

LLM THESIS:

ARE CHILDREN AND JUVENILES IN SOUTH AFRICA AWAITING
TRIAL UNDER CONDITIONS OF HUMAN DIGNITY AND SAFE
CUSTODY?

Student 200179225

DECLARATION

I, GUNN HAUGUM, HEREBY DECLARE THAT THE WORK CONTAINED HEREIN IS ENTIRELY MY OWN; EXCEPT WHERE INDICATED IN THE TEXT ITSELF. THIS WORK HAS NOT BEEN SUBMITTED IN FULL OR PARTIAL FULFILMENT OF THE ACADEMIC REQUIREMENTS FOR ANY OTHER DEGREE OR QUALIFICATION AT ANY OTHER UNIVERSITY:

SIGNED AND DATED IN OSLO, NORWAY ON THE 16TH OF FEBRUARY 2001.

Gunn Haugum

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CHAPTER 1: INTRODUCTION:

1-1: INTRODUCTION:

The South African criminal justice system is under tremendous pressure to deal with the reported increase in juvenile crime. Judging by the statistics provided by the Department of Correctional Services and the South African Police Service there is a considerable increase in juvenile delinquency, in terms of rising frequency of arrest and incarceration of juveniles. In South Africa a juvenile is defined as a person under the age of 21, thus including both children and young adults. A child is defined as a person under the age of 18. This definition is provided for by s 28(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution).¹ The new Correctional Services Act from 1998, also incorporates this definition, and moves away from the term “juvenile”.² The main focus of my research is on children, e.g. persons under the age of 18. The Department of Correctional Services still operate with the definition of juvenile in many of their statistics, so I will make use of the definition juvenile to describe persons under the age of 21 in some instances when this cannot be avoided.

The increase in the incarceration of children has caused great concern in South Africa, which has resulted in projects investigating the conditions under which children are imprisoned. The investigations have focused on both sentenced children those awaiting trial. In South Africa it is common that persons accused of crimes await trial detained in

¹ The Constitution of the Republic of South Africa, Act 108 of 1996.

² Correctional Services Act 111 of 1998 s 1.

prison, this is also the case for children and juveniles. The South African Human Rights Organisation reported in 1997 that the increase in the number of awaiting trial prisoners has led to overcrowding in many prisons, and found that the conditions under which juveniles are kept did not harmonise with the Constitution.³ The Inter-Ministerial Committee on Young People at Risk investigated the places of safety in 1996, and found that the children awaiting trial in these facilities included children being charged with petty offences right through to those charged with serious violent crimes.⁴ At the time of the Inter-Ministerial Committee's investigation there were 204 beds available in the country's places of safety, following the promulgation of Section 29 of the Correctional Services Act, No 8 of 1959.⁵

On 31 December 1999 the juvenile prison population stood at 14 130,⁶ and the Department of Correctional Service itself, admits that the level of the prison population compared to the available accommodation capacity, "clearly indicates that South African prisons are seriously overpopulated".⁷ As of 31 December 1999 the available accommodation in South African prisons was 99 834, the prisons did however accommodate 162 638. This number include all age groups incarcerated in South African prisons, and include the 58 231 awaiting trial prisoners. The cell utilisation accounted to a 62,9% overcrowding nation-wide, but in some of the prisons the overcrowding is reported to be higher than 200%.⁸

³ Report of the National Prisons Project of the South African Human Rights Commission 1997 p 28-30.

⁴ "In whose best interest?" Report by the IMC July 1996 p 6.

⁵ As amended by the Correctional Services Amendment Act, No 17 of 1995.

⁶ Annual Report of the Department of Correctional Services 1999 p 6.

The main objectives of the Department of Correctional Services are the safe custody of prisoners and the humane detention and treatment of prisoners, this is according to their own policy and the Correctional Services Act, 1998, more importantly this is according to the Constitution and in line with the international legal instruments which has been ratified by South Africa.

