establish and maintain significant contact with prisoners; and this is considered to be crucial in the quest to achieve the desired fundamental transformation of the correctional services system. The process of contact will indeed lead to the realisation that prisoners are comparable to members in society in many ways rather than as society's outcasts.

To address the problem of overcrowding in South African prisons, various initiatives have been implemented and moreover different avenues need to be investigated. The new system of Unit Management is a fundamental transformation of the prison system in line with international practice, moving away from the prison focused management approach to a prisoner focused management approach.

Due to prison overcrowding and a lack of government funds, predominantly for the building of new prison structures, the Ministry of Correctional Services decided to embark on a policy of involving the private sector in its programmes (*ISS Correcting Corrections Monograph No 29 1998:5*). There is no 'quick fix' solution to the problem of overcrowding, rather it is a combination of various aspects, from police officers, magistrates, prosecutors, the general public, private enterprises, correctional officials, who will make a difference in the reduction of overcrowding. The author, in this chapter of the thesis, will discuss philosophically the different initiatives being implemented by the Department of Correctional Services in the reduction of the prison population, and whether there can be transformation of the 'status quo' in order for there to be relief to the Department by the reduction of the overcrowded South African prison system.

6.2 WHAT IS PRIVATISATION OF PRISONS?

'Privatisation' may refer to the involvement of voluntary, non-profit organisations (for example religious organisations), or it can refer to the

involvement of the commerce sector, in the form of private for profit businesses or non-governmental organisations (*Berg 2002:7*). With regards to the privatisation of prisons, the government is relying on the private sector institutions to gratify a society's need: that is the need to be protected from criminals.

By the same token *Stinchcomb and Fox (1999:629)* states that in an effort to address current challenges, correctional agencies have employed various strategies. Some have turned to greater involvement of the private sector, on the theory that the competitiveness and cost-efficiency characteristic of private industry can be used productively in corrections

6.2.1 The Development of Private Prisons

The Department of Correctional Services decided to investigate the possibility of privatisation as part of a new prisons-building programme, one main endeavour of which was to address overcrowding, *inter alia* through the quick construction of new facilities (*Sloth-Nielsen 2003:20-21*). Although prison privatisation is considered to be a new phenomenon in South Africa, contract and lease agreements between prison authorities and private entrepreneurs were common throughout the nineteenth and early twentieth centuries, either for the use of inmate labour, or for transportation (*Correcting Corrections Monograph No. 29 1998:5*).

The re-privatisation of prisons started in the United States in the mid-1980's. The basic reasons for privatisation were the increasing prison population since the 1980's and governments struggling with the budget deficit thus turning to the private sector to lend a hand in reducing costs (*Correcting Corrections Monograph No.29 1998:5*). Unmanageable prisons and overcrowding were too much for one of the strongest governments in the world to handle (*Berg 2002:1*). *Berg (2002:2)* further states that:

“Other First World countries followed suit, adopting intolerance for crime and advocating prison privatisation initiatives. The use of prisons became the most viable and widely used solution to increasing offender populations.”

In South Africa during 1997, the then Minister of Correctional Services, Dr Sipo Mzimela, visited the United States and the United Kingdom in order to acquire more knowledge about their prison systems. Mazimela thereafter concluded “whenever the private sector got involved, they delivered a better service, and have done it at less cost to the taxpayer” (*Institute for Security Studies Volume 5 2001:2*). Thus in April 1997, there was an announcement of private sector co-operation in the building of seven new prisons, including the two super-maximum prisons in Gauteng and the Eastern Cape, in South Africa. The other prisons were two maximum-security prisons (Northern Province and the Free State), two juvenile prisons (the Eastern Cape and Mpumalanga), and a prison for awaiting trial prisoners (Gauteng).

Berg (2002:69) is of the opinion that South Africa's prison system is in serious need of reformation:

“no other country mentioned has had or probably will have such a critical problem with its prison system. All the problems experienced by other countries, such as, Brazil, America Russia, are magnified in South Africa- the overcrowding is more critical, the conditions more squalid and some of the prisons are completely inadequate for any sort of prisoner development.”

The Correctional Services Act 111 of 1998 contains section 103 (1), which specifically authorized the government to contract out prison services to the private sector. Section 103 (1) provides that:

“The Minister may, subject to any law governing the award of contracts by the State, with the concurrence of the Minister of Finance and the Minister of Public Works, enter into a contract with any party to design, construct, finance and operate any prison or part of a prison established or to be established...”

It was believed by the government that privatisation would attract private capital and thus would help to reduce prison overcrowding (*ISS Correcting Corrections Monograph No 29 1998:5*).

After legislation was passed, the DCS was able to negotiate for the first private prison contracts. The government agency set up in 1996 to oversee public-private partnerships was the Asset Procurement and Operating Partnership System (ASOPS).

The first private prison was opened in July 2001 and run by Ikhwezi Bloemfontein Correctional Contracts (BCC). This is a maximum-security prison designed to accommodate 2 928 beds. The second prison in Louis Trichardt accommodates 3 024 prisoners, obtaining a figure of 5952 prisoner places.

6.2.2 The Debate about Prison Privatisation

The philosophical debates about the correctness of prison privatisation are focused predominantly on the management aspect of privatisation (*Berg 2001:3*). The privatisation of prisons has raised put forward questions both of a political and moral nature. Questions as to whether it is “right of the state to delegate the delivery of punishment to private interest?” Surely, if prison sentences are executed in the name of the state, it should be considered improper to delegate this function to a private agency (*Correcting Corrections Monograph No.29 1998:7*).

Similarly opponents of the movement towards privatisation claim that the cost reductions can only be achieved through lowered standards for the treatment of prisoners. They fear a return to the inhumane conditions of early prisons,

as private firms search for ways in which to turn prisons into profit-making operations (*Schmallegger 1997:472*).

Furthermore *Palley in (Correcting Corrections Monograph No.29 1998:7)*, comments that “symbolically, only the state should have the power to administer justice and to execute it by coercion, because only then will justice have legitimacy in the eyes of those subjected to it.” Moreover a question that raises complex debates is, on what foundation should accountability be tenable in a post-modern society where ‘public’ and ‘private’ domains are becoming progressively more difficult to separate?

Proponents of privatisation maintain that economy, flexibility, and competition enable private companies to be more innovative and efficient at less cost. Not everyone would agree with that glowing assessment, however. Opponents of full privatisation of correctional facilities cite various concerns such as quality assurance and liability (*Stinchcomb and Fox 1999:637*).

Furthermore, arguments in favour of privatisation assert that it is the best way to decrease costs and construct new and better-designed prisons quickly. It is claimed that private correctional services can operate more efficiently, because of less bureaucratic ‘red tape’ and a higher motivation to control costs (*Correcting Corrections Monograph No.29 1998:6*). The use of electronic surveillance, such as cameras, partly replaces correctional officials. *Beyens and Snacken in (Correcting Corrections Monograph No.29 1998:6)* argue that:

“this depersonalises and dehumanises prison life, for both the inmate as well as for the prison officials. Moreover, reduced personal contact between the prison staff and inmates is known to affect security and control in prison.”

In addition *Berg (2002:87)* states that it is interesting to note how easily cost comparisons are being made despite the intense cost comparison debate amongst proponents and opponents of prison privatisation. The fact that this debate has gone on as long as it has is because a simple answer has not been found to show whether private prisons save money or not. Therefore one should not take this cost comparison at face value since there are many underlying and hidden costs that private sector contribution naturally generates that the government itself would not ordinarily generate.

Some questions over private prisons, which remain, are (*Schmallegger 1997:473*):

- Can the government delegate its powers to incarcerate persons to a private firm?
- Who would be legally liable in the event of lawsuits?
- If a private firm went bankrupt, who would be responsible for the inmates and the facility?
- Would the ‘profit motive’ operate to the detriment of the government or the inmates, either by keeping inmates in

prison who should be released or by reducing services to a point at which inmates, guards, and the public were endangered?

- What options would a government with no facility of its own have if it became dissatisfied with the performance of the private firm?

The above are merely some of the issues of concern regarding the privatisation of prisons and answers to some of these questions will be discussed further in this chapter of the thesis. It should be noted that in South Africa the privatisation of prisons is still in its infancy. It is questionable whether sufficient (and accurate) research has been undertaken on any number of issues surrounding the cost issues, the extent of profits being made, the real benefits to local contractors and consortia (and individuals?), and any other human rights concerns. Furthermore, a debate about the morality of housing 6000 prisoners in an undeniable (comparative) luxury of uncrowded new facilities, while approximately 182000 remaining prisoners are left to suffer in cells where sleeping by rote is the order of the day, is also essential (*Sloth-Nielsen 2003:26*). Therefore, whether or not privatisation is a solution to overcrowding is a matter, which requires further research and debate.

6.2.3 Specific Conditions and Requirements for Privatisation

In December 1997 the Correctional Services Amendment Act No. 102 of 1997, was published. The purpose of this Act, which was an amendment of the Correctional Services Act No 8 of 1959, was to facilitate the Minister of Correctional Services ability to contract out prisons to private companies.

The Correctional Services Act No. 111 of 1998 was published on the 27th November 1998, and included amendments made and reaffirmation of prisoner's basic rights based on the Constitution of South Africa. The Correctional Services Act No. 111 of 1998 lists specific conditions and requirements for private prison contracts:

- Contracts cannot exceed 25 years;
- The contractor, (the private entity is known as the contractor), must 'contribute to maintaining and protecting a just, peaceful, and safe society';
- The contractor is responsible for enforcing the sentences of the courts, detaining prisoners in safe custody, ensuring the prisoners' human dignity, and promoting the human development of all prisoners;
- The contractor is explicitly prohibited from taking disciplinary action against prisoners or from involvement in determining the computation of sentences, deciding at which prison any prisoner will be detained, deciding on the placement or release of a prisoner, or grant temporary leave.

A controller appointed by the Department of Correctional Services is to monitor the daily implementation of the contract between the department and the private company. The Correctional Services Act 111 of 1998 requires all prisons, public or private, to be monitored by the Judicial Inspectorate. The controller will review and monitor the daily management and operation of the contracted-out prison and will report to the Commission of Correctional Services (*Oliver and McQuoid-Mason*1998:86).

The privatisation movement has raised a number of controversial issues, and its advantages as well as disadvantages have been argued extensively.

6.2.4 Advantages of Privatisation

Privatisation of correctional facilities has been supported on the grounds of efficiency and cost effectiveness. This rationale maintains that the private sector has a number of advantages over government (*Stinchcomb and Fox* 1999:637).

6.2.4.1 Reduced Costs

The object of privatisation of prisons is to make them more cost effective and to provide for tighter management and raise the standard of correctional services (*Oliver and McQuoid-Mason*1998:86).

Furthermore *Stinchcomb and Fox (1999:637)* states that because of the competitive nature of private industry and its profit motive, there is more motivation to reduce waste, eliminate duplication, and otherwise rationalize activities in a more cost-effective manner: 'Since private sector companies function in a competitive environment, they must offer high-quality services at minimum cost'. Thus, it is maintained that government can obtain more service for less money by opening the management of correctional facilities to competitive bidding process.

In South Africa the total cost of the Bloemfontein Correctional Contracts (BCC) contract is R1 764 644 196 and the expected cost per 'bed' is R66.04 per day. The government claims that the BCC costs represent a saving of 5% on the DCS cost per prisoner per day (*Institute for Security Studies Monograph No.64 2001:2*). Presently the Department of Correctional Services has to pay R111 per prisoner per day, and this amount is constantly rising.

It is further stated that it is impossible to ascertain whether private prisons in South Africa are cheaper than publicly run prisons because the standard of care offered by private prisons is entirely unmatched in the public sector. Perhaps the greatest contribution the BCC prison will make to correctional services in South Africa is that for the first time the government will learn exactly how much it costs to provide conditions of humane detention for prisoners (*Institute for Security Studies Monograph No.64 2001:3*). Moreover, the Westville Medium B prison has an average of 48 prisoners per cell, most of which were designed for 18 prisoners. At BCC, prisoners are unlocked from

7h30 every morning until 19h30 at night and are fed three meals a day. At Westville, the prisoners are unlocked from 7h30 until 15h30, and are provided with two meals a day. Thus it becomes difficult to compare costs especially when the standard of care is not comparable between the two.

Apart from training and paying their own staff, services that the private companies may provide include laundry, catering, cleaning, uniform provision and building maintenance. Also included in the requirement that the private companies provide rehabilitation and training programmes and provide for additional inmate outdoor time and three meals a day (as opposed to only two meals a day) (*Berg 2002:87*).

By using the Asset Procurement and Operating Partnership System (APOPS) and Procurement and Operating Partnership System (POPS) programmes, the government alleviates its budget deficit by making use of private sector services and funds. APOPS is a joint venture project between the Department of Correctional Services, the Department of Public Works and the private sector, POPS operates similarly to APOPS with the exception of the fact that it requires the private sector to build (not merely finance) a new prison or to change an existing one. Also it is the desire of the government to provide essential services (like inmate accommodation, nutrition, and the like) more quickly and at a higher quality all in the hope of reducing and perhaps even ending the chronic overcrowding problem in South Africa's prisons (*Berg 2002:79-80*).

Thus it seems, on paper at least, that privatised prisons should be able to provide prisoners with a safer, healthier environment in which rehabilitation is possible.

6.2.4.2 Flexibility and Creativity

Bureaucracies are traditionally slow to experience with new approaches or even respond to immediate needs. Advocates of privatisation cite additional advantages in terms of greater flexibility, creativity, and responsiveness (*Stinchcomb and Fox1999: 637*).

One of the stipulations that the private companies had to live up to before being considered for the initial shortlist was that they could provide programmes the government could not provide (*Berg 2002:89*).

6.2.4.3 Competitive Choice

When there is dissatisfaction with the manner in which corrections is performing, it may not be easy to do anything about it through the existing system. By bringing in a 'clean slate' through privatisation, corrections is no longer burdened with 'positions remaining from old, out-dated programs, or particular management preferences from long-gone administrator' (*Stinchcomb and Fox1999:637*).

It is further stated that if the performance of a private company is unacceptable, government has the choice of resuming operation of the facility itself or contracting with a competitor. Knowing this presumably generates further incentive to provide high-quality service.

On the briefing of the public private partnership (PPP) prison contract, *Ms S Lund (Parliamentary Monitoring Group 2003:2)* stated that one of the problems with existing contracts was that despite overcrowding in the Department of Correctional Services, the PPP prisons couldn't be overpopulated, making PPP a preferable choice as a solution to overcrowding.

6.2.4.4 Quality Assurance

Given the fact that the profit motive is such a strong incentive in the private sector, fear has been expressed that 'private operators may be tempted to take shortcuts that could compromise safety' or 'reduce the quality and quantity of staff and services'. When government contracts with private industry to operate a prison, it is obviously important to specify clearly what minimum standards the contractor must adhere to, as well as to establish procedures for monitoring and enforcing compliance (*Stinchcomb and Fox 1999:637*).

Furthermore *Berg (2002:149)* asserts that overcrowding is a more obvious issue related to the quality of life within a prison. It is an assumption that private prisons will be exempt from overcrowding at least for the few months after which the private prison may be filled to capacity. *Berg (2002:110)* points

out that the contractual stage is important as not only is the competence of the private company assessed, but also clear provisions are created by which the company should manage the correctional facility. If contractual stipulations eventually make provision for an overcrowding option then it is likely that the level of overcrowding will not reach the level experienced in the public prison system.

Furthermore private prisons will necessarily be an improvement on public prisons because it would be almost impossible to perform any worse *Goyer in (Institute for Security Studies Monograph Volume5 2001:2)*.

However *Oliver and McQuoid-Mason (1998:86)* contends that it is essential that the human rights of correctional officials and prisoners are protected and promoted. The provision of safeguards against the abuse of human rights must be ensured. By at least reducing or stabilising the problems found in most public prisons affecting prisoners' lives, such as overcrowding and prison gangs, the quality of life may be improved for inmates in relation to the rights granted to prisoners by the Constitution Act 108 of 1996 (*Berg 2003:149*). As discussed in chapter four of this thesis, the Constitution of the Republic of South Africa, Act 108 of 1996, requires that a prisoner be given exercise, adequate accommodation, etc. Public prisons in South Africa fall short of providing adequate facilities, adequate accommodation is not always provided due to overcrowding and it seems that PPP prisons because of the conditions of their contract, will be able to provide prisoners with more living space and thus more facilities in which to become rehabilitated. However,

whether PPP prisons present a permanent or preferable solution to overcrowding is a matter, which is yet to be seen in South Africa.

6.2.4.5 Liability

Private operators may come and go which could possibly affect the stability of the company's management and even lead to contractual amendments being based on the particular operators' means of doing business. This may happen but the Department of Correctional Services has reduced the likelihood of this happening by thoroughly evaluating the stability of the companies involved and by making provisions within the contracts allowing for certain mechanisms to prevent or deal with the possibility of a take-over or bankruptcy (*Berg 2002:91*).

Stinchcomb and Fox (1999:638) further assert that government is ultimately accountable for its actions, whether they are carried out directly or indirectly through a private company. If an incident occurs in a privately run facility and someone dies or is hurt, 'both the private operator and the state can be sued'. The state is responsible for every institution operated under its authority- whether private or public.

6.2.4.6 Appropriate Roles

According to *Stinchcomb and Fox (1999:639)* some contend that corrections is essentially a governmental obligation that should not be divorced from the

democratic process in which society formulates public policy through elected officials. In this regard, it has been pointed out that privatisation involves 'substantial probability for the establishment of serious ethical and legal problems' that may well 'erode the sovereignty' of governmental jurisdictions.

There exists a social contract between the state and its citizens whereby the state alone has been 'granted' the right to punish those who violate criminal law. The violation is fundamentally against the state and the state alone should be responsible for inflicting punishment on behalf of society. Including a third party in this contract by allowing a private profit-seeking entity to administer punishment undermines the accepted social principle that this function is a state function exclusively, which in turn undermines the state's role in society as mediator and silent watchdog (*Berg 2002:108*). Berg further states that:

"There may also be a small chance that private companies may misuse their authority and violate the Constitutional rights of prisoners. The philosophical considerations are so entwined with practical considerations that one cannot judge private prisons merely on the basis of constitutionality and propriety. Even though it may not be proper to allow prison privatisation, *practical benefits derived* from private prisons may in the end refute the very constitutional problems one associated with private prisons in the first place ".

