ASSESSING THE IMPACT

Mandatory and minimum sentences in South Africa

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The legislation passed in 1997 that provides for mandatory minimum sentences for serious crimes was recently extended for another two years. At the time, the aim was to reduce serious and violent crime, achieve consistency in sentencing, and satisfy the public that sentences were sufficiently severe. This article argues that the legislation has achieved little or no significant impact with regard to these goals. Instead, many agree that the provisions have exacerbated the problem of overcrowding in South African prisons.

Sentencing in South Africa has traditionally been the preserve of the judiciary. Judges and other sentencing officers have customarily resisted interference with their discretion to hand down sentence, which they regarded as a fundamental aspect of judicial independence.

A source of fierce public debate soon after 1994 was the perceived leniency in punishing serious offenders, coupled with the perception that offenders were not serving enough of their sentences due to a lax parole policy. The public was also concerned about the nature and severity of sentences for heinous crimes after the abolition of the death penalty.[1]

Minimum sentencing was introduced into law in 1997 by the Criminal Law Amendment Act. The stated intention of the legislature was to reduce serious and violent crime. This deterrent function is attested to in S v Malgas when the Supreme Court of Appeal declared:

> In short, the legislature aimed at ensuring a severe, standardised and consistent response from the courts to the commission of such [serious] crimes…[2]

Other motivations included 'popular punitiveness', the need for government to show its concern with high crime rates, the public perception that sentences are not sufficiently severe, the need to 'be tough on crime', sentencing as a deterrent, and retribution – the argument of just desserts, or proportionality.

The passing of the minimum sentencing legislation took place against the backdrop of a range of other legislative and policy shifts aimed at dealing with the perception that government was not taking the

crime problem seriously. These included harsh new bail laws, legislation dealing with organised crime and the criminalisation of gangs, and eventually (subsequent to the enactment of minimum sentencing laws), the downgrading of the National Crime Prevention Strategy (NCPS) in favour of a tougher, no-nonsense approach to dealing with crime.

The following key questions are examined in this article: Are mandatory minimum sentences constitutional? Have they deterred or prevented crime? Do they afford better protection to victims? What is the relationship between minimum sentences and prison overcrowding? Finally, the article questions whether South Africa needs a more comprehensive sentencing reform strategy.

Has minimum sentencing had the desired impact?

Preventing or curbing crime, especially serious and violent crime

It is routinely noted that the impact of harsher sentencing regimes on general deterrence of crime is difficult to isolate and measure. Writing from an international perspective, Tonry states that:

> The evidence is clear and weighty, that enactment of mandatory penalty laws has either no deterrent effect or modest deterrent effect that soon wastes away. Equally clear and consistent are findings that mandatory minimum laws provoke judicial and prosecutorial stratagems, usually by accepting guilty pleas to other non-mandatory penalty offences or by diverting offenders from prosecution altogether that avoid their application.[3]

In the South African case, despite the repeated extension of the minimum sentences legislation that was originally intended to be in place only for two years, it is difficult to find substantive evidence that the new penal regime has had any general deterrent effect – or even that it has reduced crime.[4] Instead, statistics suggest an uneven change in reported crimes.[5]

According to data analysed by Schärf and Berg from 1997/98,[6] levels of recorded crime rose steadily, beginning to level off in 2000/01, dipping in 2001/02, but then rising again in 2002/03.[7] It must of course be noted that a number of factors mediate the interpretation of this crime data. These factors include the problem of under-reporting of crime to the police, means of data collection and recording, and shifting categories and methods of classification of offences.

Nevertheless, the data appear to indicate a gradual decrease in violent crime rates from 1994/95 to 1997/98, after which a sharp increase was recorded. For the purposes of this analysis, violent crime includes murder, attempted murder, rape, attempted rape, assault with intent to do grievous bodily harm, common assault, aggravated robbery, other robbery, and malicious damage to property. A few of these offences are targeted by the mandatory sentencing laws.