There are reasons to believe that the Department of Correctional Services are not able to live up to the standards set by themselves, the international instruments applicable to children awaiting trial or the Constitution. The main problems of the Department of Correctional Services are overcrowding and a lack of human resources. These problem areas contribute to other problems with regard to the supervision and control of the prison e.g. there has been an increase in assaults causing death.⁹ The overcrowding also causes serious diseases to spread more easily among the prison population, such as tuberculosis and other contagious diseases. The whole prison population is effected by the problems, but the following will have the situation with regard to children and juveniles awaiting trial in mind. The Constitution provides children special protection in s 28. Awaiting trial prisoners are afforded protection in the Correctional Services Act, 1998 and in some provisions manifest in the international instruments related to prisoners.¹⁰

⁷ Ibid.

⁸ See appendix

⁹ Op cit note 4 p 11.

1-2: OBJECTIVE:

My main objective is: are children awaiting trial under conditions of human dignity and safe custody? In order to reach my objective I will divide my research into three stages.

These three stages are:

1) Which legislative frameworks are in place?

In this first stage I will analyse and assess the legislative frameworks in place which are applicable to children awaiting trial. These instruments are both international and domestic.

2) Policies and new legislation?

The different governmental bodies' response to improve the juvenile justice system and the conditions under which children awaiting trial are incarcerated will be discussed and analysed. The Department of Correctional Services policies and reconstruction of the Department will be analysed and assessed, together with the role of the Office of the Inspecting Judge and the proposed legislation known as the Child Justice Bill, which was drafted by the South African Law Commission in August 2000.

3) How are these instruments applied?

After having analysed the current legislative frameworks, I will to analyse how these frameworks are applied. The letter of the law is useless if it does not materialise itself in

¹⁰ UN Rules for the Protection of Juveniles Deprived of their Liberty, rule 17-18.

peoples lives, applied properly. The second stage will basically involve analysing the present statistics made available to me by the Department of Correctional Services and the Office of the Inspecting Judge. These statistics will provide useful information with regard to, among other, growth in the prison population, reported incidence of assault and increase in reported diseases.

This stage will also involve giving a description of my own experiences while conducting research at one youth correctional facility and one place of safety. A place of safety is defined in the Child Care Act¹¹ as “any place established under section 28 and includes any place suitable for the reception of a child, into which the owner, occupier, or person in charge thereof is willing to receive a child”. I wanted to compare the situation for the children awaiting trial at a youth correctional facility with the situation for those awaiting trial at a place of safety, and interview children at the respective facilities. I also wanted to see if there were different age groups detained in these two facilities, and if children of different ages experienced being detained while awaiting trial in the same way. This research would provide me with current information with regard to the application of the legislative framework. The youth correctional centre I visited was Durban-Westville Youth Correctional Centre (YCC) which is situated in Durban, and the place of safety was Excelsior, which is in Pinetown. Both institutions are situated in the province of KwaZulu/Natal, South Africa.

1-3: METHODOLOGY:

1-3-1: Qualitative research:

I started my research through conducting a search on Sabinet. This search proved to be very useful in finding articles and books written on my subject, or at least close to the subject. The search brought 75 books or articles to my attention. I also searched for information on the Internet, in both South African and international web pages. This was particularly helpful in terms of finding information on the United Nations instruments applicable to children awaiting trial.

After having accessed and read a lot of the information available, this provided me with many names of individuals and institutions which I needed to contact in order to compile more current information. I conducted several interviews with people involved on different levels within the criminal justice system, in particular those involved with children awaiting trial. I interviewed Judge Fagan, the Inspecting Judge of prisons and gained more data with regard to awaiting trial children through him and his office. The Institute of Criminology at the University of Cape Town has a comprehensive library, which included articles and books on my research topic. Ms Kathy Woods, senior researcher at the Institute of Criminology, provided me with information on the proposed Child Justice Bill. Ms Patricia De Lille, Member of Parliament, provided me with all the documents in connection to an application made on behalf of awaiting trial children in Cape Town in 2000. Superintendent Niels Nielsen of the South African Police Service provided some statistics with regard to children detained in police cells. Mr Hendrik

¹¹ Child Care Act 74 of 1983.