6.2.5 Evaluation

From the above discussion it can be seen that philosophically, private prisons have many advantages, especially in terms of upholding the constitutional rights of prisoners. Various questions are raised, both on political and moral principles. Private prisons will inevitably be an improvement on public prisons because it would be nearly impossible to achieve any worse. The impact of backlogs in the Department of Justice and a lack of resources have significantly contributed to the current state of the public prison system and these are factors which are beyond the control of even the most senior DCS official. The fact remains that the conditions in South African prisons are deplorable and the private sector cannot help but be an improvement (*Institute for Security Studies Monograph No.64 2001:3*).

The author believes that in South Africa the solution to the problem of overcrowding is not the erection of more prisons, which are privately run, or the demonstration to the government the type of prisons that the South African government should create, but basically for the government to become less penalizing. Improvement of conditions in the existing prisons should take place. It is agreed that, private correctional services can operate more effectively because of less bureaucratic 'red tape' and the costs factor can be controlled, but the answer to the problem of overcrowding is definitely not the erection of more prisons.

If one compares the amount a pensioner receives a day to survive (which is about R20.00 a day), it is astoundingly less than what is paid to keep these

prisoners. Pensioners are citizens who have paid their taxes and have been law-abiding, yet when they are old they are treated worse than criminals.

Moreover if one examines the manner in which children raised in poor households where parents or guardians receive R4.00 a day, it is disappointing to note that in comparison enormous amounts of money are being spent to keep these prisoners (*Ronge 2002:1*). More money should be spent on trying to educate and train children for jobs and careers that would raise them out of the cycle that contributes and lands so many young people in prison.

The two model prisons or 'new generation' prisons discussed earlier, have various facilities, libraries, educational programmes, gyms and medical treatment 24 hours a day (*Ronge 2002:1-2*). How many of these luxuries do the pensioners or the poor children in the community have? Why not channel the money spent on private prisons to uplift the socio-economic standards, thus reducing the number of crimes. This will have a ripple effect: the fewer crimes committed means fewer criminal cases, which means fewer demands on the criminal justice system and this in turn means fewer people in prison—thus a reduction of the number of prisoners in South Africa's overcrowded prisons.

Another aspect with regards to these model private prisons in South Africa is that they are not owned and run by South Africans, but by a multinational security consortium called Group 4, which has teamed up with Wackenut, the second-largest prison management company in the United States (*Ronge*

2002:3). The author is positive that citizens of South Africa would like to know how much of the profit they receive remains in the country and why South Africans are not running the facilities here? The author feels that even though the Government is prepared to pay extensively for these facilities, that money could be used advantageously in other sectors of the economy, for example, alleviating the socio-economic conditions of South Africans. In South Africa the problem of poverty and unemployment is the major cause of criminal conduct, leading to many economic crimes. According to the department of Correctional Services Management Information Statistics, about a third of the prisoners are held for economic crimes: 59 304 out of 188 307 as on the 28 February 2003.

South Africa cannot afford to build more prisons and to hold more prisoners. It already costs R18 million per day to house them. With a reduced prison population of about 120 000, the resultant saving could be used for social upliftment, education, job creation, health services, etc (*Annual Report Judicial Inspectorate of Prisons 2002/2003:26*).

It is stated in (*Institute for Security Studies Monograph No.64 2001:2*) that the development of private prisons in South Africa has come in response to the main purpose for which privatisation was intended: the government needs help. The morale of prison staff is crumbling along with the buildings in which they work. The prisoners are kept in substandard conditions, which violate every right, which is guaranteed to them by the constitution. Nothing could be worse than the current state of the prison system, and there is not enough

money to fix it. Due to the problems, it can only be hoped that the private sector can offer a real solution. The author maintains that the privatisation of prisons may only be a short-term solution to the problems, especially those of overcrowding from which the majority of the problems emanate. Long-term solutions are necessary.

According to *Van Zyl Smit (in Dixon and van der Spuy 2004)* while private prisons may serve a useful purpose in setting standards of adequate accommodation for the rest of the prison system, there are large issues about whether in principle they are a desirable development. At this stage, while the extra 6 000 beds that these prisons are providing is not insignificant, it appears unlikely that the private sector will be able to resolve the larger question of overcrowding in the prison system as a whole.

6.3 SOME ASPECTS OF MODERN PRISON ARCHITECTURE

Before discussing the concept of unit management, the author is of the opinion that it is imperative to explain several of the aspects of modern prison architecture in order to understand how prison buildings shape prisoners. Modern penal policies are based on the assumption that most prisoners can be rehabilitated through correctional treatment (*Cilliers 1998:19*). The following are considered by *Cilliers* as the most appropriate physical setting for the most effective quest of this objective:

- **The institution must be planned with a specific purpose in mind:** The initial view of incarceration with hard labour as punishment for a crime has changed in theory as well as in practice. The offender's loss of freedom is presently considered as his punishment, and the purpose of the prison is the application of a treatment program that is required for the specific category of prisoners to be incarcerated in a specific prison.

- **The location of the institution:** This is an important aspect especially when agriculture forms part of the treatment program. Special consideration should be given to the climate, water and electricity supply, transport, as well as the availability of recreational facilities for personnel, through which they will be able to continue contact with the outside world.

- **The size of the institution:** The tendency presently is to build smaller prisons. The Standard Minimum Rules of the United Nations prescribe a maximum of 500 prisoners.

- **The size of the cells:** The type of prisoner to be detained in a prison is crucial. The question arises: could it be that the time has arrived to construct dormitories with partitions for each prisoner, and to allow specially selected prisoners to sleep in these dormitories?

- **Provision of labour:** Prison labour has been applied differently at various periods in history, the present tendency being in the

provision of training facilities to equip prisoners for productive labour after their release.

- **The provision of educational facilities:** One of the purposes of prisons today, is to prepare the prisoner to become a valuable citizen once released. The provision of scholastic as well as practical training facilities in the prison is aimed at accomplishing this objective. The entire scholastic program must be designed with a view to fitting in with the rest of the prison.
- **The provision of health services:** When a great number of people are detained, especially in overcrowded conditions, it is inevitable that some will fall ill. The provision for the appropriate health services is essential in all prisons.
- **The provision of recreational facilities:** Modern penal reformers are of the opinion that recreational facilities should consist of more than mere physical recreation, but should also include aspects such as study, prison libraries and even music and drama societies.
- **Moving around in the prison and control thereof:** Irrespective of the nature of the institution, the prisoners have to work, live and move around a lot within its walls. Moving from place to place must be designed in such a way that it does not cause chaos, a waste of time, increased costs or general inefficiency. Necessary control has to be exercised over the prisoners. Due to the various problems, the modern prison is planned as a unit, consisting of different parts.

According to *Neser (1990:64)*, most prisons are designed to accommodate a fairly large number of inmates. Although penologists do not concur on the ideal size and design of a prison, most of them take the view that a high population does not promote suitable control and is in many ways actually criminogenic, undoing most of the good made by well-intended attempts at rehabilitation.

6.3.1 The Concept of Unit Management

As with the privatisation of prisons, the concept of unit management was borrowed to a considerable extent from the United States. The Department of Correctional Services adopted the principle of unit management in the design of all new prisons constructed after 1994. The unit management approach refers to the design as well as the manner in which a prison functions (*Neser et al 2001:167*). The approach of dividing prisoners into smaller more manageable units with direct supervision, called Unit Management (UM), is the desired method of prison management. UM is a team approach to prisoner management. It incorporates the notion that co-operation is most likely in small groups that have lengthy interactions.

UM must be the basis of all structuring and resourcing of the prison level of the correctional system as the concept of unit management is regarded as one of the key service delivery vehicles to transform the delivery of correctional services in South Africa. One of the primary missions of

corrections is to develop and operate correctional programmes that balance the concepts of deterrence, incapacitation and rehabilitation for individuals in correctional facilities. Unit Management helps provide this balance. This management approach relies on continuous communication amongst staff and between staff and prisoners (*Department of Correctional Services Draft Discussion Green Paper 2003*).

Cilliers (1998:30) maintains that countries, such as Australia and the United States of America, that have established unit management as management mechanism have experienced positive results:

- Motivation of personnel;
- Innovation by personnel;
- Harmony within personnel;
- Discipline and control over offenders;
- Personnel showing empathy for the problems experienced by offenders; and
- The relationship between personnel and prisoners.

6.3.2 Benefits of Unit Management

In order for imprisonment to become more effective, it must continue to offer protection and deterrence and at the same time it is very important that the

harmful effects of this sentencing option should be lessened. Imprisonment should also offer opportunities for rehabilitation and development. This balance can only be achieved through good management and leadership.

To improve the prospects of rehabilitation, the unit management approach was rolled out in 101 prisons around the country. The aim of this initiative was to improve rehabilitation through multi-disciplinary teams consisting of social, religious and spiritual workers, psychologists, educators, correctional service officials and external community stakeholders in order to ensure appropriate placement, care and development of all offenders in prisons. The restructuring design was also based on the unit management approach (*Department of Correctional Services Annual Report 2003:20*).

According to the *DCS Draft Discussion Green Paper (2003)* the benefits of unit management can be summarised as follows:

- Staff and prisoners gain many benefits from adopting the procedures integral to unit management;
- Unit management fosters the development of correctional and managerial skills;
- The use of a multi-disciplinary team improves communication and cooperation between staff from various disciplines;
- It increases the frequency and quality of relationships between prisoners and staff, which results in better communication and programme planning;

- Decentralised management results in decisions about prisoners being made more quickly by people who really know them; and
- It results in increased programme flexibility, since each unit can develop the type of programme appropriate for its own population.

An aspect that is not easy to measure and verify, but is apparent, is the greater degree of respect of offenders towards correctional personnel. Offenders are more open to trusting personnel, and the most important aspect is certainly the greater degree of trust in the system of jurisprudence (*Cilliers 1998:30*).

6.3.3 Evaluation

The author feels that the philosophy of unit management is an excellent idea if it can be properly implemented in existing prisons. The essence of unit management lies in the belief that prisoners are rational human beings who will obey rules as long as their needs are met. Together with management styles, architecture in prisons should be of such nature that it shapes the environment to meet prisoner's needs for safety, privacy, personal space, family contact, activity, social relations and recreation. Architecture alone will not transform prisoners into subservient individuals but will shape the

environment to such a degree that attempts to influence the environment will be detected readily (*Department of Correctional Services 2003:1*).

These smaller units of prisoners (about 60), is supposed to facilitate direct supervision, establish a safe and humane environment (for both staff and prisoners) which minimises the detrimental effects of imprisonment, provides custody and control and contributes to the rehabilitation of prisoners (*Disse/ and Ellis 2002:6*).

The very act of incarceration limits the basic rights of movement and constrains the rights to communication. International instruments define the purpose of imprisonment as being to protect society against, not simply by removing offenders from society, but by trying to ensure so far as it is possible, their rehabilitation. This requires the prison administrations to achieve an appropriate balance between security and those programmes that are designed to enable prisoners to reintegrate into society (*DCS Draft Discussion Green Paper 2003*).

By the same token *Cilliers and Cole (1997:122)* asserts that a very positive consequence of unit management is that prisoners identify with their own unit, which can lead to a strong competitive spirit. This can ultimately be advantageous to the entire prison, because individuals willingly learn skills, which will equip them to adapt more effortlessly to society upon their release. Moreover correctional officers are brought into closer contact with each other and with the prisoners. One problem is that officials who have for years been

part of the old bureaucratic system do, however, find it a problem that the traditional lines of command change with unit management (*Cilliers and Cole 1997:121-122*). By the same token *Dissel and Ellis (2002:6)* share the view that whether the concept of unit management can easily be translated to older, overcrowded prisons with large numbers of prisoners in each section remains to be seen. Unit management is supposed to let ordinary warders participate in a role in the development of prisoners, but overburdened as they are by the numbers of inmates, they are unlikely to have sufficient time for this role.

The envisaged 'New Generation' prisons are supposed to carry out the rehabilitation mandate within the principles of UM. By designing prisons in a unit management format, a minimal number of officials are necessary to guard a large number of inmates, as the design of the prison allows for a greater degree of observation on the part of correctional or custodial official (*Berg 2002:135*). As discussed above one does not need more prisons to carry out these principles, they can be implemented in the existing prisons. Two new prisons were built to pilot the new philosophy, and whether this new philosophy is effectively implemented in older, overcrowded prisons is still to be seen. The author feels that if more professional personnel, such as social workers, psychologists and educationists, were employed to carry out this philosophy then it would definitely work. Eventually most prisoners are released into the community, and if they are rehabilitated the rate of recidivism would decrease, thus decreasing the overpopulation of prisons.

The Department of Correctional Services is today faced with apparently insurmountable problems, overcrowding, gangs, shrinking budgets, a better educated workforce, and a more difficult to control inmate population are just a few of the issues that must be confronted by the correction officer. Unit management is an approach to managing a correctional institution that takes advantage of sound management principles and efficiently delivers services to the inmate population (*Department of Correctional Services 2003:1*).

Furthermore, due to the fact that unit management results in a major reorganisation of the traditional ways in which correctional institutions function, it must have the clear and continuing support not only from the highest levels of top management, but also from all partners within the Criminal Justice System. The author is of the opinion that the effective implementation of the unit management system will be very difficult until the problem of overcrowding is first 'solved'.

6.4 AWAITING-TRIAL PRISONERS

As discussed in chapter three of this thesis, awaiting-trial prisoners pose the greatest challenge to prison capacity. Almost a third of our prisoners are awaiting trial, many for years. Of those awaiting trial, almost 40% are in prison only because of poverty (*Annual Report Judicial Inspectorate of Prisons 2001/2002:9*). Overcrowding not only results in violation of human rights of offenders, but also in the over-extension of staff and the creation of conditions

that undermine rehabilitation. According to the Department of Correctional Services the prison population as at the 31 March 2003 was as follows:

The Prison Population on 31 March 2003

Category	Adult		Juvenile U21 Yrs		Total
	Male	Female	Male	Female	
Sentenced	107269	2877	15216	293	125655
APOPS (sentenced)	5949	0	0	0	5949
Unsentenced	42455	1053	14306	330	58144
Total	155673	3930	29522	623	189748

TABLE 27

Source: Department of Correctional Services 2002-2003

These 189 748 prisoners are crammed into prisons with a capacity for 110 924 prisoners (as at 28-02-2003). From the table above it can be seen that

there were 58 144 unsentenced prisoners in South African prisons as at 31 March 2003. Awaiting-trial prisoners do not receive any tuition or training; nothing is done to improve their lives. Also, magistrates have found that a significant number of awaiting-trial prisoners would pose no threat to the community should they await trial outside prison.

The table below indicates the number of unsentenced offenders in custody per age category on 31 May 2002 and 31 March 2003.

Unsentenced Prisoners in Prison: 31 May 2002

Gender	18 Years	21 Years	21-25 Years	25 Years	Total
Female	45	177	244	733	1199
Male	2189	11366	14495	25098	53148
All Genders	2234	11543	14739	25831	54347

TABLE 28

Source: Department of Correctional Services 2002

Unsentenced Prisoners in Prison: 31 March 2003

Gender	18 Years	21 Years	21-25Years	25 Years	Total
Female	81	249	325	728	1383
Male	2586	11720	16098	26357	56761
All Genders	2667	11969	16423	27085	58144

TABLE 29

Source: Department of Correctional Services 2002-2003

From tables 28 and 29 it can be seen that within a space of ten months the number of awaiting-trial prisoners rose by an astounding figure of 3 797 prisoners.

6.4.1 Problems Encountered by Awaiting-Trial Prisoners

The average period that awaiting-trial prisoners remain in prison has increased. Half of all awaiting-trial prisoners have been held for longer than 4 months, some for years, with the average detention cycle time of 138 days (*Annual Report Judicial Inspectorate of Prisons 2000:12*).

As discussed in chapter three of this thesis, the main challenge confronting the Department of Correctional Services is overcrowding. According to the article 35(2)(e) of the South African Constitution's Bill of Rights the rights of prisoners to conditions of humane detention are guaranteed:

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

the provision, at state expense, of adequate accommodation, nutrition, reading material, and medical treatment.”

Any prisoner, former prisoner, prison employee or anyone that has ever visited a prison in South Africa will agree that not a single of these constitutional rights is respected in South African prisons. Overcrowding is the primary culprit (*Goyer 2003:63*).

The Law Society of South Africa (*LSSA 2003:1*) states that overcrowding has increased and health facilities have worsened. This was in addition to a lack of privacy, increase in sexual abuse and a disregard for basic rights. The LSSA report states that conditions are so bad that there could be a basis for a constitutional challenge. It is further stated that the government needs to be taken to task through its Ministers via the Constitutional Court because what the prisoners, particularly unsentenced and awaiting-trial prisoners, experienced and are experiencing comes well within the constitutional proscription of ‘not to be treated in a cruel, inhuman or degrading way’.

The office of the Inspecting Judge Fagan asserts that it is particularly worrying, given the spread of Aids, that up to 80% of new inmates were sodomised by fellow prisoners within 48 hours of being jailed (*BBC News 2000:1*). Judge Fagan, who has made the combating of overcrowding the principal purpose of his vocation, further adds that overcrowding remained the root cause of health problems and the spread of contagious diseases, including HIV/AIDS and tuberculosis, and the root cause of the overcrowding

in turn was the 'totally unacceptable' number of awaiting trial prisoners (*South African Press Association 2002:1*).

Kekana in Hlela (2002:3) asserts that awaiting-trial prisoners are vulnerable, and therefore dangerous to others, because they are in 'transit'. Experienced prisoners easily manipulate awaiting-trial prisoners. The time spent by prisoner's awaiting-trial varies between one week and two years.

It is further added by *Kekana in Hlela (2002:3)* that:

"What exacerbated the situation is that sentenced prisoners have access to awaiting-trial prisoners' cells, and not the other way round. They are familiar with the prison environment, and sometimes do the cooking and cleaning. This gives them access to those cells occupied by awaiting-trial prisoners; familiarity with the prison gives them an edge over awaiting-trial prisoners and warders. Awaiting trial prisoners might fear that if they do not co-operate with sentenced prisoners, and are then found guilty, they are likely to face the consequences when they return to prison to serve their sentences."

Correctional Services Minister Ben Skosana believes that a large part of the problem lies in the slow process of justice. He contends (*BBC News 2000:1*) that overcrowding really happens with the awaiting trial prisoners and this is the responsibility of the courts, where they have to process these offenders once the police has arrested them. Almost a third of all prisoners in South Africa are awaiting trial. Given the conditions inside the nation's prisons, they will consider themselves lucky if they make it to court alive and in good health. The author maintains that, given the shocking conditions discussed above, some drastic solutions to the problem of overcrowding must be implemented as a matter of priority.