A more nuanced analysis per crime category revealed that in some respects, violent crime had decreased – murder being a case in point. However, aggravated robbery statistics rose, as did cash-in-transit robberies;[8] both offences for which mandatory sentences might well be imposed.

Altbeker comes to similar conclusions with reference to the latest statistics released by the South African Police Service.[9] He notes, however, that methodological problems are inherent in collating and interpreting crime statistics, and that there are widely recognised discrepancies in reporting the rates of different crime categories. Murder is generally accepted as being a highly reported crime (there is a physical body to account for), whereas robbery is viewed as being largely under-reported.

Altbeker notes that between 1996/97 and 2003/04, the incidence of murder per 100,000 of the population decreased steadily from 62.8 to 42.7.[10] Indeed, a continued decline in the incidence of murder from 1994 onwards illustrates that the abolition of the death penalty in 1995 did not contribute to an increase in this offence, contrary to what many may believe. Similarly, since a downward trend was already in evidence by the time minimum sentences were enacted, and the

rate of decline did not accelerate, the subsequent decrease cannot be attributed to any intervening legislative changes.

During the same time period, however, the rate of aggravated robbery increased from 218.5 per 100,000 of the population to 288.5.[11] Given that only around 30% of robbery victims report this crime to the police, the trend is difficult to interpret.[12] The same is not true of car hijackings (one form of aggravated robbery), however. The majority of these crimes are reported to police, so the statistics indicating that hijackings dropped substantially since 1998 are probably accurate. This offence is specifically included in Part II of Schedule 2 of the minimum sentences laws.[13]

It can therefore be concluded that, at present, there is little reliable evidence that the new sentencing law has reduced crime in general, or that specific offences targeted by this law have been curbed.

A further argument that has been made by Altbeker about the function and outcome of mandatory sentences is that there are three ways in which prison sentences might reduce crime: rehabilitation, incapacitation, and deterrence.[14] He notes that there is little evidence that imprisonment rehabilitates offenders; rather, there is more evidence to the contrary. Indeed, anecdotal evidence from members of the Department of Correctional Services suggests that prisoners serving extremely long terms of imprisonment – such as those prescribed as mandatory sentences – have nothing to hope for. The prospect of release is so far off that they are consequently less amenable to any rehabilitation.[15]

This leads to Altbeker's second point, namely that the use of prison to incapacitate offenders breaks down when prison sentences are too long, as prisoners are kept behind bars well past the age at which most criminologists expect them to continue offending. After this point, they are consuming scarce prison space without doing much to reduce crime, since those behind bars would in any case be less likely to offend.[16]

Altbeker points out that evidence suggests that the preventive effect of a 1% increase in the certainty that an offender will go to prison is far more effective than a 1% increase in the length of a sentence.[17] Thus, from a crime control perspective, it is more efficient to use prison space for more people sentenced to shorter periods, than for fewer people sentenced to longer terms.[18]

Promoting consistency in sentencing
Eliminating inconsistent and apparently widely diverging sentencing practices was a key objective underlying the introduction of minimum sentences. As Terblanche has pointed out:

> [t]he lack of consistency in sentencing is a major problem in South Africa, as it is in other countries where sentencers have largely unfettered discretion in imposing sentence.[19]

Terblanche asserts, however, that the minimum sentences legislation has, if anything, worsened the disparities and inconsistencies that prevail in relation to the offences targeted by the law.[20] Certainly, despite assertions from judges and magistrates that the prescribed sentences require them to treat all those guilty of a particular type of crime in the same way, irrespective of differing circumstances, newspaper reports abound of apparently severe cases in which judges have found room to depart from prescribed minimum sentences.[21]

What about the rights of victims?
The women's rights lobby and victim groups support the extension of the minimum sentences legislation, especially insofar as it targets certain sexual offences and signals the severity of crimes involving sexual violence.

