

SUBMISSION BY THE CIVIL SOCIETY PRISON REFORM INITIATIVE TO THE NATIONAL ASSEMBLY PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON THE CRIMINAL LAW (SENTENCING) AMENDMENT BILL [B 15 OF 2007]

Prepared by

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Introduction

1. The Civil Society Prison Reform Initiative (CSPRI) was established in 2003 and is a project of the Community Law Centre at the University of the Western Cape in Cape Town, South Africa. CSPRI was established in response to the limited civil society participation in the discourse on prison and penal reform in South Africa. To address this, four broad focus areas were developed:
 - Developing and strengthening civil society involvement and oversight over corrections
 - Promotion of non-custodial sentencing and penal reform
 - Improving prison governance
 - Improving offender reintegration services
2. The introduction on minimum sentences legislation in 1997 was envisaged as a temporary measure by the legislature, and thus its renewable status. The Criminal Law (Sentencing) Amendment Bill [B 15 of 2007] (the Bill hereafter) is an attempt to address a number of issues emerging from its application in the past nine years. Some of the concerns raised as motivation for the Bill are valid and are worthy of serious debate. It should also be acknowledged that the Bill, if enacted, will have wide ranging impact, especially on the Department of Correctional Services (DCS).
3. CSPRI shares government's concern about the high levels of crime in South Africa. However, the increasingly punitive approach to crime and offenders, an approach facilitated in no small measure by current legislation, is similarly cause for concern. As will be shown below, this has made a significant contribution, and will continue to do so, to the growth in the prison population. The ensuing prison overcrowding has resulted in the detention of offenders in conditions violating Sections 10, 12(e) and 35(2)(e) of the Constitution. Prison overcrowding in South Africa also drew the

attention of the UN Committee against Torture, as evidenced by the following comment in its Concluding Remarks on South Africa's Initial Report:

*While recognising some improvement of the situation in the State party's detention system, the Committee remains concerned about the overcrowding in prisons and other detention facilities as well as with the high rate of HIV/AIDS and tuberculosis amongst detainees. . . The State party should adopt effective measures to improve the conditions in detention facilities, reduce the current overcrowding and meet the fundamental needs of all those deprived of their liberty, in particular regarding health care; periodic examinations of prisoners should be carried out.*¹

4. The minimum sentences provisions² in the Criminal Law Amendment Act (105 of 1997) are based on an assumption that has not been borne out by evidence to date. Long prison sentences have not been shown to act as a deterrent to would-be criminals, nor to reduce crime or to reduce re-offending. Perhaps the most significant finding is reported by Gendreau, Goggin and Cullen, based on an extensive meta-analysis, namely that imprisonment does not contribute to reducing recidivism.³ Even when controlling for risk profiles, those offenders who were sent to prison had a higher re-offending rate than those who received a community-based sentence. Higher recidivism rates are also associated with longer prison terms. In short, this means that imprisonment *per se* increases the recidivism rate and the longer the term, the worse the impact. The same researchers report that imprisonment increases recidivism for low-risk offenders and further that a "no-frills"-approach to imprisonment (very bare and basic conditions) further contributes to elevated levels of recidivism. The increases in recidivism are also not insignificant, and are estimated to be between 5% and 9%. From a policy perspective they conclude that:

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

¹ UN Committee against Torture (2006) *Consideration of Reports Submitted By States Parties Under Article 19 of the Convention Conclusions and recommendations of the Committee against Torture South Africa CAT/C/ZAF/CO/1*, 37th session, 6 – 24 November 2006, para 22

² See sections 51 and 52

³ Gendreau P, Goggin C and Cullen FT (1999) *The Effects of Prison Sentences on Recidivism, Public Works and Government Services, Canada.*

5. Cullen and Gendreau⁴, in their review of correctional rehabilitation, found that interventions that aim at greater control over offenders (e.g. various forms of supervision and probation), and are regarded as by-products of the “get-tough-on-crime”-approach, are not effective in reducing recidivism. They report further that in the same manner that effective programmes are based on sound theory and empirically-tested methods and interventions, control-inspired interventions appear to be based on “a common-sense-understanding that increasing the pain and/or the surveillance of offenders would make them less likely to commit crimes”. There is therefore sufficient reason to investigate and promote forms of sentencing that are indeed evidence-based supported by reliable conclusions of their effectiveness in reducing re-offending.
6. Extensive research in the US has built growing consensus amongst researchers on four issues in respect of the impact of imprisonment on crime rates:
 - Incarceration has some effect on crime rates, but the strength of this relationship is considerably more modest than the public and policymakers generally believe.
 - As rates of incarceration increase, there is an effect of diminishing returns, primarily due to the imprisonment of increasingly less serious offenders.
 - The deterrent effect of criminal justice sanctions is more a product of certainty, than of the severity, of punishment. Policy changes that enhance punishment without increasing the risk of apprehension are unlikely to contribute much to deterrence.
 - Social investments, including preschool programmes, high school graduation incentives, and substance abuse treatment, have been demonstrated to be more cost-effective than incarceration in reducing crime.⁵
7. The Bill therefore needs to be seen within the context of a wider governmental approach to reducing crime in the first instance, and second, a commitment from government on broader sentencing reform.⁶ The Bill proposes fundamental changes