6.4.2 Possible Solutions to Reduce the Awaiting Trial Population

In pursuance of the endeavour to reduce the number of awaiting trial prisoners, various steps can be implemented. The high level of awaiting-trial prisoners is an enormous cost to the South African Government. Firstly, by reducing the inflow from the courts, and secondly, by getting those in prison out of prison are some of the ways in the reduction of the number of prisoners (*Annual Report Judicial Inspectorate of Prisons 2000:16-17*).

Furthermore less use can be made of awaiting-trial imprisonment. According to *Walmsley (2001:7)*, awaiting-trial imprisonment is often unnecessary. Legislation needs to be in place to ensure that there are suitable restrictions on the circumstances in which awaiting-trial imprisonment can be used, so that it is always restricted to cases where offences are particularly serious or

where for some exceptional reason it is not in the public interest to allow the suspect to remain in the community. The author will elaborate further on this.

6.4.2.1 Reducing the Inflow from the Courts

An increase in the number of prisoner's awaiting-trial has unfavourable implications for the already overcrowded prisons (as discussed in chapter three of this thesis). One of the reasons for overcrowding is brought about by blockage and delays in bringing cases to trial. Another reason for the large number of people held awaiting-trial is their inability to pay bail.

6.4.2.1.1 Bail

The purpose of bail is two-fold. Firstly, it helps to ensure the reappearance of the accused and secondly, it prevents unconvicted persons from suffering imprisonment unnecessarily (*Schmallegger 1997:303*). Forty percent of those awaiting trial are in prison mainly due to poverty, as they cannot afford to pay even the very low bail amounts set for them. According to Judge Fagan (*Annual Report Judicial Inspectorate of Prisons 2001/2002:7*), this percentage of accused persons was found by a magistrate to pose no threat to the community should the accused await trial outside prison. Bail was fixed in amounts from under R50 upwards. He further stresses that (*Annual Report Judicial Inspectorate of Prisons 2002/2003:8*):

“Because those prisoners could not afford to pay bail amounts, they are in prison. They just sit idly without receiving instruction or attending courses, wasting their lives. Besides losing their employment or schooling, the cost to the State is enormous. The social cost of locking up those persons, who are all in law presumed to be innocent, and of whom about 35% only will be convicted, in what has been referred to as ‘universities of crime’, is inestimable.”

The author feels that bail should be set according to the earning power of the offender. Since a considerable percentage of offenders come from poverty stricken backgrounds, it is advisable to uplift the socio-economic conditions of these poverty-stricken offenders. The alarming increase in the crime rate has resulted in a huge influx of criminals and, more particularly, awaiting trial-prisoners. As discussed earlier in this chapter of the thesis, poverty and unemployment are most important contributing factors of criminal conduct.

There should be greater use by police of their powers to release arrested persons on bail. Various avenues are available to police, some of which are: release on warning, admission of guilt fines and bail.

According to the Judicial Inspectorate of Prisons, a disturbing statistic is the number of ‘non-affordable bail’ cases. On 24 March 2003 there were 19 592 accused persons in South African prisons as awaiting-trial prisoners who had been granted bail but could not afford the amounts. Because of poverty the

accused were taken to and held in prison where they would be kept on average for 143 days before trial. It is further alleged that whether the fault is that of the magistrate in failing to make a proper enquiry, or to misleading information emanating from the prosecutor or the investigating officer or the accused himself, it is apparent that more care should be taken. Not only are these 19 592 persons being deprived of their liberty unnecessarily, but it is costing the State an enormous amount to detain them in already overcrowded prisons. It is pertinent to note that during 2001, just over half the cases were withdrawn; the conviction rate of those brought to court was 37% (*Annual Report Judicial Inspectorate of Prisons 2002/2003:27*).

The author suggests that the physical costs of detention are not the only costs to be considered, there is an increased health risk to the prisoner and the community; there are problems relating to gangsterism, violence and sex offences.

In 2000 the Minister and the President, by using Section 66 of the Correctional Services Act No 8 of 1959, released 8 451 unsentenced prisoners who had been granted bail of less than R1000 but had been incapable of post it. Furthermore, the argument put forward by the Inspecting Judge and accepted by the Minister of Correctional Services, was that these prisoners had been granted bail by a court and therefore a court had decided

in principle that they did not represent any danger to their communities should they be released (*Van Zyl Smit in Dixon and van der Spuy 2004*).

In 2001 a new provision added to the Criminal Procedure Act 51 of 1977, allows a head of a prison to apply to court for bail conditions of unsentenced prisoners to be reconsidered so that they could possibly be released. This provision is clearly intended to relieve overcrowding (*Van Zyl Smit in Dixon and van der Spuy 2004*). Moreover *Van Zyl Smit* further alleges that:

“this provision may only be invoked where the head of a prison is satisfied that the prison population of a particular prison is reaching such proportions that it constitutes a material and imminent threat to the human dignity, physical health or safety of an accused”.

The author is of the opinion that in order to alleviate the problem of overcrowding, there should be an increased use by the police of their powers to release persons on warning or on bail. With regards to the justice, there should be more support by investigating officers to prosecutors to facilitate them to put forward sufficient information before courts in order to determine whether it is essential for an accused to be detained pending trial. In the event of it not being imperative for the accused to be behind bars and should the release on warning not be acceptable, then what is being advocated that there should be more support from all aspects of the criminal justice system, the accused, police and prosecutor in order to determine an affordable bail option for the accused (*Judge Fagan 2002:3*).

In the event of the accused not being able to afford bail, and the release on warning being unsuitable, the use of placement under the supervision of a correctional official (section 62(f) of the Criminal Procedure Act No 51 of 1977) should be utilised. In the case of children, they should be placed in the care of parents or guardians or held in places of safety (*Judge Fagan 2002:18*). This will not only assist in the overcrowding of prisons but also will prevent juveniles, minor and first time offenders from being associated with all the negative elements of imprisonment as discussed in chapter four of this thesis. Prison sentences should be used to maintain dangerous and repeat offenders behind bars.

Furthermore the Minister of Justice, Dr Dullah Omar (*Institute for Security Studies [n.d.]:2*) contends that there should be intensive training for detectives and prosecutors on all aspects relating to bail; the establishment of an integrated information system for the bail system; the creation of special bail courts where possible; and the better management of investigations and court cases.

In addition, magistrates must be afforded the chance to make self-ruling decisions in terms of the granting of bail and should not be prejudiced by public or political pressure. With regards to the awaiting-trial prisoners who were granted but were unable to meet payment, the Department of

Correctional Services should furnish the courts with feedback regarding this on a monthly basis. The magistrate, who should decide whether the awaiting-trial prisoner could afford to pay and whether the prisoner can be released on, for example, a warning, should revisit the bail option (*Judge Fagan 2002:4*).

6.4.2.1 2 Pre-Trial Services

The aim of Pre-Trial services is to enable courts to make informed bail decisions while improving the treatment of witnesses. It is also designed to make the justice more accountable and to provide for community participation. According to (*Ntuli and Dlula [n.d.]:257*), this programme has helped to ensure that:

- Dangerous suspects are less likely to be released on bail;
- Petty offenders are released with a warning or on affordable bail;
- All accused persons are closely supervised, reducing the likelihood of witness intimidation and court delays due to failure to appear; and
- There is a decrease in the number of prisoner's awaiting-trial.

Pre-trial services pilot projects have been instituted in Mitchells Plain, Johannesburg and Durban and an initial evaluation has indicated that

substantial success has been achieved (*Dr Dullah Omar Institute for Security Studies [n.d.]:3*). Although this programme has been implemented it needs to be expanded further in order to have a significant effect on the overcrowding of South African prisons.

6.4.2.1.3 Pre-Trial Diversion

As discussed in chapter five of this thesis diversion is a procedure by which a person is referred away from the criminal justice system, in order to deal with the person in a developmental and strength-based manner, which allows the person to take responsibility for their actions and make restitution to the victim and the community (*Ntuli and Dlula [n.d.]:258*). Diversion programmes fundamentally attempt to prevent people who have committed a crime from being incarcerated by providing alternatives to trial and convictions. Diversion from the criminal justice system serves two purposes (*Muntingh 2001:5*):

- It averts exposure to the adverse influences of the criminal justice system; and
- It attempts to avoid further offending by providing a variety of options.

Diversion programmes are an opportunity for first time offenders guilty of minor crimes to be helped to accept responsibility for their actions, identify the underlying problems of their behaviour and learn skills for new careers.

Pre-trial intervention represents the system's first opportunity to make a positive change in the defendant's lifestyle, at a point before more serious criminal behaviour patterns become firmly established. By providing individual treatment in the community, the intent is to help resolve whatever problems led the offender to come to the attention of criminal justice authorities (*Stinchcomb and Fox 1999:133*).

The author feels that pre-trial diversion should be implemented more vigorously in South Africa, especially to juvenile offenders. If alternatives are implemented then the resultant consequence will be the reduction in the overcrowding of prisons.

6.4.2.1.3.1 Diversion Programmes Available to the Courts

The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) launched the first diversion initiatives in South Africa in the early 1990s in the Western Cape and KwaZulu-Natal. Role-players were disturbed about the number of children being convicted regularly for petty offences and receiving a meaningless sanction from the court such as a suspended or postponed sentence. This type of sentence has little educational or preventive consequence on an individual who does not fully understand the functioning of the criminal justice system (*Muntingh 2001:5*). NICRO has developed five planned diversion programmes, which are available to the courts (*Wood 2003:2*):

- **Youth Empowerment Scheme (YES):** This is a life skills programme. An array of issues is covered, such as: crime and the law, conflict resolution, parent-child relationships, self-esteem and responsible decision-making. Children may be referred to the programme as a pre-trial diversion or as a postponed or deferred sentence.
- **Pre-Trial Community Service (PTCS):** Instead of proceeding with prosecution, the child, on accepting responsibility for the offence committed, is ordered to perform a specified number of hours of community service. The numbers of are determined by NICRO and in consultation with the public prosecutor.
- **Victim Offender Mediation (VOM):** In this process both the victim and the offender are brought together, under the facilitation of a specially trained NICRO mediator. In the course of the mediation, the victim and child consider the repercussions of the offence on their respective lives. They then work out a mutually acceptable course of action that will attempt to repair the harm caused by the crime while holding the child accountable for their behaviour.
- **Family Group Conferences (FGC):** This is a restorative justice intervention. The family, community members, teachers, etc. of both the victim and the offender are involved in the mediation process. The emphasis is placed on

preventing recidivism. A plan is drawn into a contract, submitted to the prosecutor and monitored by NICRO.

- **The Journey:** This programme is aimed at juveniles and high-risk children, who are often repeating offenders or school dropouts. The programme entails life-skills training, adventure education and vocational-skills training and usually runs between three and twelve months depending on the needs of the child.

6.4.2.1.3.2 Advantages of Pre-Trial Diversion

Pre-trial diversion offers benefits to both the defendant and the system. Untried offenders who truly are committed to making positive changes in their lives may appreciate this 'second chance', as well as the opportunity it presents to obtain help with their problems. At the same time, greater advantage is taken of resources available in the community, thereby supplementing the limited capabilities of the criminal justice system to deal with the vast array of personal problems generating criminal activities (*Stinchcomb 1999:134*).

a) Avoiding the Stigma of the Criminal Justice System

Despite its varied philosophical roots, the practice of diversion is believed to promote more humanitarian and less stigmatising responses to child offending than punitive sentences (*Wood 2003:1*). Even pre-trial interventions that do

not address the root causes of behaviour at least do no further harm to the defendant. By providing an option to official processing through the system, stigma of being labelled 'criminal' is avoided. Having a criminal record has long been acknowledged as a serious obstacle to employment, social relationships, and even family stability (*Stinchcomb and Fox 1999:134*). Diversion ensures that offenders keep away from the prosecution process and conviction, thereby giving offenders the correct incentive to avoid further criminal behaviour.

b) Normal Environment

Although the effectiveness of diversion remains debatable, the effects of prison are all too well known. Operating in the open environment of the community, diversion has been commended for offering an alternative to the counter productiveness of incarceration, substituting 'a normal environment for an abnormal one, and at a substantially reduced cost' (*Stinchcomb and Fox 1999:135*). When offenders, especially juveniles are incarcerated, they adapt to the rules and regulations of the prison system and this has a detrimental effect on the offenders in terms of adapting to the realities of life after release.

Diversion encourages offenders to seek employment and maintain themselves and their families as well as giving them a chance to reimburse victims for the harm caused. Furthermore offenders are allowed to take responsibility for their behaviour.

c) Costs

Compared to the expense of going to trial, the skyrocketing costs of prison construction, and the sophisticated technology needed to maintain institutional security, diversion is significantly less expensive. While economic considerations alone should not determine how extensively pre-trial intervention is used, the fact remains that imprisonment is notoriously destructive. If more beneficial results can be achieved in the community, lower costs represent an added incentive to experiment with such options (*Stinchcomb and Fox 1999:135*).

Moreover, according to *Wood (2003:16)* a cost analysis of diversion revealed that the initial investment required for developing suitable diversion interventions will be quickly recouped by the reduction in the amount of time that children spend in custody. Diversion redistributes resources in a way that the justice system can operate at the optimal level.

d) Efficiency and Flexibility

In addition to lower costs; diversion presents an opportunity to enhance the efficiency of the criminal justice system. Given the fact that the courts are already overburdened with serious violent crimes, the system would probably crush under its own weight if all previously diverted, less serious offences were suddenly added to its official workload (*Stinchcomb and Fox 1999: 135*).

Many offenders' crimes are caused by special problems: vagrancy, alcoholism, and emotional distress, that cannot be managed effectively through the criminal justice system (*Todd et al 1994: 159*). Without the opportunity for diversion and the expanded community resources, which it embraces, such cases would probably be dealt with through rather limited, generally punitive, and often inappropriate responses (*Stinchcomb and Fox 1999: 135*).

Thus the diversion theory recognises the flexibility in police investigation and the prosecution system to allow them to address the concerns of offenders and society and to deal with crimes more effectively (*Lee [n.d.]:296-297*).

6.4.2.1.3.3 Disadvantages of Pre-Trial Diversion

Various programmes based on the diversion theory (discussed above), have been developed and implemented to prevent offenders from being secluded from the community and to offer an alternative to the official prosecution process. Despite all the benefits of diversion, many programmes have produced results that contravene the objectives of diversion (*Lee [n.d.]:297*).

a) Net Widening

The primary criticism of diversion is that it results in 'net-widening'. When police, prosecutors, and judges are aware that offenders can obtain help for their problems rather than simply serve time, there is some danger that the

system will extend its reach into borderline behaviour that would otherwise have been overlooked. If diversion results in bringing more clients into the system and/ or dealing with them more harshly, it becomes a form of net widening (*Stinchcomb and Fox 1999:136*).

In addition *Lee ([n.d.]:297)* contends that one of the biggest problems of diversion-based programmes is that it has expanded the social control network contrary to the initial goal of reducing it. Furthermore some programmes have deprived offenders of the right to follow the legal procedures, especially receiving assistance from lawyers.

b) Leniency and Effectiveness

The fact that diversion reduces the consequences of criminal behaviour raises the criticism that it is too lenient, doing little to hold offenders accountable for their actions or to deter future crime. To be taken more seriously as a form of punishment, however, community-based alternatives must demonstrate that they are 'tough with the enforcement of court orders-most of all, in quick, decisive and uncompromising reaction to non-compliance'. When community corrections takes its mission seriously, firmly supervising its clients and holding them accountable for compliance with established conditions, concern that it is too lenient is considerably diminished (*Stinchcomb and Fox 1999:135*). Furthermore the lack of punishment undermines the effectiveness of correctional services in terms of stopping crime.

c) Discretion

According to *Stinchcomb and Fox (136:1999)* too much unregulated discretion can produce coercion-forcing treatment on those who have committed no crime or for whom there is 'insufficient evidence to obtain a conviction'. Avoiding a conviction is not the objective of diversion. Rather, it is a tool to facilitate 'effective treatment of the social, psychological, or interpersonal problems underlying the deviant act'. Pressuring defendants into pre-trial diversion programs not only raises ethical questions but also creates a situation where-in defendants may involuntarily abdicate many of their due process rights, most significantly, the right to trial and protection against self-incrimination.

6.4.2.1.3.4 Evaluation

Pre-trial intervention is regarded as one of the least intrusive community-based interventions, since it diverts the case out of the criminal justice system prior to judgement (*Stinchcomb and Fox 1999:165*). Besides providing the offender with a 'second chance', it avoids the stigmatisation of a criminal record. The stigma of a criminal record could position young first offenders on a path of permanent crime patterns since it is an obstacle to opportunities for employment and social acceptance and may leave them with no other option. If a larger percentage of juvenile offenders are diverted from the criminal justice system, the Department of Correctional Services will realise substantial savings as a result of the decrease in children placed in their facilities or under their supervision.

In South Africa, for the period 2001-2002, NICRO recorded the following offence profile: property related cases (74%), crimes against persons (14%), and victimless or other crimes (12%). While the proportional relationship between different offence categories has changed slightly over recent years, it appears that diversion is still predominantly being used for minor property offences. In terms of the Child Justice Bill's (49 of 2002) ultimate objective to see an increase in the number of children diverted, these figures indicate that there is still a great deal of scope for further expansion of diversion interventions, especially for children who have committed more serious offences (*Wood 2003:11*).

Advocates of diversion have campaigned for the expansion of diversion and enactment of legislation so that diversion can become the cornerstone of the juvenile justice system (*Muntingh 2001:1*). The child is diverted from the mainstream criminal justice system, is encouraged to accept responsibility for the wrongdoing, and is presented with practical ways to account for their infraction. In this way the overcrowding of prisons is reduced considerably, and the criminal justice system is able to cater for the more serious offender. Structured diversion programmes should be implemented throughout South Africa. The enormous savings from this implementation should be used to remunerate prosecutors and also to introduce other performance-enhancing incentives. According to *Lee (Ibid:297)*, the flaws of diversion can be mended when offenders acknowledge their wrongdoing and pledge to follow the diversion programmes laid down by the courts.

What the author advocates is not the abolition of prisons, but basically a decrease in the criminal justice process for those offenders who could be treated in ways less expensive to the State, thus not only lightening the load of offenders passing through the criminal justices system but also decreasing the population in prisons.