The submission of the Western Cape Consortium on Violence Against Women analysed an array of recent cases in support of their contention that the abolition (or non-extension) of the mandatory sentencing legislation would prejudice women. Among other arguments, the cases they cite reveal that, in their opinion, the following factors are consistently and erroneously used to justify lesser sentences, namely:

- the previous sexual history of the complainant;[22]

- an accused's cultural beliefs about sexual assault;[23]
- an accused's use of intoxicating substances prior to the assault;[24]
- an accused's lack of intention to cause harm to the complainant in committing the rape;[25]
- an accused's lack of education, sophistication or a disadvantaged background;[26]
- a lack of 'excessive force' used to perpetrate the rape;[27]
- a lack or apparent lack of physical harm to the complainant;[28]
- a lack or apparent lack of psychological harm to the complainant;[29] or
- any relationship between the accused and the complainant prior to the offence being committed (including a consensual sexual relationship).[30]

The Consortium noted that the above issues were precisely those that in earlier arguments had been put forward as factors that the courts should not take into account in determining substantial and compelling circumstances. With this in mind the Consortium put forward the following suggestion as one optional reform proposal:

> In light of the problematic jurisprudence on the meaning of 'substantial and compelling circumstances,' it is submitted that Parliament must enact *mandatory* interpretative guidelines for the judiciary, setting out how it is to be interpreted in light of the Constitution and international obligations to protect the rights and dignity of women. Specifically, the legislature should set out circumstances or factors that may not in themselves be regarded as 'substantial and compelling circumstances ... .[31]

Commentators have also drawn attention to the poor drafting of the Act, and the difficulties this has caused the courts as they have had to delve into the details of the offence types set out in Schedule 2.[32] Problems were also encountered in the application of the legislation to district courts, as the law makes mention only of regional courts and high courts. Terblanche argues that this may have been justifiable in the light of the fact that the legislation was introduced as an emergency measure, but he suggests that it is now time for it to go:

> One should not be fooled into believing that the Act is anything but an expensive tool. Just consider the many thousands of judicial officer hours that have been consumed in trying to make sense of its provisions, or trying to get around those provisions that turned out to be patently unfair … These costs might have been worthwhile if the Act had actually achieved its purpose.[33]

The impact on prison overcrowding

When considering the cost of minimum sentencing, a question that needs to be asked is whether South Africa can afford a prison population of the size that it is now; and one that is bound to escalate as prisoners serve longer and longer terms of imprisonment. Not only are current overcrowding levels alarming, but the circumstances under which prisoners are accommodated may well be unconstitutional.[34] We cannot build our way out of the problem, and the connection between sentencing regimes and conditions of imprisonment needs to be re-established urgently.[35]

Several commentators, notably Judge Fagan, the Inspecting Judge of Prisons, have ascribed worsening prison overcrowding to the impact of minimum sentences:

> The effect of the minimum sentence legislation has been to greatly increase the number of prisoners serving long and life sentences. It has resulted in a major shift in the length of prison terms [see Figure 1].[36]

Judge Fagan notes that sentences of seven years and less showed little change from 1997 (67,535) to 2004 (67,483), while sentences of more than seven years increased rapidly from 1997 (29,376) to 2004 (67,081). Life sentences increased from 638 in 1997 to 5,511 on 30 September 2004. He notes that in April 1998 – immediately before the implementation of the minimum sentence legislation – only 18,644 (19%) of the sentenced prisoners were serving a term of longer than ten years. This has since increased to 49,094 (36%) (Figures 2 and 3).