⁴ Cullen FT and Gendreau P (2000) *Assessing Correctional Rehabilitation: Policy Practice and Prospects* in J Horney (ed) *Criminal Justice 2000, Volume 3: Changes in Decision Making and Discretion in the Criminal Justice System*, US Department of Justice, Washington, p 154.

⁵ Mauer M (2006) *Sentencing in South Africa – lessons from the United States*, Paper Presented at conference “Sentencing in South Africa”, 25-26 October 2006, Cape Town, Hosted by the Open Society Foundation of South Africa, p. 89.

⁶ ‘Courts to get tough on criminals’, *IOL* March 28 2007

http://www.iol.za.org/index.php?set_id=1&click_id=13&art_id=vn20070328092530366C246491

to sentencing in South Africa and these should not be ventured into without the empirical evidence to support such changes, as well as sufficient consultation with stakeholders in government as well as outside of government.

Impact on the prison population

8. Recent research commissioned by the Open Society Foundation (SA) investigated the link between the size of the prison population and sentencing.⁷ Using data supplied by the Department of Correctional Services covering the period 1995 to 2005, the researchers tracked changes in the profile of the sentenced prison population.
9. The first significant finding was that prison admissions since 2000 have been declining, yet the sentenced prison population was increasing – in short, fewer people are being sentenced to imprisonment but for longer. This indicated that the turnover of the prison population was slowing down and not that more serious offenders were being imprisoned. It should also be added that after 2000 that the unsentenced prison population stabilised at 60 000 and has since been declining steadily to a low of 42 000 in 2006.
10. Secondly, the increase in sentence jurisdiction of the magistrates and regional courts, enabled by the Magistrates Amendment Act (66 of 1998), had a material effect on the general increase in sentence tariffs. There is little doubt that this has had a very significant effect on the growth of the prison population.
11. Thirdly, the minimum sentences legislation had a dual effect, in that it firstly compelled sentencing officers to impose certain sentences, as was the intention of the Act, but it also appears that this has raised the general sentencing tariff, even where the offences did not fall within the specific focus of the minimum sentences legislation.
12. Between 1995 and 2004 the South African prison population grew from 116 846 to 187 036, while available accommodation remained the same at approximately 113 000. From 1995 to 2005 the profile of the sentenced prison population showed remarkable changes, as presented in Table 1. The most significant trend is the rapid increase in the number of prisoners serving sentences of longer than seven years. For example, the number of prisoners serving sentences of 10-15 years increased by 275%, the 15-20

⁷ Giffard C and Muntingh L (2006) *The effect of sentencing on the size of the prison population*, Open Society Foundation, Cape Town.