Although the courts are implementing some measures with regards to diversion, it requires the partnership of various components of society: family welfare structures, the schools, the church and concerned non-governmental organisations to divert offenders from the criminal justice system. This will clear the courts and empty the prisons. Over the years children have been victims of the socio-economic and political inequities widespread in South Africa. An enormous number of offenders, juveniles and adults, appear in court charged with minor crimes, such as loitering, shoplifting or being under the influence of alcohol. These crimes are regularly socio-economic in nature and are not dangerous to the rest of society. Therefore the wider use of diversion should be encouraged in order to facilitate with the overcrowding of prisons.

6.4.2.1.4 Plea Bargaining

As discussed in chapter five of this thesis, formalized plea and sentence negotiations were introduced into South Africa's courts in December 2001 (*Vera Institute of Justice 2003:1*). A form of 'charge bargaining' has been in

existence for many decades, but now legislation makes provision for 'sentence bargaining'.

Plea bargaining, is intended to speed up the processing of criminal cases, and has been used in a number of cases recently, reducing year-long trials to a few days and saving taxpayers millions of rands (*Daily News July 16 2003*). The advantage of this type of plea bargaining is that it happens swiftly, thus benefiting both sides and alleviating the work load of the courts. The parties have more control over the outcome as it is negotiated and brings equity into the picture, especially in instances involving first-time offenders or where the state's case relies on weak evidence (*Law Society of SA 2002:1*). On the other hand the negative aspects may be that victims do not 'have their day in court' and the fact that presiding officers may not accept the outcome of the negotiations, thus causing long delays before the case may be completed.

There is a concern in the legal circles that uncertainty about how plea bargaining works is preventing lawyers from using it as often as they should and cases are still brought to trial that could be resolved quickly through negotiation (*Daily News July 16 2003*). Chief Justice Arthur Chaskalson warned that courts might start throwing out cases if the awaiting-trial period is too long.

Opponents of plea-bargaining argue that not all judges and prosecutors honour the deals made between the prosecution and defence and that innocent defendants are encouraged to plead guilty. Furthermore critics may

convey anxiety that some deals are too good for defendants, that those charged with serious offences are permitted to plead guilty to less serious offences, and that some defendants charged with violent offences get off too lightly (*Reid 1997:508*).

The author asserts that plea-bargaining is an effective way of shortening the litigation period, thereby reducing the number of awaiting trial prisoners. According to Adv Chris Jordaan, head of the Commercial Crimes Unit, asserts that plea-bargaining is still not used effectively in South Africa. He states that (*Daily News July 16 2003*):

“Out of the 254 convictions from April 1 last year to March this year in the Pretoria office, only 4,3% were plea bargain agreements. It has not taken off the way we hoped. It seems that a lot of lawyers doing criminal work are not au fait with the new amendment as they perhaps should be. Plea bargaining agreements help the state finalise cases quickly and releases money for cases that cannot be resolved through negotiation. We do not just lock people away. We are willing to give the offender a lesser sentence in return for assistance. The state will not bargain away a prison sentence if the offence requires one, and will not bargain with a person who is not represented by legal council.”

According to Judge Fagan (*Judicial Inspectorate of Prisons 2003:3*), overcrowding is at its worst among awaiting trial prisoners, and the advantages that plea-bargaining will have on the current awaiting trial population is clear and could bring the numbers down dramatically. The last few months have seen the implementation of plea-bargaining in some courts but not nearly enough. The use of plea-bargaining in many more cases especially those where people are awaiting-trial in prison will have to be implemented. A process of informing awaiting trial prisoners and their legal representatives of the concept of plea-bargaining, of the advantages it has for the accused and of the procedure which they have to follow should they be interested to plea bargain should be engaged in.

If plea-bargaining remains, its goals must be fairness, less delays, less disparate sentences, and sentences close to those that would result from trial. In order to achieve these goals, the parties to the negotiation must have a reasonable perception of the conviction and sentence probabilities (*Reid 1997:509*). Furthermore Reid states that the defendant should not be required to accept higher bargained sentences because he or she is in prison, is unable to come up with the money for an attorney, has not seen the pre-sentence report, or is represented by a public defender who does not have the time or resources to go to trial. Neither should prosecutors be forced to offer low bargains because of limited resources.

The author is of the opinion that if the nature of the crime, previous convictions, the interests of the community and personal circumstances of the

accused are taken into account, as stipulated by the Criminal Procedure Act 51 of 1977, then plea-bargaining is definitely another way of alleviating the overcrowding in prisons.

6.4.2.1.5 Admission of Guilt and Payment of a Fine

This is an economic punishment that requires the offender to pay a specified amount of money within restrictions set by the law. There should be wider use by prosecutors and clerks of the court of the procedure of the admission of guilt and payment of a fine without a court appearance. In a number of countries, such as Germany, the fine has become the most important alternative for short prison sentences of up to six months (*ISS Correcting Corrections Monograph No. 29 1998:4*).

From American and British research, it is evident that three factors are associated with the successful collection of the fine (*ISS Correcting Corrections Monograph No. 29 1998:4*):

- The fine must not exceed the paying capacity of the offender to any great extent;
- Payment in instalments must be limited as much as possible; and
- The payment should not be too long.

The advantage of a fine is that the punishment constituent can certainly be as harsh as that of a prison sentence. The author is of the opinion that various factors should be taken into account when imposing a fine on an offender, the court must investigate the ability of the person to pay the fine, and the fine should be proportionate to the income of the offender, so that the offender is able to pay the fine. There should be increased use by police, prosecutors and clerks of the court of procedure of admission of guilt and payment of a fine without the offender appearing in court. Thus in order to successfully reduce the prison population fines should be imposed taking into consideration the above-mentioned factors.

6.4.2.1.6 Investigating Officers Assisting Prosecutors

At the end of 2002 there was a backlog of almost 200 000 cases in the country's criminal courts, an increase of 10% compared to 2001. Such a high backlog of cases has a negative impact on the average case cycle time, which, in turn, undermines the prosecutions' chances of obtaining convictions, and infringes the rights of incarcerated awaiting trial accused. The case backlog was a consequence both of the low productivity of the average magistrate's court during 2001/2, and the massive increase in cases referred to court during 2002 (*Leggett et al 2001/2:1*).

More assistance should be given by investigating officers to prosecutors to enable them to place adequate information before the courts in order to establish whether it is necessary for the accused to be detained pending trial

(Judge Fagan 202:3). Furthermore, the propensity of the South African Police Service in arresting people on suspicion without having conducted a meticulous investigation leads to delays in bringing the prisoners to trial thereby increasing the time spent awaiting-trial and contributing to the overcrowding. Thus the South African Police Services should conduct proper investigations, which will be of assistance to the courts.

As a result of its fundamental position in the criminal justice process, the performance of the prosecution service is crucial to the smooth running of the entire system. A poorly performing prosecution service detrimentally affects the ability of the prison system to rehabilitate the prisoners in its care. If prosecutors process cases slowly, or do not apply their minds properly to accused persons' request for bail, the number of unsentenced prisoners increases. This causes overcrowding in the country's prisons and makes it difficult for prison wardens to adequately look after sentenced prisoners and rehabilitate them (*Leggett et al 2001/2002:64*). Furthermore if the prosecution service does not function optimally, witnesses are discouraged from testifying and many guilty accused are acquitted of the charges against them. This lowers police morale, and fosters public perceptions that crime pays, creating public disillusionment in the ability of the criminal justice system to successfully fight crime, and reducing the system's deterrent effect.

6.5 GETTING AWAITING-TRIAL PRISONERS OUT OF PRISON

There should be greater use by the courts of alternatives to imprisonment for those awaiting trial. According to the Judicial Inspectorate of Prisons the following are some ways (most of which have been discussed in chapter five) in which the prison population of awaiting-trial prisoners can be reduced (*Annual Report Judicial Inspectorate of Prisons 2001/2002:12*):

- Placement under supervision of a correctional official;
- Electronic Monitoring;
- Children (under 18 years) to be placed in the care of parents or guardians or held in places of safety;
- Courts on remand dates to consider alternatives to further imprisonment (as discussed in this chapter of the thesis);
- Cases of awaiting-trial prisoners to be given preference over those of accused awaiting trial outside prison;
- Consideration to be given to ways of expediting trials of awaiting-trial prisoners: for example, additional presiding officers and prosecutors, additional courts and Saturday courts;
- Withdrawal by prosecutors of trivial cases, weak cases and cases where accused had been awaiting trial for long periods. A withdrawn case can always be reopened; and
- Heads of prison to be encouraged to apply for the release of awaiting-trial prisoners in terms of section 63A of the Criminal Procedure Act 51 of 1977 when conditions caused by overcrowding became intolerable.

From the factors discussed above various steps, already discussed in this chapter, have been implemented to reduce the overpopulation of overcrowded prisons but these are not sufficient to counteract the overpopulation.

In March 2002 the Judicial Inspectorate brought the first application under section 63A of the Criminal Procedure Act 51 of 1977. According to this if the head of prison is satisfied that overcrowding in his prison constitutes a material and imminent threat to the human dignity, physical health or safety of awaiting-trial prisoners who are unable to pay their bail amounts, they can apply to the court for release under various conditions. This section cannot be used where the charges are for serious offences. The introduction of section 63A has not been successful in reducing overcrowding for various reasons (*Annual Report Judicial Inspectorate of Prisons 2002/2003:23*):

- It is invidious for heads of prison to state on oath that the overcrowding in their prison 'constitutes a material and imminent threat to the human dignity, physical health or safety' of the accused. An affidavit to that effect could reflect on the head of prison and might be used in damages claims by prisoners;
- It is at times not possible to determine from the warrants of detention whether the offences that prisoners are charged with, fall within the prescribed categories;

- The requirement that the application must contain a certificate from a duly authorized prosecutor that the prosecuting authority does not oppose the application, leads to long delays as the prosecutors call for reports from the investigating officers concerned; and
- Several applications are necessary as applications must be made to the court that imposed bail and a particular prison might serve numerous magisterial areas.

Further steps in terms of public awareness of overcrowding and the unacceptable conditions in the prisons was highlighted through articles, TV, radio, workshops and discussions with judges, magistrates and prosecutors.

Between April 1984 and 13 October 2000 there were 19 amnesties and burstings. The largest were in May 1986 (25 045 reduction in prisoners), December 1990 (18 054 reduction), June 1994 (16 386 reduction) and in October 2000 (1 732 reduction). There was one release of awaiting-trial prisoners with unpaid bail up to R1000.00 in September 2000 with a 6 901 reduction (*Annual Report Judicial Inspectorate of Prisons 2002/2003:25*).

The result was that the number of awaiting-trial prisoners was reduced from 64 000 in April 2000 to 57 858 in 2003.

6.5.1 Electronic Monitoring

Electronic monitoring has been widely used in the United States for more than a decade, and now many countries in the rest of the world, such as the United Kingdom, are introducing schemes for the tagging of certain offenders (*BBC News 2001:1*).

In South Africa a pilot study on the use of electronic means of monitoring persons on parole or serving a sentence of correctional supervision was tested in Pretoria in 1997. The Department of Correctional Services concluded a study establishing that the electronic monitoring of offenders in community corrections is cost-effective and reduces the level of non-compliance when offenders are placed under house arrest (*Leggett et al 2001/2002:63*). Moreover, electronic monitoring could consequently reduce the level of prison overcrowding by reducing the risk of releasing offenders into community corrections. Such a system also promises to be more effective and cheaper than the present system whereby departmental officials physically check on the whereabouts of parolees and persons on community corrections.

Home confinement under electronic monitoring can be employed at virtually any point in the criminal justice process following arrest-from pre-trial to post-sentencing, and even post-incarceration (*Stinchcomb and Fox 1999:137*). In addition *Stinchcomb and Fox* maintain that the thousands of offenders being monitored represent a wide range of criminal behaviour. Most have been either convicted or accused of *major traffic offences (usually driving under the influence)*, *property crimes or drug offences*. On the other hand, opponents of

the electronic monitoring system believe that electronic restraints will turn society into a virtual prison by intensifying the social network. While its benefits and drawbacks have been debated, electronic monitoring has become a key ingredient in response to prison crowding and overloaded probation/ parole caseloads.

The development of electronic monitoring is a way of coping with the rising prison populations and the cost of keeping prisoners in institutions.

6.5.1.1 Electronic Monitoring: 'No Soft Option'

Since offenders prefer electronic monitoring to life in prison, opponents of the system have been able to argue that it is a 'soft option'. Judge David Mellor (*BBC News 2001:2*) asserts that the curfew orders as a valuable addition to his sentencing powers. He further adds that correctly targeted, it is an excellent option. It isn't a soft option. There are those who come into court expecting immediate imprisonment who feel an immediate sense of joy and relief, but as the weeks turn into months, and they find that they are in effect imprisoned in their home, all their normal pleasures and leisure is taken out of their life, they find it burdensome.

Similarly, Julia Sharp of Youth Justice (*BBC News 2001:2*) sees electronic tagging as a useful way of enforcing curfews for juvenile offenders. She states that:

“A young person will often test it out. For instance, if they are curfew at seven o’clock, they might come back at two minutes past seven. When they realise the system works, it gives them boundaries. Often with their parents, they’ll push it and say they’re sorry their watch has stopped. However they can’t argue with an electronic system, and it takes that responsibility away from parents.”

When enforced by electronic monitoring, home confinement satisfies the public’s demand for retribution and protection without abandoning the system’s desire for more productive offender processing. It has thus produced a reasonable alternative that can simultaneously ‘satisfy punishment, public safety, and treatment objectives (*Stinchcomb and Fox 1999:139*).

By the same token, *Whitfield (2000:2)* maintains that electronic monitoring, in its various forms, cannot be uninvented. The desire for surveillance and control has to be balanced against individual rights and freedoms, and a realistic appraisal of what the equipment can achieve. Electronic monitoring is becoming part of the mainstream criminal justice provision.

6.5.1.2 Electronic Monitoring and the Rising Prison Population

The modern development of electronic tagging has been adopted as a way of coping with the rising prison populations and the expense of keeping prisoners behind bars. South Africa believes it will enable 30 000 prisoners a year to be released from the country’s overcrowded jails (*BBC News 2001:1*).

Much of the recent popularity of EM has resulted from the combination of increasingly punitive public attitudes towards crime and decreasingly available space in correctional institutions. With society not in the mood to 'coddle criminals', alternatives to prison crowding must be tough, not compromising public safety (*Stinchcomb and Fox 1999: 139*).

There are cost benefits for the criminal justice system. In England and Wales sending someone to prison for a year costs a minimum of 24 000 pounds. Tagging an offender costs just 2 000 pounds, and eases the strain on the prison system (*BBC News 2001:*). In addition, *Whitfield (2000:2-3)* contends that post release schemes have generally been the most successful of all tagging programmes. The economic benefits are less than would be achieved if prison were not used at all but they can demonstrate:

- Reduced cost through shorter periods in custody;
- High public acceptance for this phased return to freedom;
- High compliance and successful completion rates, not least because the penalty for non-compliance (return to prison) is known in advance.

Judge Mellor (*BBC News 2001:3*), states other benefits from tagging some offenders, rather than sending them to prison. He postulates that:

“The sort of offender one has in mind is the taxpaying citizen who has behaved in a way that would normally be met with a short term of imprisonment. Instead of taking someone out of

the community, so that he loses his job and the taxpayer has to support him, and indeed support him in prison, it can be much more productive to lock him up at home.”

Tagging prior to trial is usually proposed as a technique for reducing chronic prison overcrowding. The proponents and opponents of tagging are divided on the issue of whether tagging will have the effect of reducing prison populations, but they agree that tagging must not be used to enlarge the reach of, or to widen the ‘net’ of, the criminal justice system (*Hassett [n.d.]:1*).

6.5.1.3 Evaluation

From the above, the author strongly advocates the implementation of electronic monitoring in South Africa. The utilization of EM could restore the original level of confidence in community correction as this provides better control over offenders in the community, providing control and support required by courts, the parole board and the communities (*Eksteen 1997:26-27*). Furthermore, this technology gives the capability to focus more effort on offenders with problems. The EM system takes away the tedious and routine tasks of monitoring and provides the monitoring officials with accurate and timeous information on immediate problems at hand, giving them the edge to react on curfew violations even before a real violation can happen. With EM many more violations can be detected (*Eksteen 1997:41*).

Beyond monetary considerations, *Stinchcomb and Fox (1999:140)* affirm that social benefits represent other advantages. The offender can remain employed, continue any treatment initiated in the community, avert family break-up, and avoid the negative effects of imprisonment. In contrast to correctional institutions, it represents a speedier and more flexible response to handling vast numbers of offenders than would ever be possible through new facility construction.

Courts and communities are very concerned about the existing level of control over probationers and offenders released on bail or parole. They are demanding a much higher level of supervision over these offenders and are starting to question the effectiveness of the normal physical method of monitoring. EM provides this higher degree of effectiveness and assurance of better overall control over these people in the community (*Eksteen 1997:41*).

In the criminal justice system, with the overcrowded prisons, alternative sanctions have become imperative. The use of EM as an alternative to prison crowding is increasing dramatically, since it enables community-based treatment without compromising public safety, at a cost considerably less than incarceration (*Stinchcomb and Fox 1999:166*).

In South Africa if the system of EM is implemented, more offenders can be let out on parole, thereby decreasing the number of offenders in prison. With the

overcrowded prison and the need for intermediate sanctions as punishment, EM will prove to be an effective tool for the criminal justice system.

6.6 THE SENTENCED PRISONER POPULATION

In pursuance of the aim of reducing the total number of sentenced prisoners from 131652 (as at 30 April 2003) to at most 100 000 various measures need to be implemented. While some steps have been taken to reduce the numbers of unsentenced prisoners with some, albeit limited, positive results, there have been no effective steps to reduce the number of sentenced prisoners (*Van Zyl Smit in Dixon and van der Spuy 2004*). Various examples to reduce the number of sentenced prisoners have been suggested by the Inspecting Judge Fagan. The following are some of the measures to be implemented (*Judicial Inspectorate of Prisons 2001/2002:13*):

- (i) Use of diversion, not only for juveniles;
- (ii) Use of non-custodial sentences viz.
 - Postponed sentences with or without the conditions set out in section 297 (1)(a)(i) of the Criminal Procedure Act 51 of 1977 e.g. Compensation to the victim in money or service, community service and submission to instruction or treatment;
 - Suspended sentences with or without conditions;
 - Discharge with a reprimand (the conviction is recorded as a previous conviction);
 - Affordable fines;

- Community based sentences under correctional supervision;
- For juveniles, placement in the custody of a suitable person and/ or under supervision of a probation officer or correctional officials;
- Periodical imprisonment for a certain number of hours to be served over weekends (section 285 of Act 51 of 1977);
- In cases of a fine with alternative imprisonment and the fine is not paid, immediate release by the Commissioner under correctional supervision (section 287(4)(a) of Act 51 of 1977);
- Application to court by Commissioner for conversion of sentences of imprisonment into correctional supervision or another non-custodial sentence (section 276A(3) of Act 51 of 1977);
- Increased use of parole.