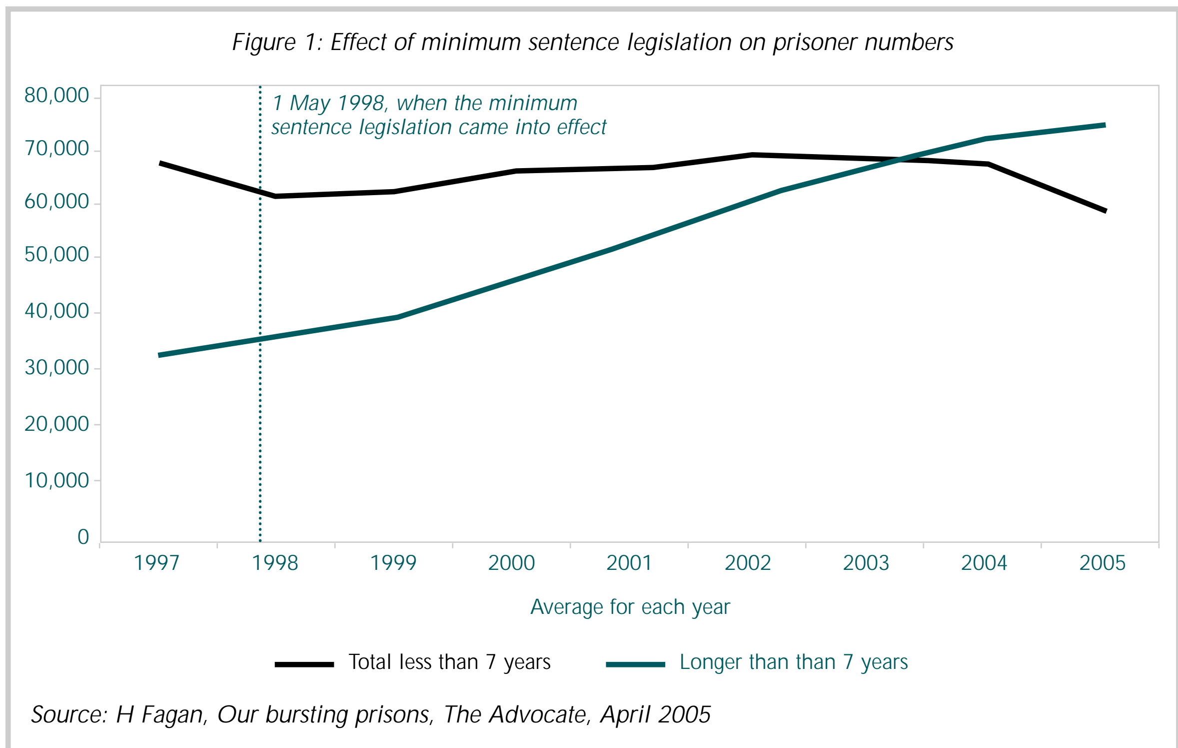

Figure 1: Effect of minimum sentence legislation on prisoner numbers

Source: H Fagan, Our bursting prisons, The Advocate, April 2005

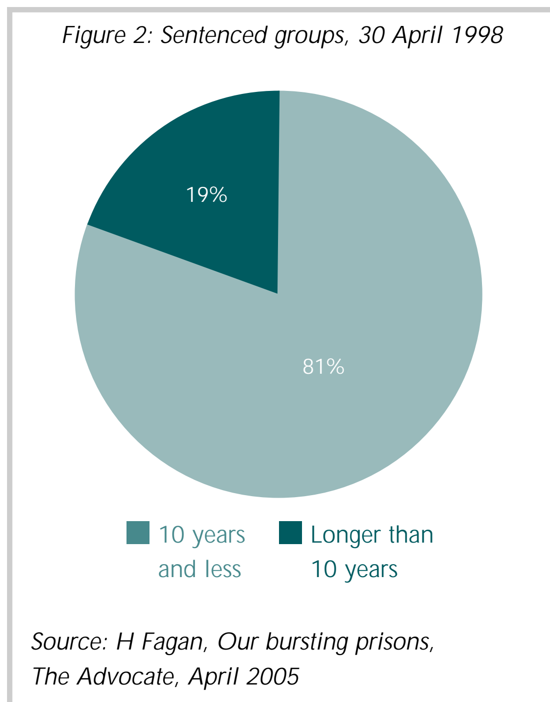

Figure 2: Sentenced groups, 30 April 1998

Source: H Fagan, Our bursting prisons, The Advocate, April 2005

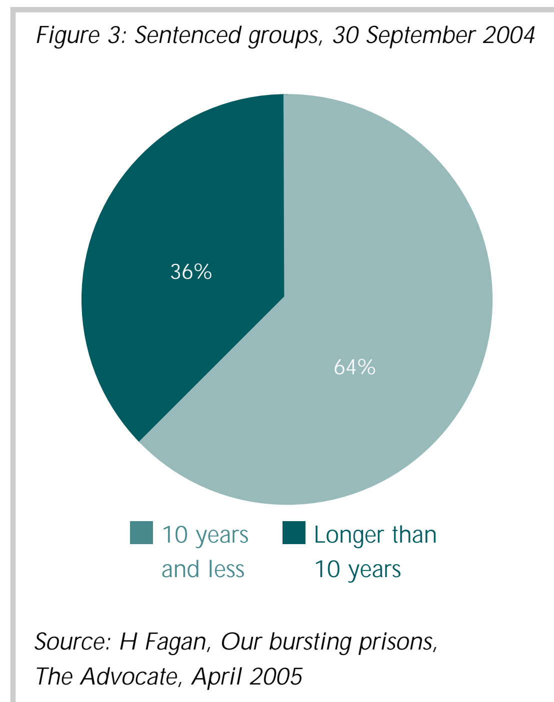

Figure 3: Sentenced groups, 30 September 2004

Source: H Fagan, Our bursting prisons, The Advocate, April 2005

According to the Inspecting Judge, the sentenced prisoner population has increased by 28,801 prisoners since April 2000, despite the fact that about 7,000 inmates were released on parole in September 2003. Fagan argues that with a growth rate of more than 7,000 prisoners a year, the resulting inhumane conditions will necessitate periodic mass releases.

Concerns about prison overcrowding and the impact of minimum sentences are not limited to the Inspecting Judge. The Department of Correctional Services has identified the problem as a key priority, and the Democratic Alliance has also publicly linked the minimum sentencing laws to overcrowding of prisons.[37] Writing on prison overcrowding, Steinberg notes that:

> …[it is] somewhat baffling that parliament passed the minimum sentencing provisions apparently without thought to the effect on prison volumes…[and that there is] abundant international evidence that a sudden and sustained increase in sentences for serious crimes will inevitably lead to an…increase in prison numbers.[38]

Steinberg cites the example of the US where mandatory minimum sentences were introduced in the late 1970s and early 1980s. From 1980 to 1995, the US prison population grew by 242%. The generally accepted reason for this growth is the lengthening of prison sentences, the decreased possibilities of parole, and policies mandating incarceration for growing numbers of offences.[39]