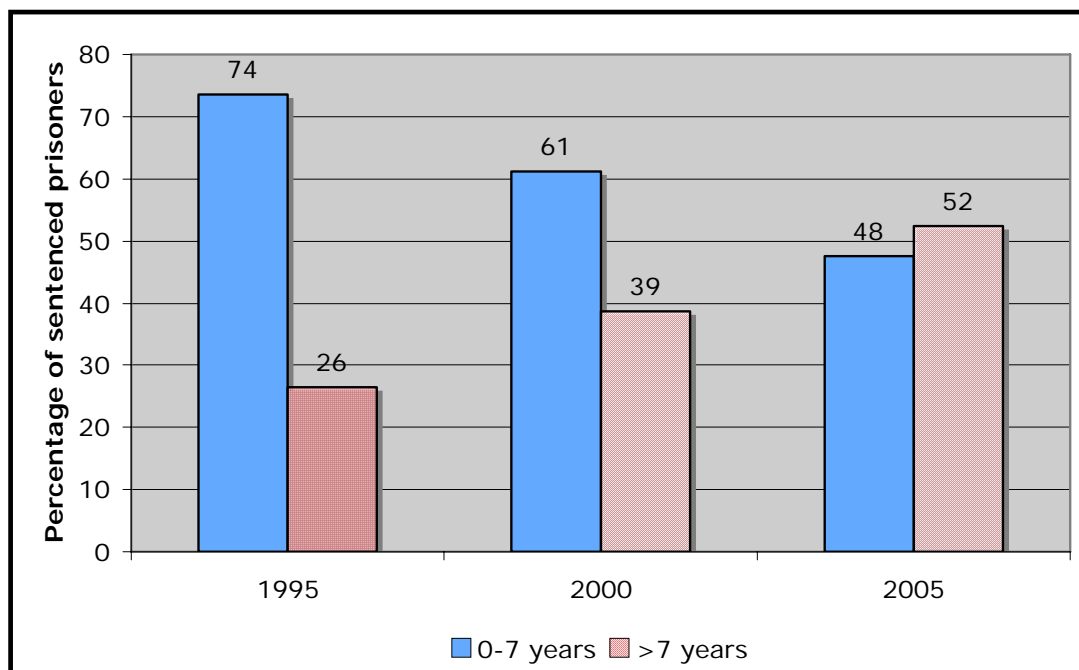
year category by 298%, and life sentences by a phenomenal 1197%. The general trend is that the longer the sentence, the greater the increase. On the other hand, prisoners serving sentences of less than 12 months showed a decline, as well as prisoners serving sentences of between three and seven years. Figure 1 shows very clearly how the proportion of prisoners serving sentences of less than seven years declined, while those serving sentences of longer than seven years increased from just less than 26% in 1995 to 52% at the end of 2005.

Table 1 Overview of the South African prison population

Sentence Category	Average for January of each year			% increase		
	1995	2000	2005	1995-2000	2000-2005	1995-2005
Unsentenced	24265	61563	52313	154	-15	116
0 - 6 months	5831	5717	5674	-2	-1	-3
>6 - 12 months	6374	6598	5416	4	-18	-15
>12 - <24 months	3765	6156	5763	64	-6	53
2 - 3 years	12854	13846	17816	8	29	39
>3 - 5 years	21066	16162	16731	-23	4	-21
>5 - 7 years	15068	13882	12137	-8	-13	-19
>7 - 10 years	12193	18418	21233	51	15	74
>10 - 15 years	6168	10442	23139	69	122	275
>15 - 20 years	2660	4603	10586	73	130	298
>20 years	1885	4919	9197	161	87	388
Life sentence	443	1086	5745	145	429	1197
Other sentences⁸	4274	3031	1706	-29	-44	-60
Total sentenced	92581	104860	135143	13	29	46
Total prisoners	116846	166423	187456	42	13	60

⁸ Over 80% of the category "Other Sentences" consists of indeterminate sentences for "habitual criminals". Others include death sentences, day parole, periodic imprisonment, "Other mental instability" and prevention of crime.

Figure 1 Proportion of prisoners serving sentences of shorter and longer than 7 years



13. Changes in the sentencing legislation have thus had a significant and presumably unanticipated impact on the size of the prison population. It is furthermore important to see the minimum sentences legislation, the increase in sentence jurisdiction, and perceptions about crime and safety as forces working in tandem, and resulting in the rapid increase in the prison population from 116 000 in 1995 to 187 000 in 2004.
14. It should further be borne in mind that government was compelled in 2004 to implement a remission of sentence programme resulting in the release of more than 30 000 sentenced prisoners in order to alleviate prison overcrowding. Amnesties and remissions are stop-gap measures and should ideally not be part of government's strategy to alleviate prison overcrowding. A far more measured approach based on an appropriate and comprehensive approach to sentencing is required.
15. Research by Giffard and Muntingh⁹ attempted a projection of the prison population if current trends continue until 2015. Acknowledging that such projections are fraught with difficulties, an attempt was made based on a number of assumptions:¹⁰ it assumes that all social, political, health and other variables are to remain constant for the projection period; only sentences longer than seven years have been forecast; and the final projection assumes that sentences of seven years and less remain the same

⁹ Note 7

¹⁰ For a detailed discussion of these difficulties, see the full report, page 39.

over the entire forecast period, as well as assuming a stable unsentenced prison population.

16. Table 2 shows the projections for the entire prison population. The three columns on the left show the projection, if it is assumed that these totals are frozen from December 2005, after the special remissions. The three columns on the right show the projection based on the assumption that these sentence categories return to their pre-remission levels and then hold stable.