The above are excellent examples because, as stated previously, the Inspecting Judge has boldly spoken out against the dangers of overcrowding and is clearly committed to reducing it. All of these proposals are aimed at persuading the courts to reduce the use of prison sentences for relatively petty offences and the prison authorities to reduce prisoners more easily (*Van Zyl Smit in Dixon and van der Spuy 2004*).

According to the Department of Correctional Services *Van Zyl Smit (in Dixon and van der Spuy 2004)* states that the projected increase of prison population in 2006 will be 249 216, and the planned prison capacity will be 121 846. The projected overpopulation is thus 127 370. The figure below is thus the Department of Correctional Services' own projection of what will happen if current trends of growth in prison numbers continue. The accommodation statistics are its predictions of what is likely to result from both its capital works programme and its repair and renovations programme. The figure below does not take into account the increased rate of growth that is likely when the new, more restrictive, legislation on release comes into effect (*Van Zyl Smit in Dixon and van der Spuy 2004*).

The Projected Increase of Prison Population as at 31 March 2003

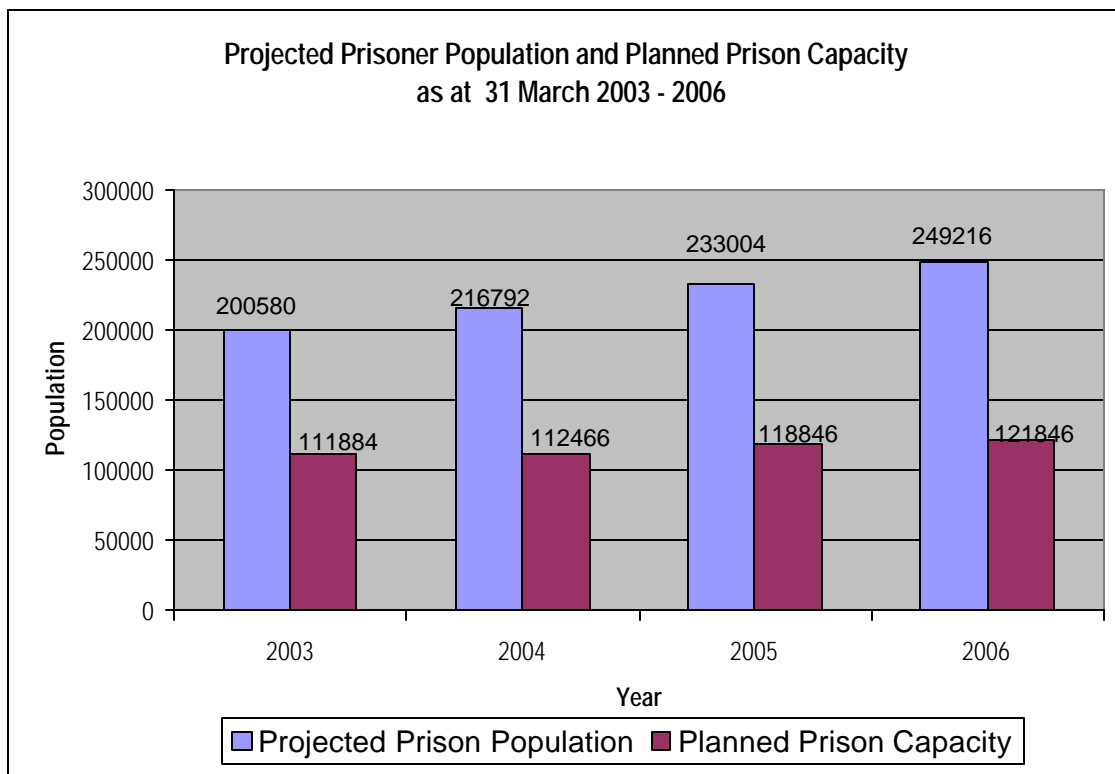


FIGURE 7

Source: *Van Zyl Smit in Dixon and van der Spuy 2004*

The table below represents the number of offenders per sentence group as on the 31 March 2003 in relation to the 2001 and 2002 (*Department of Correctional Services 2003:48*).

No. Of Offenders Per Sentence Group as at 31 March 2003

Sentenced Groups	2001/03	2002/03	2003/03
Unsentenced	56 422	55 500	58 144
0-6 Months sentence	6 298	6 335	7 276
Sentence of more than 6 mts to 12mts	6 790	6 561	6 934
Sentence of more than 12 mts to <24mts	6 292	6 272	6 429
Sentence of more than 24 mts to 3 Years	15 930	17 102	17 590
Sentence of more than 3 Years to 5 Years	15 823	16 876	17 180
Sentence of more than 5 Years to 7 Years	13 059	12 911	12 649
Sentence of more than 7 Years to 10 Years	19 909	20 889	21 325
Sentence of more than 10 Years to 15 Years	13 591	16 610	19 380
Sentence of more than 15 Years to 20 Years	5 881	7 281	8 578
Sentence of more than 20 Years to Life	8 391	10 388	12 242
Other sentenced offenders	2 573	2 273	2 021
Total Sentenced	114 537	123 498	131 604
Total Population	170 959	178 998	189 748

TABLE 30

Source: Department of Correctional Services.

The number of prisoners serving terms of more than ten years has increased by 204%, while those serving more than 20 years has increased by 284% (*Van Zyl Smit in Dixon and van der Spuy 2004*). He further states that:

“It is clear that concentrating on keeping ‘petty’ offenders out of prison will make no significant difference to the prison population. It is in any event a long-term trend that offenders are being sentenced to imprisonment for longer terms. Indeed, the signal may be misunderstood as meaning that if one is less harsh on the lesser offenders the others can justifiably be given significantly longer sentences or actually detained for a greater part for their sentences.”

Some of the measures: for example, diversion, non-custodial sentences, suspended sentences and fines, used in the reduction of the awaiting-trial population could be used in the reduction of the sentenced population.

6.6.1 Reasons for the Increase in Prison Population

The questions arise: Why are prison populations so high and why are they on the increase? There are various reasons for the overcrowding. Crime rates alone cannot explain the movements in prison populations. Part of the rise in prison population is attributed by many experts to an increasing belief that prison is preferable to alternatives (*Walmsley 2001:4*). Furthermore, *Khun in (Walmsley 2001:4)* points out that an increased fear in the criminal justice

system, disillusionment with positive treatment measures, the strength of retributionist philosophies of punishment, are all positioned behind this conviction. Loss of confidence in the system may lead to harsher legislation being passed, and retributionist philosophies can readily be translated into popular demands for longer, tougher sentences.

Similarly, another of the reasons for this is that the laws, justice, and the general public do not fully realise the severity of the overcrowding problem.

Van Zyl Smit in (Dixon and van der Spuy 2004) states that:

“The legislature and to some extent also the courts seem to believe that their primary concern should be to create a framework that imposes and in fact applies harsher punishments in the form of longer prison sentences because of the increase in crime. They seem to regard overcrowding as simply an unfortunate consequence of this. It is possible that there has been an increase in crime in South Africa in the past eight years, although reliable objective evidence of this is limited. There is no evidence that significantly more offenders are being convicted or that the overall seriousness of the crimes of which offenders are convicted has increased. What the politicians are responding to is an increased public fear of crime and their collective actions are resulting in prison overcrowding.”

In 1995 and again in 1997, Parliament took the more considered legislative step of amending the law governing bail. Both amendments made it harder for a detained person to be granted bail. In 1996 the Minister of Justice had appointed a Committee of the South African Law Commission to investigate sentencing. Despite the fact that investigations were still under way, the Government announced that it was planning the introduction of legislation setting mandatory minimum sentences. The aspects that were not even raised in debate in Parliament were the impact that the legislation would have on prison numbers or whether the prison system would be able to house prisoners for the additional periods that the new legislation would require (*Van Zyl Smit in Dixon and van der Spuy 2004*). In addition the abolition of the death penalty in South Africa in 1995 brought the advent of a new sentencing dimension in the criminal justice system. This resulted in magistrates opting for longer sentences especially for those offenders who committed atrocious crimes, such as, murder, rape and kidnapping (*Ntuli and Dlula [n.d.]:252*).

Cell Accommodation and utilisation: 31 March 1996 - 31 March 2003

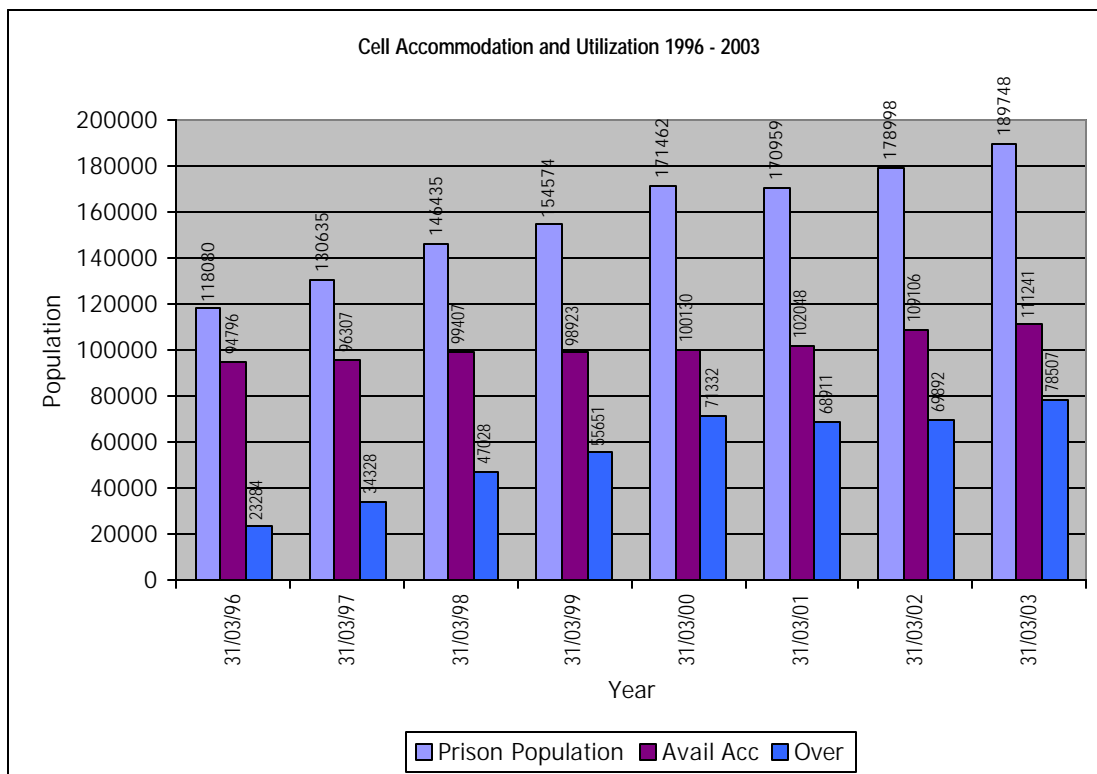


FIGURE 8

Source: Department of Correctional Services 2002-2003

From the figure above it can be seen that the level of the prison population compared to the available accommodation clearly indicates that South African prisons are seriously overpopulated. The graph above indicates the enormity of overpopulation for the past eight years.

6.7 RESUMÉ

South African prisons are immensely overcrowded. With high recidivism rates and new minimum sentencing laws that have seen local magistrates courts imposing much longer sentences than in the past for the same offences, South African imprisonment rates are rapidly increasing, and the prisons are facing a self-acknowledged crisis (*Gillespie 2003:1*). Furthermore Gillespie states that as a response to this crisis the State commissioned the construction of more prisons, including two private prisons funded by international security companies. The building of prisons seems to be in line with the general public response, which values penalizing responses to crime, and 'lock 'em up' strategies. This is so, despite the significant reaction from the office of the Inspecting Judge of Prisons, which argues for the early release of prisoners, and the decrease of awaiting-trial prisoner numbers in order to relieve the prison of huge penal population.

Correctional philosophies and the functions of penal institutions are in a recurrent state of transform, with the exclusion of the fundamental undertaking of incarceration. The movement of increased civil rights of inmates has brought a new consciousness to the public, and to the administrators who are responsible for providing and operating facilities. While physical facilities can have an impact on rehabilitation, merely providing a good physical environment does not necessarily guarantee rehabilitation. The most that physical facilities can provide is an environment conducive to rehabilitation. For such physical conditions to be translated into rehabilitative reform, the

physical environment, operational philosophy, quality of space, and staffing must all be coordinated for that purpose (*Atlas: 1991:2-8*).

Similarly *Walmsley (2001:9)* contends that it is one thing to identify the measures that need to be implemented in order to reduce the high prison populations and to combat the growth in numbers. It is another to persuade those concerned actually to take them. Simply altering laws and creating possibilities of new non-custodial sanctions is not enough. It is vital to persuade all key players in the criminal justice world to accept these measures and that it is meaningful. The policy makers, legislators, the judiciary, police, prosecutors, media and the general public need to be convinced.

In order to reduce the overcrowding in prisons there has to be a reduction in the number of both the awaiting-trial and the sentenced prisoners. Reducing the inflow of offenders from the courts to the prisons and trying to get those in prison to be released should accomplish this.

The effect of long sentences has a distinct increase in the number of sentenced prisoners. Additional space has to be established for those prisoners serving long sentences and life sentences, for they will occupy the limited space available, for numerous years. According to the (*Annual Report of the Judicial Inspectorate of Prisons 2002/2003:28*), long sentences might have been necessary in 1997 to reassure a public that believed that crime

was out of control, to pass legislation limiting the right to bail and laying down minimum sentences, but this is no longer necessary.

If more people show interest in the human rights of incarcerated prisoners, then more effort will be placed on resolving the overpopulation in correctional facilities. One of the major concerns of the public is the change of the criminal behaviour of offenders, to remove the risk they pose to society, and to transform them into socially attuned individuals. Since prisoners are eventually released into the community, it is the responsibility of society as well to facilitate their adjustment back in the community. Thus the criminal justice practitioners need to investigate and facilitate new or better ways of addressing the escalating overcrowding of prisons, thus the transformation of the status quo.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 INTRODUCTION

Most prisons in South Africa are severely overcrowded with some accommodating up to three times the number of people for which they were designed. To add to this the courts are faced with a backlog of many, many cases, which means that it takes weeks, months and in many cases years to finalize a criminal prosecution. This has resulted in an awaiting-trial prisoner population of 58 144 out of a total of 189 748 prisoners (*Judicial Inspectorate of Prisons 2003:1*).

Prison overcrowding is one of the largest problems facing the South African criminal justice system today. Many people may think this issue does not affect them, but the problem becomes important when overcrowding forces prisoners to be granted early release (*Ntuli and Dlula [n.d.]:250*). The ordinary person (or non-prisoner), is affected too, when those being released are not rehabilitated, leading to further criminal activities affecting the general public, and also, as has been discussed in chapter four of this thesis, when those released are infected with STDs, TB etc because of adverse conditions in crowded prisons.

Furthermore prison overcrowding causes a controversy of positive and negative views concerning the construction of more prisons. Supporters claim

that building more prisons is the only solution, while opponents argue that community-based alternatives could be used to reduce the prison population, address the problems caused by overcrowding and to enhance effective rehabilitation and successful reintegration of offenders into the community.

There is little doubt that the most serious problem facing those responsible for South Africa's prison system, is overcrowding. Overcrowding exacerbates the problems, which face prison administrators worldwide: gangs, violence, sexual assault, public health problems and escape attempts. As such it makes managing a prison difficult, and reducing the chances of re-offending almost impossible. To make matters worse, South Africa's prisons are also understaffed, badly designed and structurally crumbling (*Louw 2001:1*).

This situation has two important implications, the first being the cost to the taxpayer of the awaiting-trial prisoners which amounts to about R5.5 million per day or more than the R2 billion per annum, money which could have been spent on schooling, medical health and work creation. Secondly, because of overcrowding, prison services cannot give adequate effect to the provisions of the Constitution that all prisoners should be kept under humane conditions. Without humane treatment, one cannot begin to contemplate the successful rehabilitation of offenders, which may be the reason why the recidivism rate is so high (*Judicial Inspectroate of Prisons 2003:1*).

The causes of overcrowding lie, amongst others, in (*Department of Correctional Services Draft Green Paper 2003*):

- The inefficient functioning of the criminal justice system;
- In the particularly high incarceration rate in South Africa when compared to international trends;
- The introduction of minimum sentences for particular categories of serious crime in 1997 resulting in an increase in the proportion of long term offenders in DCS facilities;
- In the crime trends in South Africa, particularly as it relates to serious violent crime and serious economic offences;
- The level of awaiting-trial detainees held in correctional centres and
- In adequately need-driven facility planning in the integrated justice system.

Similarly *Walmsley (2001:4)* is of the opinion that the following reasons contribute to the prison population growth:

- An increasing belief that prison is preferable to the alternatives;
- An increased fear of crime;
- Loss of confidence in the criminal justice system;
- Disillusionment with positive treatment measures; and
- The strength of retributionist philosophies of punishment.

The above are some of the factors that have affected the growth in the prison population. The additional use of imprisonment, longer sentences and the

restricted use of parole or conditional release can be contributing factors in the overcrowding of prisons (*Walmsley 2001:6*).

According to the South African Law Commission, (*SALC 1997 Mandatory Minimum Sentences*), the rationale for mandatory minimum sentences can be tracked back to a call from the community for heavier penalties and for offenders to serve a more realistic term of imprisonment. *Neser (2001:1)*, states that crime threatens the very foundations of democracy and, therefore, there is no doubt that responsible and affordable allocation of punishment is needed to wipe out violent crime. Short-term solutions such as mandatory minimum sentences will not provide the ideal solution to this grave problem, and it is generally accepted that, instead, it is the certainty of punishment that can reduce crime. This in turn will have a ripple effect on all sectors of the criminal justice system, mainly reducing the overcrowding of the prisons.