It is an unassailable reality that the sentenced prison population in South Africa has increased rapidly since 1998. Moreover, the evidence is overwhelming that a significantly larger proportion of inmates are serving long terms of imprisonment – with the number of prisoners serving sentences of more than ten years having quadrupled from 10,000 to 40,000 in the past nine years.[40]

Nevertheless, critics argue that it cannot be conclusively shown that the increase in long-term and life sentences is *necessarily* due to the implementation of the minimum sentences legislation. It could, they assert, simply be due to a general increase in the prevalence of serious crime, or to a generally more punitive and intolerant mood among judicial officers. It could even be the result of better police clearance rates for serious offences.

A case-by-case analysis would be needed to establish conclusively the link between the implementation of the legislation and the statistics discussed above. A study of this nature was done five years ago during the South African Law Commission's investigation into sentencing, but the results are now outdated.[41] Furthermore, analysis of police dockets would be required to assess whether better quality investigations can account for the increased numbers of prisoners serving long-term or life sentences.

Conclusion

The legislature's aim, when introducing the minimum sentencing provisions in 1997, was to reduce serious and violent crime, to achieve consistency in sentencing, and to address public perceptions that sentences were not sufficiently severe.

Although the impact of minimum sentencing is difficult to quantify, the information presented in this article suggests that there has been little or no significant impact with regard to any of the above goals. It is unclear that the legislation has served a deterrent function, and the criminal justice system seems no closer to achieving consistency in sentencing than in 1997.