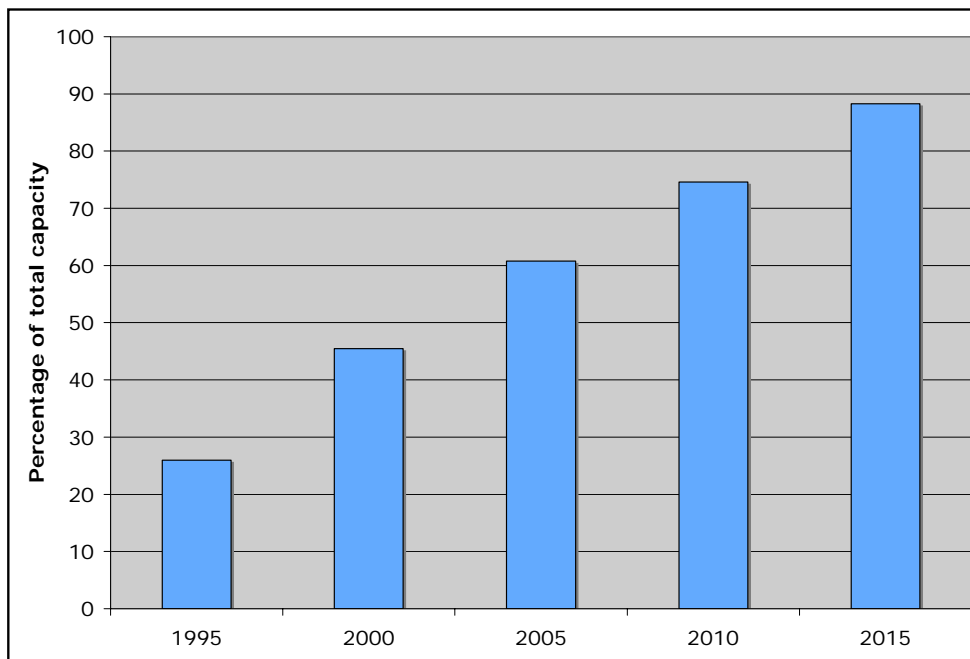
Table 2 Projection of the total prison population 2005 to 2015, two scenario's

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

17. While the very long sentence categories seem to have experienced the most spectacular increases (with the total of those serving life more than doubling over a ten year period, for example), it is the >10-15 year sentence category that is providing the bulk of the increase. The projections suggest an increase of nearly 20 000 offenders serving >10-15 year sentences between 2005 and 2015.
18. The increases of all the sentence categories of longer than seven years have serious implications for prison overcrowding. The projections suggest that, assuming 9 000

new prison places by 2010 and a further 9 000 by 2015, the proportion of prison places taken up by prisoners serving sentences of longer than seven years will increase from 61% currently to 75% in 2010 and 88% in 2015. In 1995, this sentence category took up only 26% of the available capacity, and in 2000, the corresponding figure was 45%, as shown in Figure 11.

Figure 2 Projected percentage of total national capacity used by prisoners serving sentences of longer than 7 years



Possible impact of the Bill

19. The research referred to above demonstrated that when the sentence jurisdiction of the magistrates and regional courts were increased, that sentencing officers used this extensively and this accounts for the rapid increase in the 10-15 year sentence category.
20. Based on the above information regarding the effect of changes in the sentencing legislation on the size of the prison population, it is concluded that the Bill will have a significant impact on the size of the prison population by effectively increasing the sentence jurisdiction of the regional courts to impose any sentence up and including life imprisonment, as described in the proposed amendments to sections 51(1) and 51(2).

21. An increase in the prison population will have an obvious impact on the budget of the Department of Correctional Services and it is therefore noted with concern that the memo accompanying the Bill reflects erroneously that there will be no financial implications for the state.

Recommendations

22. In view of the above, CSPRI submits that there is an urgent need for comprehensive sentencing reform and that piecemeal efforts to address the concerns of selected stakeholders, such as the National Prosecuting Authority, may in the medium to long term turn out to be very costly.
23. It is furthermore submitted that the potential impact of the Bill is of such a vast nature that more comprehensive and formal consultations need to be held with key stakeholders in government, the judiciary and civil society. Such consultations need to be done within a realistic time frame in order to provide stakeholders with sufficient time to collect and analyses information.
24. It is therefore proposed that the Department of Correctional Services must submit information to the Portfolio Committee on Justice and Constitutional Development on what it sees as the possible impact of the Bill on its operations as well as the budgetary impact.
25. Given the magnitude of such a sentencing reform programme, it is submitted that the *status quo* be maintained for a further two years in order for government to initiate and complete a sentencing reform dialogue with a broad range of stakeholders. The proposed deletion of Section 53 is premature in the light of the number of stakeholders involved and the significance of making the minimum sentences legislation permanent, as opposed to its current temporary status.

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