7.2 PRISON POPULATION STATISTICS

The prison population in England and Wales is now more than 50% higher than it was in the early 1990s, producing the second highest rate in Western Europe. This rise is attributable to public anxiety, aggravated by media reaction, and to crime in general. The use of custodial sentences rose by 40%, and sentence lengths rose by more than 10% (*Walmsley 2001:5*). He contends that if steps are not taken to reduce high prison population rates and stem the growth, then the current 8, million in prison will soon become 10

million or more and we will be creating a world where a significant minority are locked away, at a great cost in human, as well as financial resources.

Overcrowding has also become a severe problem in Scottish jails, according to a new report by the chief inspector of prisons. In his latest report he highlighted 'chronic overcrowding' in prisons like Barlinnie in Glasgow and Low Moss in East Dunbartonshire (*BBC News 2001:1*).

Scottish Conservative justice spokesman Bill Aitken said it was a matter of 'great concern' that five prisons were now overcrowded. As more prisons become overcrowded, there will be a temptation to go for early release schemes, which fail victims, benefit criminals and endanger the public (*BBC News 2001:4*).

Overcrowding in Britain's prisons has forced the Prison Service to house some inmates in police cells. Nearly two-thirds of Britain's prisoners are being held in overcrowded jails. In some instances, prisons are holding almost double the number of recommended inmates (*BBC News 2002:1*). The prison population currently stands at 71 471 and is beginning to climb. Prison numbers have spiralled from 45 500 in June 1992, and have jumped 6 000 since the start of the year (*BBC News 2002: 1*).

The rise in the prison population has escalated over the years as will be discussed. According to *Mauer (1992:2)*, the United States of America has widened its gap over South Africa in its rate of incarceration, with a rate of 455

inmates per 100 000 population compared to South Africa's rate of 311 per 100 000. The U.S.A. rate has increased by 6.8%, compared to a 6.6% decline in South Africa. In (1994:3) *Mauer* documented that the United States had surpassed South Africa and the former Soviet Union to become the world leader in its rate of incarceration. In (1997:4) *Mauer* reported that Russia and the United States were the world leaders in incarceration. The USA has more prisoners than any other country, approximately 700 per 100 000, and an incarceration rate that has recently overtaken Russia's, approximately 665 per 100000, as indicated below (*Ash 2002:70*).

The Ten Countries with the highest proportion of prisoners to population - 2002

	Country	Total Prison Population	Prisoners Per 100 000
1.	USA	1 933 503	700
2.	Russia	962 700	665
3.	Belarus	56 000	555
4.	Kazakhstan	84 000	5200
5.	Turkmenistan	22 000	490
6.	Bahamas	1 401	480
7.	Belize	1 097	460
8.	= Suriname	1 933	435
9.	=Ukraine	219 955	435
10.	Kyrgyzstan	20 000	425
	England & Wales	67 056	125

TABLE 31

Source: UK Home Office, World Prison Population List (3rd ed.)

In his latest annual report, the inspecting judge of prisons, Judge Hannes Fagan, revealed that South Africa now has more prisoners in prison than ever before. He said the overpopulation (in some prisons as high as 300%), was placing an unbearable burden on the Department of Correctional Services. On average there were 188 000 prisoners in prison last year while the capacity was only 110 000 (*SABC News: Fokus 2003:1*).

Early in 2003, Durban Medium C prison in KwaZulu-Natal was overpopulated by 364%, Umtata Medium prison in the Eastern Cape by 342% and the Johannesburg Medium B prison in Gauteng Province by 292% (*Institute for Security Studies 2003:1*).

In South Africa, on 31 May 2003 there were 53 939 unsentenced prisoners in detention, representing more than a quarter of the total prison population (*Department of Correctional Services 2003:3*). One of the worst cases in the country is the Johannesburg prison. Here the main concern was the number of awaiting trial prisoners, especially children. *SABC News: Fokus (2003:1)* spoke to a young offender who had been arrested on a charge of being an accomplice during a hijack. He was jailed when he was 14 years. Now, 4 years later, his case has still to be finalised in court. Meanwhile he must live in a cell built for 38 inmates where at least 80 are accommodated. Some of those cells do not have working toilets or running water.

In South Africa's prisons there are too many awaiting-trial prisoners and more than 1300 have been awaiting trial for more than two years (*The Mercury*

2004:3). Of the country's 180 000 prisoners, 50 623 are awaiting trial and Judge Fagan is of the opinion that the ideal would be to reduce this number to 20 000 awaiting-trial prisoners. Judge Fagan further postulates that South Africa's prison system is the third worst in the world with four in every 1000 people behind bars. The United States is the worst, with seven in every 1000 people in prison (*The Mercury* 2004:3).

These figures can be attributed to a range of factors including weak investigations by the police, tightening of South Africa's bail laws, inexperience and weak management systems in the prosecution service and poor case management by the courts (*Institute for Security Studies* 2000:1).

In South Africa the majority of sentences given to offenders are less than six months, followed by sentences ranging from six months to two years, and sentences of two to five years. Between 1995 and 1999, only 7% of sentences were between five and ten years, while less than 5 % of sentences were more than ten years. It is, therefore, certain, that most of those incarcerated will return to the community sooner rather than later (*Sekhonyane: 2002:16*).

The table below illustrates the increase in the prison population compared to the cell accommodation and the number of staff (*Institute for Security Studies and the Department of Correctional Services* 2002/2003). The rise in the prison population is directly related to the increase in crime, especially the violent nature of many criminal acts in South Africa.

Prison Capacity in South Africa: 1994-2003

Year	Number of Prisoners	Cell Accommodation	Number of Correctional Staff
1994	113 776	95 695	29 701
1995	112 572	94 381	29 503
1996	125 750	94 796	29 352
1997	142 410	96 307	29 555
1998	146 278	99 407	30 197
1999	162 638	99 407	30 197
2000	163 546	100 130	33 093
2001	175 290	105 435	35 320
2002	185 114	110 874	33 475
2003	179 517	111 241	33 385

TABLE 32

Source: Department of Correctional Services

In 1994 the total prisoner population in South African prisons was 113 776. In 2003 it was 179 517. The total official capacity of the system in 1995 and 2003 was 95 695 and 111 241 respectively. This basically means that in 2003 the prison service had to accommodate 68 276 more prisoners than for whom there was capacity. The number of prisoners has increased by 65 741 in 2003 compared to 1994.

7.3 COST FACTOR

The total budget allocated to the Department of Correctional Services during the budget year 2002/2003 was R6.9 billion from the state treasury. The growing prison population is the most important influence on the outputs and budget of the Department of Correctional Services. At least 60% of the budget is spent on incarceration and administration. The Department has estimated an increase of 225 600 prisoners by 2004/2005, which is likely to have serious budgetary implications (*Institute for Security Studies 2003:1*).

In February 2002 the average unsentenced prisoner spent 139 days in prison at a cost of approximately R13500 to the state. The South African Prisoner's Organisation for Human Rights (*SAPOHR 2003:1*) stated that the enormous amounts spent on awaiting-trial prisoners were an unnecessary amount spent on people who were not supposed to be in prison. Inspecting Judge of Prisons, Hannes Fagan described the awaiting-trial periods as scandalous and said that it cost taxpayers approximately R110.00 a day to house one prisoner (*The Mercury 2004:3*).

7.4 PRESENT CONDITIONS IN PRISONS

If one examines the statistics of prison populations, it is clear that there is a very serious overcrowding problem and concomitantly a breakdown of law, order and standards within the prison system. This is most evident in the makeshift arrangements to accommodate the large number of prisoners

crowded into the cells. When serious overcrowding exists, it follows that there is a lack of basic necessities such as toiletries, towels, blankets and sheets. In instances where provision is made, it is insufficient (*SAHRC1998:12*). Due to overcrowding and the lack of accommodation, some prisoners sleep on cement floors. At other prisons there are serious complaints of cell blankets being dirty, wet and lice-ridden.

The prisoner's rights entrenched in the Bill of Rights were expanded upon in the Correctional Services Act, No 111 of 1998. The objectives of the stated Act is changing the law governing the correctional system and giving effect to the Bill of Rights in the Constitution Act 108 of 1996, and in particular its provisions with regard to prisoners (*Oliver and McQuoid-Mason 1998:75*). All prisoners are supposed to be treated under conditions of human dignity. The emphasis shifted from that of punishment to that of detention under conditions of human dignity in order to better rehabilitate prisoners and prepare them to lead socially responsible and crime-free lives on their release.

Ten years after the April 1994 election, the conditions in prisons fall short of the stated aims. Many prisoners endure awful treatment due to overcrowded and understaffed prisons. The findings of the *South African Human Rights Commission (1998:12)* on the prisons visited; found that in most instances, there is no provision of hot water, electricity or ventilation. At some prisons there was no privacy in the toilets and showers, no hot water and no heaters. Many cells were dirty and smelt unclean, with some toilets not working, not

working properly or leaking. The Jali Commission has revealed stories of inhumane living conditions at St Albans Prison outside Port Elizabeth.

On the 14 October 2003, the researcher together with Criminology three students visited the Westville Medium B Prison in Durban. The visit revealed that cells meant to accommodate 19 inmates actually housed 50 to 60 inmates. Toilets formed part of the cell and this is the norm in most prisons. Thus when the toilet malfunctions there is an overall effect on the entire cell. This lack of hygiene is a health threat and inmates do not have the necessary privacy for intimate functions.

The alarming increase in the crime rate has contributed in a huge influx of convicted criminals and, more particularly awaiting-trial prisoners. As a result South African prisons are over-populated. South African prisons are overcrowded by approximately 71% (*Institute for Security Studies 2003:1*). This means that the supervision and monitoring of prisoners is an arduous and daunting task. In this environment, correctional officials and inmates are exposed to violence, corruption, and communicable diseases. Harsh controls are required simply to prevent escapes.

The Law Society of South Africa (LSSA) has warned that unless the living conditions of the inmates in South African prisons are improved and tangible, achievable measures of rehabilitation and training are introduced; the judicial system will increasingly produce a super breed of criminals (*LSSA 2003:1*). In

addition the Judicial Inspectorate of Prisons reported in 2000 on the conditions in prison as follows *Disse* (2002:10):

“Conditions in prison, more particularly for unsentenced prisoners, are ghastly and cannot wait for long term solutions. For example, one toilet is shared by more than 60 prisoners; [there is a] stench of blocked and overflowing sewage pipes; shortage of beds resulting in prisoners sleeping two on a bed whilst others sleep on the concrete floors, sometimes with a blanket only; inadequate hot water; no facilities for washing clothes; broken windows and lights; insufficient medical treatment for the contagious diseases that are rife. The list of infringements of prisoner's basic human rights caused by overcrowding is endless.”

These conditions have not improved over the intervening years, and today, with an even greater prison population they are worse.

Living conditions in most prisons are appalling, with several inmates forced to sleep on mattresses on the floor. The Minister of Correctional Services, Mr Ben Skosana, said that prisoners' human rights are being violated and that further efforts to relieve overcrowding are needed (*CNN 2000:1*). One of the ways in which one can assess prison conditions is to consider how overcrowded prisons are (*Van Zyl Smit in Dixon and van der Spuy 2004*). According to him this has been the approach adopted by the Inspecting

Judge, who emphasised that, “overcrowding continues to hamper the efforts of the Department of Correctional Services to give effect to its statutory responsibility namely to detain all prisoners under humane conditions” (*Judicial Inspectorate of Prisons 2002:3*).

According to *Van Zyl Smit (in Dixon and van der Spuy 2004)* the figure below shows the diversion between capacity and population graphically.

Total Prison Population and Prison Capacity: January 1995 - July 2002

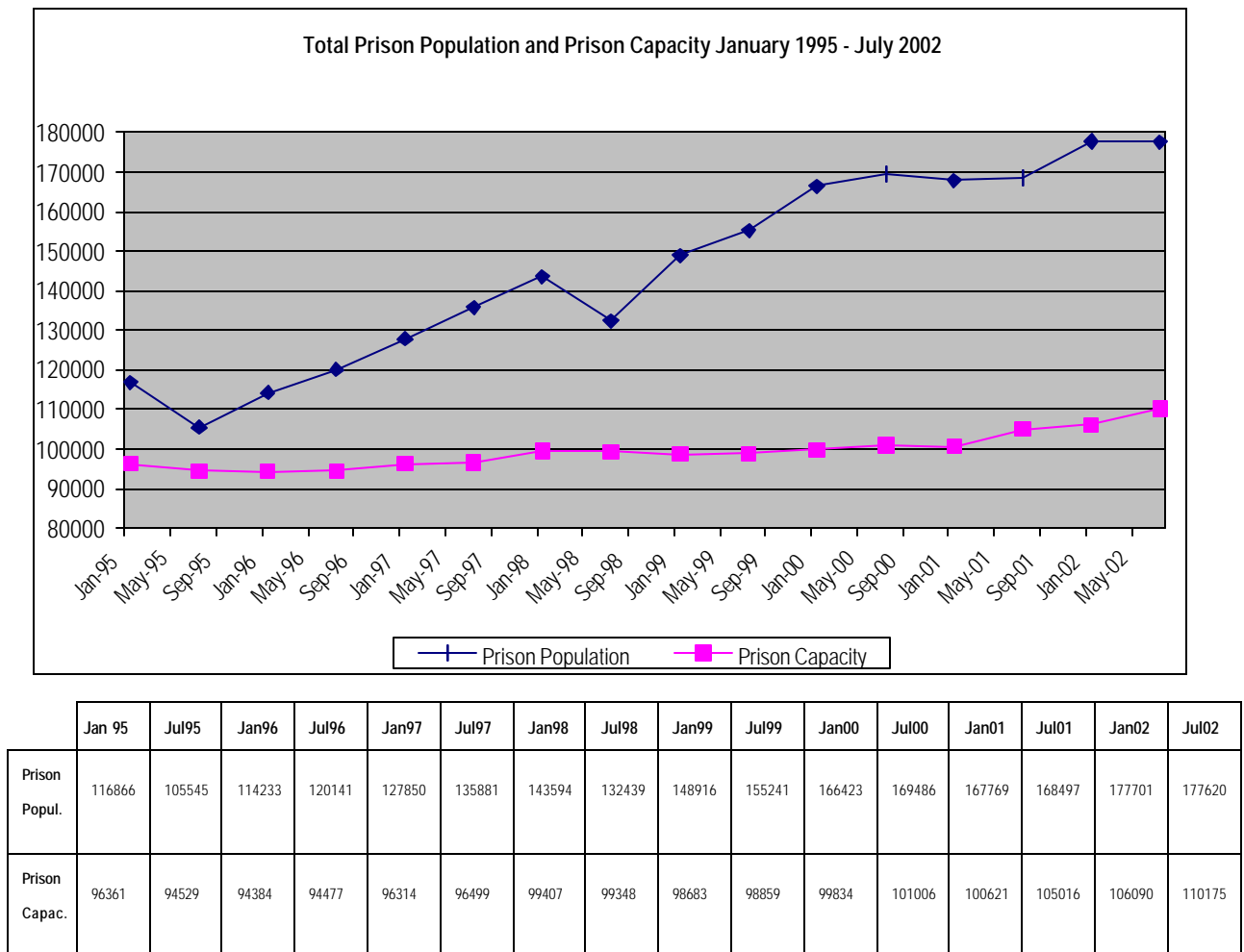


FIGURE 9

Source: *Van Zyl Smit in Dixon and van der Spuy 2004*

Pollsmoor's admissions centre, where awaiting-trial prisoners are held, has more than 3 800 prisoners despite a capacity for holding only 1 872. According to Judge Fagan this creates major problems because prisoners cannot be rehabilitated (*The Mercury 2004: 3*). Furthermore he contends that:

“How can you teach them if there isn't sleeping space? The quality of the food has worsened, as well as health services and education. Prison officials find it more difficult to control gangs. Overcrowding also impacted negatively on staff morale.”

SAPOHR (2003:1) asserts that conditions are inhumane and undermine human dignity as enshrined in South Africa's Constitution Act 108 of 1996. SAPOHR emphasises that unless the Government urgently acted to solve the problem, they would take the Government to court for violating prisoner's constitutional rights.

Prisons, even the most reformed ones, produce damage and disease; in varied forms and intensity, they produce damaged and ill people. This suggests that harm is inevitably the result of imprisonment and too extreme for an imprisoned individual to deal with. Although many may argue that it is what offenders deserve, the risk of psychological and physical harm to an inmate must be acknowledged, as well as the fact that such 'damaged' individuals will one day have to return to society. On the other hand, it is simply too convenient to demand the abolition of such institutions, as some

critics tend to argue. Such institutions are not the ideal means of dealing with criminals, but alternative forms of punishment are seldom seen as a priority by many governments (*ISS Correcting Corrections Monograph No 29:1998*).

7.5 THE CONSEQUENCES OF OVERCROWDING

Overcrowding remains the major factor that impacts negatively on the Department's costs, performance and service delivery (*Annual Report Department of Correctional Services 2002-2003*). There are various consequences of prison overcrowding, such as:

- Mass handling of individual needs;
- A reduction in rehabilitation programmes;
- The earlier release of criminal elements;
- Pressure on the Treasury for the supplementation and extension of personnel;
- An increase in capital expenditure for the creation of prison accommodation to eliminate backlogs;
- Negative behavioural patterns in prisons;
- An increasing burden on the Treasury, for the support of the families and dependants of prisoners; and
- Health threats to the community when the prisoner returns with a disease contracted in prison.

The present prison conditions make very little allowances for rehabilitation and reintegration of the offender. This is apparent from the high levels of recidivism.

Prison overcrowding not only leads to the violation of the rights of prisoners but also over stretches the limited staff resources at the department's disposal and makes it difficult to effectively deliver on rehabilitation. The responsibility of the correctional services is not merely to keep individuals out of circulation in society, nor to merely enforce a punishment meted out by the court. The responsibility of the Department of Correctional Services is first and foremost to correct offending behaviour, in a secure, safe and humane environment, in order to facilitate the achievement of rehabilitation, and avoidance of recidivism (*Department of Correctional Services Draft Green Paper 2003*).

According to *Van Derventer (SABC 2003:1)*, overcrowding in South African prisons is of such a serious nature it could be seen as a human rights contravention. He further stated that there was no way in which conditions arising from overcrowding in prisons could be defended. What is even more serious is to put a department of state in a position that makes it nearly impossible to uphold the Manifesto of Human Rights. *Van Derventer* further states that:

“Keeping prisoners in safe custody was but one of the department's prime objectives and that the other was to try to rehabilitate prisoners so that they could be returned to society and live a normal productive life. This is not possible when

people are deprived of their humanity. The correctional services department could not take the punishment for this alone. The other two departments in the justice cluster, justice and safety and security, were stakeholders in this mess.”