It is difficult to determine whether the legislation has addressed public perceptions that sentences are not sufficiently severe, because specific research on this issue has not been done. However, survey data does indicate that public fear of crime – which is no doubt related to opinion about how the justice system deals with offenders – has increased dramatically over the past five years. The 2003 Institute for Security Studies (ISS) victim survey found that significantly more people felt unsafe in 2003 than they did in 1998.[42]

Although unrelated to its intended goals, the one clear consequence of the minimum sentencing regime is that it has exacerbated the problem of overcrowding in South African prisons.

There is, however, no guarantee that if the minimum sentences contained in Act 105 of 1997 were abolished, the sentencing tariff would drop. Indeed, ever sensitive to the public mood, magistrates and judges are by and large unlikely to shift sentence terms measurably downwards. This means that a more comprehensive sentencing reform initiative should be a matter of priority. Such an initiative

could take the form envisaged in the SA Law Reform Commission's Report (2000) or some other form, such as via the guideline judgments of the Supreme Court of Appeal.

Endnotes

1 *Sunday Tribune*, 30 January 2005, quoting Democratic Alliance Spokesperson on Justice, Sheila Camerer. The death sentence was ruled unconstitutional in 1995 in *S* v *Makwanyane and another* 1995 2 SACR 1(CC).
2 S v Malgas 2001 (1) SACR 469 (SCA) par 25.
3 M Tonry, *Sentencing, judicial discretion and training*, 1992, quoted in SS Terblanche, Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997, *Acta Juridica* 194, 2003, p 137.
4 The National Assembly and the National Council of Provinces have by resolution, on 12 and 13 April 2005, voted to support a further extension of the Act until 30 April 2007. The Proclamation by the State President to give effect to this resolution has been signed. It is perhaps worthy to note that the parliamentary extension was supported by all political parties.
5 A three-year moratorium (imposed in July 2000) on the release of crime statistics was lifted on 22 September 2003.
6 W Schärf & J Berg, Crime statistics in South Africa 1994–2003, 17(1), *South African Journal on Criminal Justice*, 2004, pp 57–78.
7 Ibid, p 61.
8 Ibid, pp 72–73.
9 A Altbeker, The impact of the introduction of the minimum sentencing legislation on levels of crime and crime prevention, presentation at the OSF-SA workshop report on minimum sentencing, January 2005, pp 6–7.
10 Ibid.
11 A Altbeker, Puzzling statistics: Is South Africa really the world's crime capital?, *SA Crime Quarterly* 11, 2005.
12 P Burton, A du Plessis, T Leggett, A Louw, D Mistry, H van Vuuren, *National Victims of Crime Survey: South Africa 2003,* Institute for Security Studies monograph series no 101, Pretoria, July 2003.
13 Part II (b) of Schedule 2.
14 See *OSF-SA Minimum sentences roundtable report*, March 2005, <www.osf.org.za>.
15 The point was also made by a member of the Department of Correctional Services at the Open Society Foundation Roundtable workshop on minimum sentences legislation that such prisoners have nothing to lose and are more willing to use violence and weapons in attempting to escape.
16 *OSF-SA Minimum sentences roundtable report*, op cit, p 7.
17 Referring to A Blumstein, Prisons, in JQ Wilson & J Peterseia (eds), *Crime*, ICS Press, California, 1995, p 408.
18 *OSF-SA Minimum sentences roundtable report*, op cit.
19 SS Terblanche, Sentencing guidelines for South Africa: Lessons from elsewhere, *South African Law Journal*, 120(4), 2003, p 858.
20 Ibid, p 881. See also *OSF-SA Minimum sentences roundtable report*, op cit, p 12.
21 See *Sunday Tribune*, 30 January 2005 for allegations in this regard. It has been rumoured, further, that all of the judge presidents of the various provincial divisions of the High Courts provided submissions to the Department of Justice and Constitutional Development prior to the extension of the legislation, expressing their (and their benches') opposition to the continuation of the life of Act 105 of 1997.
22 *S v Mahamotsa*, op cit.
23 *S* v *Mvamvu* (case 350/2003 (SCA)).
24 *S* v *Njikelana* 2003 (2) SACR 166 (C).
25 *S* v *Mvamvu*, op cit.
26 *S* v *Njikelana,* op cit.
27 *S* v *G,* op cit and *S v Shongwe* 1999 JDR 0473 (O).
28 *S* v *G*, op cit, *S* v *Njikelana,* op cit and *S* v *Shongwe,* op cit.
29 *S* v *Mvamvu*, op cit and *S* v *Shongwe,* op cit.
30 *S* v *Mvamvu,* op cit and *S* v *Abrahams,* op cit.
31 Submission of the Western Cape Consortium on Violence Against Women (copy on file with authors), 2005, p 7.
32 Terblanche, 2003, op cit, p 194.
33 Ibid, p 220.
34 Steinberg, op cit.
35 Steinberg (ibid, p 13) notes that this link appeared to have fallen off the judicial map, and refers in this regard to a study in 2002 in which 42 magistrates and High Court judges were asked whether the capacity of the correctional system to carry out sentences should be considered when sentence is imposed: 80% of the respondents said never or almost never, and only 10% said always or almost always (M Schonteich, D Mistry & J Struwig, *Qualitative research report on sentencing: An empirical, qualitative study on the sentencing practices of the South African criminal courts, with a particular emphasis on the Criminal Law Amendment Act 105 of 1997,* South African Law Commission, Discussion Paper, May 2000).
36 H Fagan, Our bursting prisons, *The Advocate*, April 2005. See too H Fagan, Curb the vengeance: laws on minimum sentencing and parole spell worsening prison conditions, *SA Crime Quarterly* 10, December 2004.
37 *Sunday Tribune*, 30 January 2005. It has also been asserted that an increase in the sentencing jurisdiction of the lower courts has played a contributory role in escalating prison terms, and consequently overcrowding. The jurisdiction for district courts was increased to three years, and that of regional courts