Prison overcrowding has a direct bearing on many aspects of a prisoner's life in that it inevitably leads to a deterioration of hygiene, care, and supervision. In addition to the basic health and sanitation risks, the incidence of rape within a prison varies with the intensity of overcrowding. The risks of violence as well as sickness are obvious. The more crowded the prison is, the greater the likelihood of acts of rape and homosexuality. And the dangerous corollary to this is that increased homosexual activity means more prisoners more often are participating in high-risk behaviour for transmitting HIV (*Goyer 2003:34*).

SAPOHR (2003:1) asserts that overcrowding contributed to the spread of HIV/Aids and other infectious diseases. Illegal drugs are easily available and prison gangs form an integral part of the prison. Gangs are extremely powerful in the communal cells during lock-up times. Gang rule involves extensive use of violence, including sexual violence. In South African prisons gangs are a major obstacle to efforts of transform and demilitarise the prison culture. Gang rule impacts negatively on attempts to rehabilitate prisoners, and consequently also on the communities to which prisoners return when released (*Nair 2002:1*).

According to the Minister of Correctional Services, *Mr Ben Skosana (2002:1)*, the most crucial of all the challenges facing Correctional Services today

revolve around the serious overcrowding of the prisons and the extent to which this state of affairs effectively negates the rehabilitation of offenders. He further states that the reality is that the prisons are overcrowded, making it impossible to manage these prisons in such circumstances, thereby rendering the idea of rehabilitating those inside prison a pipe dream.

The rights of prisoners are violated by the lack of access to basic amenities and rehabilitation in prison. *Morodi (2003:10)* maintains that correctional administrators are responsible for the welfare of the offenders committed to their charge and have a critical role to play in implementing the rights of offenders because in committing inmates to correctional institutions, the courts have assigned them the accountability for their care and welfare.

According to the Jali Commission (appointed in October 2001), there are major problems experienced by the Department of Correctional Services. These include frequent escapes, serious breaches of security, the rapid spread of HIV/Aids, low staff morale, large number of juveniles in prisons, and criminal activity in prisons have all added to the crisis experienced by corrections.

In light of the above summary of the overcrowding in prisons and the resultant effects thereof, dealt with more fully in chapters, three, four and five of this thesis, it can be seen that a new approach is necessary for a transformation of the status quo as discussed in chapter six of this thesis. It is with this in mind that the following recommendations are made.

7.6 RECOMMENDATIONS

There are numerous ways in which the criminal justice can deal with an offender, for example, imposing: a fine, community-based sanctions, diversion, etc. Despite this, the courts rely on the imprisonment of the offender as a form of punishment even when the case does not warrant as serious a punishment as imprisonment. Courts are overworked, prosecutors and other personnel underpaid, prisons overcrowded and the legal aid mechanism under-funded.

The alarming increase in the crime rate has resulted in a huge influx of convicted criminals and, more particularly, awaiting-trial prisoners. Approximately two-thirds of the awaiting-trial prisoners have been granted bail but can't pay it. The question that arises; what are the solutions to the problem of overcrowding? Presently, in South Africa, there are some measures being instituted by the criminal justice system to a 'certain extent' to reduce the number of prisoners (discussed in chapter six of this thesis). One of these is the release of thousands of prisoners who do not pose a threat to the community. Multiple questions arise thereof:

- Why imprison these minor offenders?
- Why let the petty offender become a burden to the state, come into contact with other hardened criminals, diseases and institutional crimes?
- Why exacerbate the overcrowding in prisons?

The most crucial of all the challenges facing the Department of Correctional Services revolves around the serious overcrowding of correctional facilities and the extent to which this state of affairs effectively negates the rehabilitation of correctional clients, undermines human dignity in correctional facilities and renders safety and security of offenders and the community vulnerable (*Department of Correctional Services Draft Green Paper 2003*).

Even though a considerable spectrum of alternative sentencing options have been implemented over the past in South Africa, the further development of these options and the application thereof have become imperative.

7.6.1 Community-Based Sentences as an Alternative

Presently in South Africa, the direction of sentencing is moving towards the rehabilitation and reformation of the offender. While the main recognised ends of punishment remain prevention, retribution, deterrence and rehabilitation, penal systems should develop a more humane implementation of punishment.

The court is called upon to exercise its penal discretion judicially and only after a careful and objectively balanced consideration of all relevant material. Punishment should ideally be in keeping with the particular offence and specific offender. Both mitigating and aggravating factors have to be objectively considered in a balanced process (*Maharaj 1999:35*).

With regards to alternative sentencing options, maximum use should be made of existing resources and also the development of other resources in the community should be utilised. *The Prison Reform Trust (1994:56)* attests that offenders who have committed less serious offences should be handled in the community through diversion or through community-based sentences. Similarly *Neser in (Neser et al 2001:167)* is of the opinion that truly effective alternatives to imprisonment should comply with certain basic requirements namely:

- The options should provide concrete, credible protection to the community;
- The measure should have the potential to develop and change the offender;
- Supervision should be used to limit to the minimum the opportunity to participate in criminal activities;
- The form of punishment should be sufficiently unpleasant to persuade the offender not to commit further crimes and at the same time to deter potential offenders.

The author undoubtedly agrees that the philosophy for community-based alternatives provides a solution to deal with petty criminals. As stated above it is a form of punishment and the offender is paying back to the community for the transgression of the law that he has violated. Implementation of community-based sentences, as an alternative to imprisonment is to a great extent dependent on the community. The offender is subjected to a variety of programmes over a period of time, as is applicable to community service and

correctional supervision. This should not be viewed as a limitation, but rather as an enlightened and humane application of suitable and effective sentencing. Community-based alternatives gives the offender the opportunity to enhance his self-respect by being able to do something constructive for the community, by being able to continue working and maintaining family ties.

Furthermore, the offender remains economically productive, which also promotes the principle of cost-effectiveness and affordability in the administration of justice. One of the main objectives of community-based sentence is for the offender to maintain daily contact with the community and law-abiding citizens and not to become contaminated by hardened criminals.

An additional advantage of basing programs within the community and utilizing all the available resources available in this setting is the significant cost savings to the taxpayer. Thus if community corrections are more successful in preventing recidivism, the cost goes beyond the immediate program to the predicted savings, over many years, across the entire criminal justice system: decline in police and court activity and reduced maintenance of prisons to house potential offenders.

Community-based corrections should be imposed on those offenders who could perhaps be dealt with more effectively in the community than in prison. Furthermore, by imposing a community-based sanction offenders are given the opportunity to make decisions and take responsibility for their lives. Offenders are expected to participate in rehabilitative programmes, and are

encouraged to take steps in the direction of correcting their criminal behaviour. Opponents would argue that many courts are reluctant to use this option as they do not see it as adequate punishment and that many of the offenders do not live in areas that can be easily monitored. But this obstacle can be overcome if there is a proper infrastructure and the co-ordination between the various factors and key role players that influence the success of community-based sanctions. Some of the key role players are:

- The offender;
- The prosecution;
- Legal practitioners;
- The judiciary;
- The probation service;
- The victim;
- The media;
- The legislature; and
- Scientific knowledge about goal attainment; and
- Most importantly the general public.

Each of these key role players (represented diagrammatically below) are not partial; they are equally significant and any effort to promote the extension of community service, must pay due attention to all components. Thus if offenders are selected very carefully, community-based sanctions can play a major role in the successful rehabilitation of offenders, but this in turn depends on a proper infrastructure.

Key Role Players within the Criminal Justice System

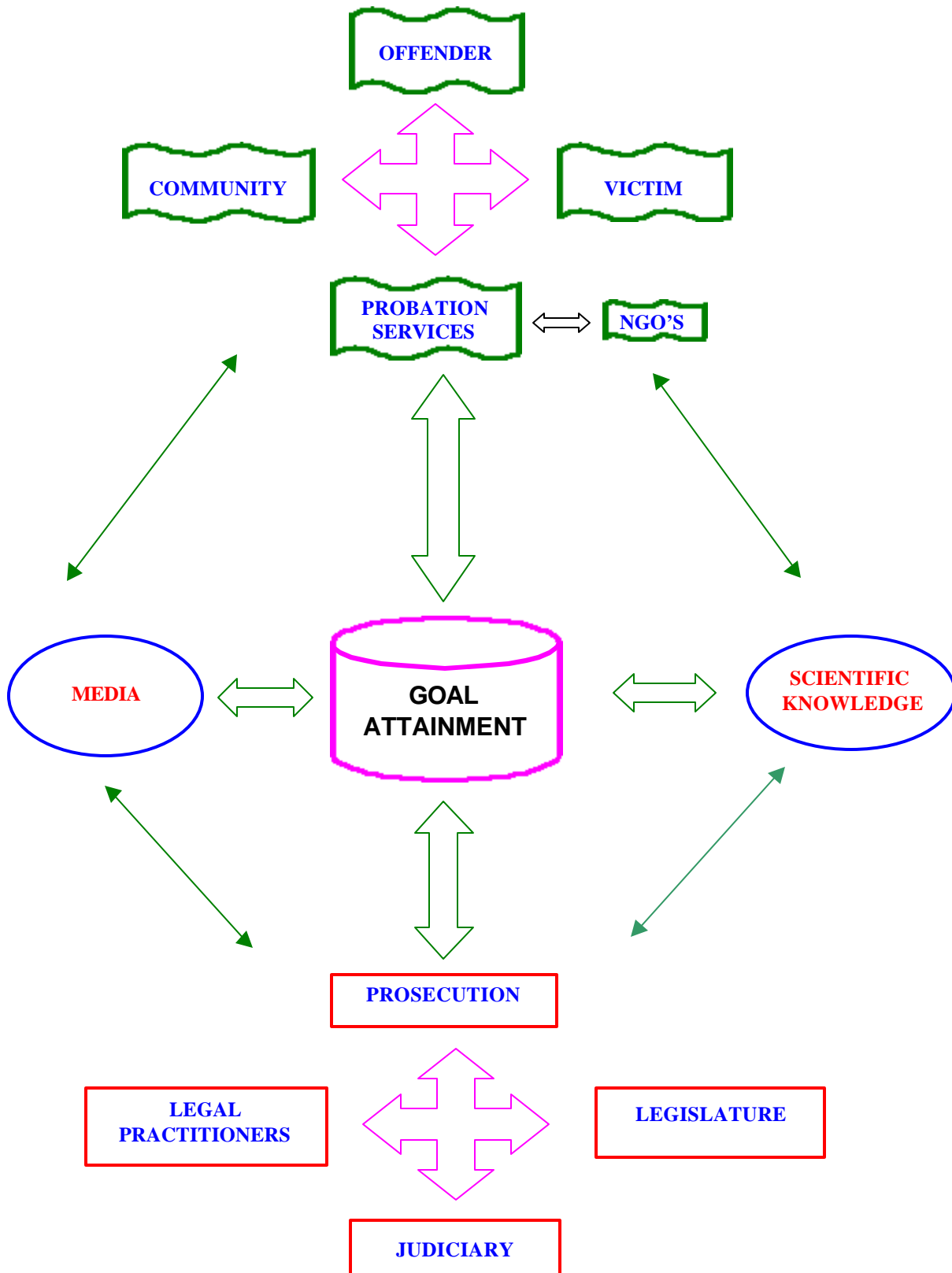


FIGURE 10

As discussed in chapter four of this thesis, due to the problems of imprisonment, which are exacerbated by overcrowding, the prison environment is not only unsuitable for rehabilitation; there are also other important considerations, (family, work, health, stigmatisation, etc), which makes the extensive use of alternative penalties desirable.

Thus on a humanitarian as well as on a realistic level, the imprisonment of offenders in overcrowded prisons, especially awaiting-trial and short-term prisoners, under atrocious conditions is objectionable. Once again, the author reiterates, that imprisonment should be imposed on habitual criminals and alternatives to imprisonment for petty offenders, for example, those charged with drunkenness, road traffic offences and the contravention of local authority regulations.

Thus measured against the inhumane prison conditions, the great danger of petty and first time offenders falling under the influence of hardened criminals, the enormous cost to the state and the possible problem of escaping does not justify keeping thousands of extra persons incarcerated (*Freedom from fear* [n.d.]:21).

Laws, which call for longer sentences and the refusal to grant bail, without increasing the resources available for enforcing them, will result in larger prison populations but not necessarily a reduction in crime. A common misconception, perpetrated by politicians who exploit the public's fear of crime in order to gain votes, is that building prisons can reduce crime. Research in

the field of criminology and penology has constantly found that prisons do not deter crime (*ISS Correcting Corrections Monograph 64 2001:7*).

It was found by *Muntingh (2002)*, from the National Institute for Crime Prevention and Reintegration of Offenders (NICRO) that:

“Throughout the world, people are imprisoned in vast numbers without it having resulted in any significant reduction in crime. The threat of punishment also does not appear to have any significant impact in terms of preventing people from committing offences. The fact that so many current prisoners are in fact recidivists and have been in prison before clearly shows the deterrence approach does not hold much promise as a crime reduction strategy.”

Prisons are not the ideal means of dealing with criminals, since many return to the community and commit further crimes. Such recidivism is a contributing factor to the high crime rate in South Africa. A non-prison penalty is a more rational route for criminals found guilty of most crimes in order to achieve protection, recompense victims for the harm done, and a solution that might reduce crime rates in the future (*Oppler1998:1*). The South African government should prioritise various alternatives including community sentences.

7.6.1.1 More Confidence in the Criminal Justice System

The implementation of supervision and the utilization of electronic support systems, contributes to the success of the community corrections programme in other countries: for example the USA and UK. Thus the author feels that if electronic monitoring is implemented forcefully within community corrections, this will unquestionably provide the community with confidence that these offenders are in the community under supervision from the Department.

If this is implemented with a proper infrastructure between the different departments and key role players, such as justice, the community and welfare organisations, then prison overcrowding will be alleviated and the freed space could be utilized for hardened offenders.

On the other hand if the police service should reach a higher level of efficiency with more arrests and more successful investigations, the prison population would reach even more outrageous figures. The backlog at courts will become even more critical, putting more pressure on the prison system generating more impetus to the vicious circle of backlogs and inefficiency (*Command Security Services [n.d]:1*).

7.6.1.2 Awaiting-trial and Short-term Prisoners

With regards to awaiting-trial prisoners, a large percentage of them are in prison due to the fact that they cannot raise the amount fixed for bail. The

author feels that bail should be adapted to the ability of the accused to pay and should not be given under the following circumstances:

- In the case of serious offences;
- If the accused poses a danger to the community;
- If the release of the accused poses a danger to himself; or
- If there is a real possibility that the release of the offender would defeat the ends of justice.

According to South African law, theoretically, the awaiting-trial prisoner is innocent, and a vast majority are found not guilty, yet ironically they are detained under conditions that are worse than that of sentenced prisoners.

When Judge Jose Caubi Arraes of San Paulo, ordered a high school dropout to sing the national anthem for stealing cosmetics, people thought that he had gone 'nutty'. He pointed out that (*Daily News 16 August 1997*):

“Sending her to jail would not have done her or society any good, so I opted for an alternative sentence. In this way, she can recover her place in society, which she abandoned by stealing. For the next year she will come to my office and sing the national anthem once a month. She will also have to write down the lyrics once a week and complete high school.”

While such a judgement is likely to be scorned by a society determined to exact its retribution on criminals, some local magistrates are imposing creative sentences instead of a fine or prison term.

Although magistrates in South Africa are exploring such creative options as those implemented in Brazil, courts should have greater confidence in the system. Durban magistrates Anand Maharaj and Russell Hand have been exploring such options. According to them the Criminal Procedure Act gives magistrates great flexibility. *Maharaj* in (*Daily News 16 August 1997*) states that:

“I often order convicted felons to pay money to charity. If they couldn’t, they were sent to prison. Stereotypical sentences like fines and imprisonment don’t always work and don’t get to the root of the problem. Creative sentences benefit both the victims of crime and society directly and make the criminal pay directly.”

Magistrate Russell Hand also believes that we need to get away from fines and imprisonment. The prisons are overcrowded and often prisoners are released early, taking the sting out of the sentence.

The author feels that having these creative options for minor crimes, will aid in the rehabilitation of both the victim and the offender. However Durban Chief Magistrate *Mzwenkosi Isaac Mkhize* states that (*Daily News 16 August 1997*):

“At the moment rampant crime is an obstacle. Society is demanding stiffer sentences and we have to balance the views of society, the circumstances of the accused and the nature of the crime.”

A large number of minor offenders end up in prison because of their inability to pay fines. If fines could be adjusted to accommodate an offender's income and if it could be paid in instalments, then the prison population would no doubt decrease. In South Africa a large percentage of the offenders that are sent to prison for short terms come from the lower socio-economic group.

Thus short-terms of imprisonment is more detrimental to the offender for it contains all the negative elements of imprisonment, for example, potential criminal contamination through association with 'hardened criminals', disruption of family life, loss of income and stigmatisation.

7.6.1.3 Further Prison Construction

When the level of occupation exceeds the infrastructure capacity of the prison, the quality of institutional life is threatened. In South Africa serious crimes such as rape, assault, robbery and car hijacking have increased. As a result of a wave of serious crime resulted in sentencing patterns involving long terms of imprisonment. The growth in prison capacity did not keep pace with the increase in the number of offenders sentenced to prison, resulting in more crowded conditions (*Conklin 1995:428*). In addition to this courts follow the

‘get-tough’ sentencing policy, which is associated with longer terms of imprisonment.

South Africa is heading towards a ‘punitive society’, similar to the USA where bigger and better prisons are being built to accommodate increasing numbers of offenders (*Security Guide*1999: 2). The Department of Correctional Services is attempting to manage the overcrowding in prisons through various means, one of which is through the Asset Procurement and Operations Partnerships Systems (APOPS). Building new institutions could be counterproductive, precisely because the availability of accommodation might encourage presiding officials to imprison more offenders.

The Department of Correctional Services argue that the ‘new generation prisons’, are not for political gain but to make the prison manageable and secure as well as to reduce utility costs which are high, partly due to the number of appliances used by inmates.

The author agrees with Judge Fagan on his postulation that what is needed is ‘not more prisons but a reduced number of prisoners in prison’ (*Annual Report Judicial Inspectorate of Prisons 2001/2002*:4). It is acknowledged that private prisons may never be overcrowded, for the contract stipulates the number of prisoners allowed in the private prison whereas public prison officials have little choice as to the number of prisoners they can imprison. Thus all the problems experienced in public prisons due to overcrowding may be

diminished to a great extent in private prisons (*Berg 2002:145*). The question arises: Is this not a 'bourgeois' prison system?