from 10 to 15 years. However, proper case-by-case studies would be required to ascertain whether the tariff has indeed escalated as a consequence of increased sentencing jurisdiction.

38 J Steinberg, *Prison overcrowding and the constitutional right to adequate accommodation in South Africa*, Occasional Paper, Centre for the Study of Violence and Reconciliation, 2005.

39 Ibid, p 10 quoting D Gilliard & A Beck, *Prisons and jail inmates*, 1995 and Bureau of Justice Statistics, Washington DC, 1996; J Woolredge, A state level analysis of sentencing policy and inmate overcrowding, *Crime and Delinquency* 42(2), 1996, p 456; T Gabore & N Crutcher, *Mandatory minimum penalties: Their effect on crime, sentencing disparities and criminal justice expenditure,* Canadian Department of Justice, Research and Statistics Division, Ottawa, 1997.

40 W Hartley, Jails may soon turn away prisoners, *Business Day*, 14 April 2005.

41 See South African Law Commission, *Conviction rates and other outcomes of crimes reported in eight South African police areas*, Research Paper 18, 2000. This study concluded, somewhat bleakly, that crime does indeed pay, with only six convictions after more than two years for every 100 violent crimes (murder, rape and aggravated robbery). Less than one in 20 perpetrators of reported adult rape (5%) or aggravated robbery (3%) is convicted. Moreover, South Africa's figures did not appear to fare well compared to other countries for which comparable data was available. In those jurisdictions, approximately 50% of reported murders result in convictions, compared to 11% in South Africa. The conviction rate for reported rape is 19% in the US and 10% in England and Wales, compared to 7% in South Africa (Research Paper 18, p 26).

42 P Burton, A du Plessis, T Leggett, A Louw, D Mistry, H van Vuuren, *National Victims of Crime Survey: South Africa 2003,* Institute for Security Studies monograph series no 101, Pretoria, July 2003.