In private prisons, the standards and the quality, hygiene etc is remarkably different. What does this mean in terms of a society that is trying to deal with questions of equality? Does it mean that there will be different forms of punishment for the rich and poor? Whereas in fact if people contravene the law then the notion of equality requires that the law must punish them equally, and that means the conditions under which they find themselves must be the same for all prisoners at large (*Berg 2002:146*). All inmates residing in overcrowded public prisons will not have the same opportunities as those in programme-oriented, non-overcrowded, newly constructed private prisons.

Building more prisons is not favoured, although as an emergency measure to cope with overcrowding, the proposal to build four "New Generation" prisons to house 30 000 prisoners is supported (*Annual Report Judicial Inspectorate of Prisons 2002/2003:26*). Judge Fagan further states that reduction in prisoner numbers is the correct course to adopt:

"We are already incarcerating far too many people. 4 out of every 1000 South Africans are in prison. We are among the countries with the highest prisoner numbers per population in the world. 65% of all countries have incarceration rates of 1.5 or less people per 1000. In Africa the median rate for Western and Central African countries is only 0.6 per 1000."

The author is of the opinion that extending or modernising existing prison facilities, to compliment the process of rehabilitation, is strongly advocated.

Thus with a shortage of approximately 68 500 beds (in 2003) for overcrowded prisons, one of the immediate temporary solutions is to build more prisons, but this is the generally very costly. This money could be more profitably utilised for:

- Upgrading existing prisons in line with the unit management philosophy;
- Providing better facilities for the implementation of community-based sentences-improving the infrastructure to handle these offenders, especially minor offenders;
- Uplifting socio-economic conditions (poverty and unemployment are a cause of criminal conduct, mostly economic crimes, prison populations increase in poor economic conditions); and
- Creation of more jobs.

In addition the Department of Correctional Services is aware of the problems and challenges faced by the prison system. It has recognised that the rehabilitation of offenders should be a primary function, but also remains aware that this goal is difficult, if not impossible to attain given the current situation of overcrowding. The department has adopted several strategies to attempt to deal with overcrowding, including the construction of more prisons. However, it is impossible to build itself out of the overcrowding problem

(*Correcting Corrections Monograph No 64 2001:1*). Alternate options such as electronic monitoring and early release of petty offenders should be implemented more rigorously.

Other temporary measures to alleviate the problem could be implemented, for example:

- Building temporary low cost structures (expenditure with regards to financial restrictions should be considered);
- Using other facilities, such as unused hostels for detaining minimum security prisoners (such as the military base in Devon which has been converted into a prison which can accommodate between 600 and 1 500 inmates (*Sunday Times 11 July 1999*);
- Transferring offenders from one institution to another to fill unoccupied capacity (for example in Kwa-Zulu Natal the Durban Medium C Prison has an occupancy level of 337.41% and the Port Shepstone Prison has one of 269.63% (31 May 2003 Department of Correctional Services), as opposed to Vryheid Prison and New Hanover Prison which have an occupancy of 46.39% and 79.82% respectively. In Mpumalanga the Carolina Prison has occupancy of 196.08% as opposed to the Geluk Prison, which has 74.32%.

South Africa encompasses ideologies from both First World and Third World countries. Privatisation of prisons is an ideology from a First World country namely the United States of America. South Africa has unique problems especially with regards to the socio-economic conditions; therefore whether privatisation of prisons this will work in South Africa is still to be seen.

7.6.2 Diversion

As far back as 1967, the *National Council on Crime and Delinquency* in (Kari Sable Burns 1994-2004:1) states that:

“Undoubtedly, many offenders, especially those whose problems are more social than criminal, can be screened out of the correctional system without danger to the community, especially a community where remedies for their problems can be obtained through existing non-correctional resources. The juvenile court intake and referral methods have proved the value of this policy of diversion. Applications of a similar system to adult cases could reduce court dockets and correctional caseloads. Criteria for the diversion of adult offenders from the correctional process need to be developed, and, to support the policy and practice of diversion, community agencies must cooperate by extending their services to offenders.”

The Department of Correctional Services is being placed under unbearable strain to provide living conditions in accordance with international standards. Inadequate provision exists for the detention of juvenile offenders accused of serious crimes while awaiting-trial. Emphasis should be placed on implementing the diversion programme for first-time child offenders of minor crimes (discussed in chapter six of this thesis) (*Freedom from fear* [h.d.]:21). There is a continuous self-defeating cycle of imprisonment, release and imprisonment, which fails to change undesirable attitudes and behaviour. Novel ways must be used to help the first offender avoid a continuing career of crime. Criminologists, jurists, penologists and social workers worldwide are challenging the assumption that everyone who commits a crime must be imprisoned.

There should be an abatement of imprisonment through the implementation of diversion and community-based corrections. Various petty offenders and minor thieves, who are basically social nuisances and are not threats to society, have been further exposed to criminal behaviour by being imprisoned.

Imprisonment is detrimental to juveniles who may be exposed to criminalization and abuse by older inmates. If the option of imprisonment is used, the juveniles may return to their communities as more hardened criminals and unable to integrate and lead productive lives, in normal society. Juveniles need to be kept away from adult prisons and their different needs should be recognised.

Structured diversion programmes should be implemented throughout South Africa. Person's accused of first-time relatively minor offences should be routinely released on their recognizances unless there are special reasons for not doing so. The resultant savings should be used to better remunerate prosecutors and introduce other performance-enhancing incentives (*Freedom from fear [n.d.]:20*).

7.6.3 'Boot Camps' for Youth Offenders

Plagued by overcrowded penitenties, the high cost of new prison construction and a rising tide of drug-related crime, some states are packing young offenders off to the correctional equivalent of boot camp. The camp differ in format, but recruit from fundamentally the same group: young felons, many with long juvenile rap sheets, who are facing their first state prison terms, usually for non-violent crimes. Officials hope the procedure will shock them out of criminal careers, leaving prisons for only the most hardened criminals (*Stinchcomb and Fox 1999:537*).

Similarly, in South Africa, 'boot camps' based on military basic training can be implemented for young adults. This can be used to reduce the juvenile prison population whereby young offenders spend one and a half to three months separated from hardened criminals participating in a demanding daily schedule of activities characterised by strict rules and discipline. Young inmates can perform useful services to the community, for example, cleaning

of parks. Upon successful completion of the programme they can be released to community supervision (*Freedom from Fear* [n.d.]:21).

7.6.4 Informal Methods of Control

Another alternative, which has been implemented for centuries, is to implement or acknowledge traditional systems and informal ways of settling disputes. This can provide a cheaper and more accessible justice without custodial sentences. For centuries some of the pre-colonial, traditional, systems of justice in developing countries involved highly localised panels of elders, or individual chiefs, traditional authorities (TAs).

The TAs and their decisions were decentralised, and decision-making tended to involve other community members, including the victims of crime and the relatives of the offenders. Penalties often involved recompense of some kind to the victim or to the community. This is similar to the policy of restorative justice (discussed in chapter two of this thesis). One would argue that victims would take the law into their hands, but if the courts oversee this it could be implemented successfully.

The author feels that this policy should be researched whereby key members of the traditional fraternity, the wider community and the decision makers within the formal system should come together in order to deal with minor offenders. Paralegals and traditional authorities should be properly trained. While these petty offenders would still be eligible for punishment, they can be

diverted from the justice system. This would serve a dual purpose (*New Models 2000:2*):

- Less strain on scarce prison resources by not contributing further to overpopulation in prisons;
- Allowing less serious criminals to continue to contribute to the local economy and support dependent family and extended family members.

7.6.5 Other Possible Solutions

As discussed, through research it has been found that prison conditions throughout the world do not meet acceptable standards. In some areas in the world, for example Malawi, small-scale initiatives, which could be reproduced on a larger scale to humanise prison systems, are in the pipeline. In Malawi, low-technology methods are being introduced in prison farm improvements. A large number of prisoners are to be employed to produce enough food for prisoners and staff throughout the year (*New Models 2000:2*).

In South Africa, with its vast acres of land and technology, could utilize this system, especially for minor offenders, which would not only decrease the prison population, but would also contribute to the up-liftment of the economy of South Africa. Thus the author reverts to what has been expressed about the expenditure on private prisons, and that is, money should not be spent building more prisons, but should be used to uplift socio-economic conditions

with the help of the prisoners. The offenders can give back to society at the same time providing a service to them.

7.6.5.1 Payment of Fines

Offenders who are unable to pay fines, and who are then forced to accept the alternative of imprisonment, constitute a considerable portion of the total number of sentenced prisoners (also discussed in chapter six of this thesis). Measures such as the following could reduce the non-payment of fines and the subsequent admission to prison of such persons (*Office of the Inspecting Judge 22 June 2000*):

- The imposition of realistic fines that are within the accused's capacity to pay, such as the day fine system;
- Options such as fines in instalments and taking possession of the accused's property before non-payers are sent to prison;
- The courts could consider an alternative sentence for the remaining part of the sentence when a part of a fine has been paid (*Neser 1993:287*).

The author feels strongly about this, for if substantial portions of offenders are imprisoned due to the non-payment of fines, and then if these measures were implemented, it would reduce the prison population, thus providing one alternative to the alleviation of the overcrowding problem.

7.6.5.2 Penal Colonies

Another possible solution to the problem of overcrowding that can be postulated is the development of a penal colony. Towards the end of the 18th century, a solution to overcrowded prisons in Britain was formulated. This entailed the deportation of convicts to one of the colonies. This policy proved to be very successful and between the late 18th and 19th centuries over 160 000 convicts were sent from Britain to New South Wales in Australia and other overseas penal colonies. Skilled workers, for example, carpenters and cultivators, were chosen for essential jobs, as soon as they disembarked. Many others were assigned to labouring or handed over to property owners; merchants or farmers who may once have been convict themselves (*BBC News 2004*).

South Africa is faced with an exploding prison population, and at a glance the map would indicate that should a South African penal colony be established, St. Helena or the islands of Tristan da Cunha would be the closest to the South African mainland. However, an agreement will have to be reached with Great Britain to make this feasible.

The table 30 in chapter six of this thesis illustrates that the number of long-term sentenced offenders as at March 2003 were:

- More than 10 years to 15 years: 19380 offenders;
- More than 15 years to 20 years: 8578 offenders;
- More than 20 years to life: 12242 offenders.

That is a total of 40 200 offenders. If these offenders could be transported to the island, which could be developed into a self-sufficient environment, they could become economically viable through their own labour. This would be applicable to hardened criminals and lifers who fall within the category stated above. A limited number of personnel would be required to administer the island.

They would be removed from their present prison society, thus , alleviating the contamination of other less serious offenders and diminishing the overcrowding. It could be argued that this will violate the prisoner's constitutional right, but imprisonment, which is his punishment for committing a crime against society, is already a curtailment of his freedom. On the other hand, a positive aspect of establishing a penal colony is that a holistic approach to the development of the individual could take place by utilizing his skills and talents to the maximum.

Thus, the idea of a penal colony would serve a dual purpose:

- It would be an incarceration of the offenders;
- It would serve the purpose of the rehabilitation of the offenders because by using their skills they would become useful members within the microcosm of their penal society.

Thus, instead of spending millions of rands building more prisons, the money could be used to develop the talents of the offenders, by revisiting the idea of

penal colonies. Offenders should be responsible for helping to build and maintain the settlement for themselves thereby providing an alternative to the overcrowded prisons.

The establishment of a penal colony can be postulated as a possible solution to the ever-growing number of criminals.

7.6.5.3 Halfway Houses

The successful re-integration of offenders into the community after confinement is difficult. In prison the inmate's every movement is scrutinised. The routine, regulation and negative effects of socialization into prison life can be intensive and long lasting. The author feels that resources should be used to establish halfway houses, which will help the offender to phase gradually into community life.

Prisoners should be subjected to intensive skills development programmes that will be of benefit to them in becoming productive members of society. Staff should be available to help with obtaining employment, transport, housing and personal needs of the offender. If the offender were equipped with skills to obtain employment then it would help to prevent them from returning to crime on release.

At least 95% of South African prisoners will return to the community after serving their sentences and a good portion of these will serve sentences of six

months or less. Without reintegration services upon their release, it is not surprising that prisoners completing their first sentence will find themselves hardened by their experience and either unable or unwilling to pursue non-criminal endeavours (*ISS Correcting Corrections Monograph 64 2001:41*). The government agencies should invest resources into helping the offender readjust to the community.

7.6.5.4 Release of Elderly Prisoners

As the population in general is aging, so too is the population of correctional institutions. As the elderly become a larger percentage of prison inmates, correctional administrators will be faced with unique challenges to address their needs. If aging inmates are simply mainstreamed with the overall population, they will be vulnerable to being preyed upon by younger, healthier inmates. They are also less likely to be able to participate physically in the recreational and vocational programs that are traditionally offered in correctional facilities (*Stinchcomb and Fox 1999:429*).

As part of an effort to reduce overcrowding and save the government money, the release of elderly and infirm inmates who are no longer deemed a threat to society, should be considered. Due to the policy of 'get tough' laws, prison officials are not only dealing with the lack of prison beds, but also the increasingly costly healthcare behind bars.

7.6.5.5 Video Link Hearings

The South African Law Reform Commission draft bill on the use of video links to handle the remand hearings of awaiting-trial prisoners will help to address the high number of awaiting-trial prisoners, which in turn will help solve the problem of prison overcrowding (*news24.com 2003:1*).

The proposed new system would be able to speed the judicial process by allowing prisoners who were not appearing in court for the first time to testify via a video link up. This would be extremely important because valuable court time is wasted due to the delays in transporting the accused to court and this would ease the backlogs in the country's courts.

If this system is effective, it would reduce the number of awaiting-trial prisoners who are adding to the overcrowding.

7.7 CONCLUSION AND RECAP OF RECOMMENDATIONS

Various factors have contributed to the astounding increase in the prison population; the alarming crime rate has resulted in a huge influx of convicted criminals and, more particularly, awaiting-trial prisoners. The total population in South Africa's 239 prisons, as at January 2003, stood at 187 615, compared to the approved occupancy level of 110 874. Of the total, 57 872 are unsentenced. South African prisons are thus over-populated by 76 741 prisoners.

According to the Daily News 20 May 2002, it was found that out of the 55 285 awaiting- trial prisoners, about 20 000 posed no threat. So why not allow them to await their trial outside prison? Why expose them to the appalling conditions in prison, thereby contributing to them being exposed to hardened criminals and providing an incentive for them to re-offend. There are two main factors that contribute significantly to the increase of awaiting trial prisoners: inappropriately designed or implemented bail laws and inefficiencies in the processing of cases by the criminal justice system.

Prisons must be reserved as a last resort treatment alternative. Prisons should be a measure to restrain those offenders who cannot be 'cured', the main function being the protection of society and secondly to do so with the minimum amount of cruelty. Although alternatives to incarceration may not be effective as far as rehabilitation is concerned, they represent a more humanistic approach to punishment.

There should be a speedier processing of those arrested, less discriminatory use of bail policies, and greater use of alternatives.

The nature of penal policy is presently founded on certain misconceptions, which obstruct the development of a rational penal policy. One of these is the policy of 'getting tough' on criminals. The belief is that society expects harsher and longer sentences, 'the heavier the punishment the greater the deterrent'. This is ill founded for historically there is no justification for the belief that criminals are deterred by heavy sentences. The certainty of punishment for

those who transgress is more important than the severity of punishment. A very small percentage of prisoners are detained permanently in penal institutions, sooner or later the vast majority are returned to society.

There has to be an integrated approach between the police, the criminal justice and corrections to try and eradicate crime and the maintenance of law and order in the country. There is no 'quick fix' approach postulating that by erecting more prisons the number of prisoners will decrease. This may alleviate the overcrowding but magistrates may impose more sentences of imprisonment than using alternatives. The aim should be to provide a concrete basis for fairer, more approachable justice system appropriate to the culture and economic situation of a developing country. There should be new models of justice to deal with minor crimes and juvenile offenders, which include alternative dispute resolution, community-based sentences and restorative justice, which are effective, appropriate and respect human rights.

Prisons are stretched beyond capacity and are run by some staffs that lack professional skills and resources. A high proportion of those being held have been neither accused nor convicted of any violent or serious offence. The environment in prisons tends to be squalid, overcrowded and unsanitary. Many prisoners do not survive. Prisoners are exposed to an environment ripe for brutalisation and sexual abuse especially of minors and women, which invariably leads to more serious criminal behaviour in the future (*New Models 2000:1*).

Speeding up the wheels of justice is of crucial importance. Increasing the number and efficiency of the courts will help in eliminating excessive delays in the justice system (*Freedom from Fear* [n.d.]:2). This would help in the reduction of the number of awaiting-trial prisoners. Prison is absolutely necessary for the protection of the public especially from violent and sexual offenders and hardened criminals, but every effort should be made to find alternative sentences for other criminals.

Although the Criminal Law Amendment Act 105 of 1997 has toughened sentencing laws, the Criminal Procedure Act 51 of 1977 allows magistrates wide sentencing options and they should have confidence in the system and utilize their rights. So, although the release on bail is more difficult, with the resultant effect of the overcrowding of the prison system, policies with regards to awaiting-trial offenders should be reviewed urgently and this will result in the reduction of overcrowded prisons.

Prison sentences must be used to keep dangerous and repeat offenders behind bars. On the other hand the imprisonment of offenders for short terms for lesser offences, that is first-time offenders, often results in their committing more serious crimes in the future. Offenders should participate in rehabilitation and training programmes.

The author is of the opinion that prisons play a very important role in the protection of society, especially from serious offenders. The use of imprisonment as a primary sanction for a vast majority of offenders should be

eliminated. Prisons must be used as a last resort penalty. With the overcrowding of prisons, the rehabilitation policy, which has become the integral philosophy of correctional institutions, is basically an exercise in ineffectiveness.

The reduction of the prison population basically depends on the use of community-based and other alternatives to imprisonment. The success of this will depend upon the assumption that society, that is the courts and magistrates, can break away from centuries of reliance on imprisonment as punishment, and the policies that have been advocated should be put into practice.

Overcrowding not only results in the infringement of human rights but also results in the breakdown of law, order and standards within the prison system. Hence the severe overcrowding of prisons is a critical issue that confronts the criminal justice system.