Schmidt, Member of Parliament from the Democratic Party, asked the Minister of Correctional Services, Mr Ben Skosana to provide me with information on my topic and I received transcripts from debates in Parliament and the Department of Correctional Services policies and other relevant documents. Ms Ann Skelton, previous member of the Inter-Ministerial Committee of Youth at Risk (IMC) and chairperson of the Juvenile Justice Project Committee, gave some insight into the work of these two committees. At Durban-Westville Youth Correctional Centre I interviewed two of the social workers in order to verify some information given to me by the awaiting trial children and to gain information about the social workers role at the youth correctional centre. At Excelsior I spoke to the Superintendent, Mr Tony Sobramony and to the social worker, Mrs Vanessa Singh in order to get information about the management of Excelsior and to verify the children's stories if possible.

The admission process to the institutions I wanted to visit was surprisingly short and uncomplicated. I have been made aware that this might be a result of getting in touch with the social workers of the facilities in question. A more formal approach might have been much more difficult. I was surprised on several occasions how easy it was to get into the YCC without being asked for ID or checked at all. I was permitted to organise my own interpreter, and there were no questions asked with respect to his background or identity.

The interviews with children awaiting trial at Durban-Westville Youth Correctional Centre and Excelsior Place of Safety, were conducted with hope of getting two different perspectives from the children awaiting trial. There are different Departments in charge

of the two institutions of detention. The Department of Correctional Services are responsible for the safe custody of the children at the Youth Correctional Centre, while the Department of Welfare is responsible for all aspects of the management of Excelsior. Seven semi-structured interviews were conducted, four at the Youth Correctional Centre and three at Excelsior. I would have liked to conduct more interviews, but I chose to conduct longer and in dept interviews, in stead of interviewing a greater number on a superficial level. The interviews took between one and two hours and the children were interview without staff present. The children at Excelsior were interviewed as a group of four, the reason for this was the fact that these children were considerable younger than the ones at the Youth Correctional Centre and they seemed a bit apprehensive to talk to me one on one. Even though I would have preferred to conduct the interviews with one child present at a time, I decided to go through with the interview when the children expressed their will to be interviewed as a group. During the interview the children spoke openly, as far as I was not able to detect any reluctance or hesitation in their answers that can be accounted to the presence of the other children. It was also possible to verify some of the information considering the admission papers and the social workers assessment of each child. The children at Youth Correctional Centre were interviewed with no one present, except from the interpreter on two occasions. There were no time constraints on the children or I when conducting the interviews.

The main obstacle to my research was to get access to some current statistics in the Western Cape while there is a moratorium on these statistics in force since 1998. Unfortunately I was not able to get an explanation from the Department of Correctional

Services for the need for this. When I tried to get in touch with the individuals and office responsible for the moratorium I was set over from the one office to the next, without getting any answers. I also wanted to interview the Head of the Youth Correctional Centre. This was not possible, first due to the fact that it was impossible for me to get through on the telephone, then due to the busy schedule of the Head of the Youth Correctional Centre.

CHAPTER 2: LITERATURE REVIEW:

2-1: INTRODUCTION:

The criminal justice system has undergone several changes since 1994, when a democratically elected government came into place. There has been a restructuring of the Correctional Services, the South African Police Service and the courts, with the Constitutional Court on the top of the hierarchy. Juvenile justice has also received a lot of attention, particularly since South Africa ratified the United Nation Convention on the Rights of the Child in 1995.¹² Both non-governmental and governmental bodies have been involved when investigating the juvenile justice system and making recommendations for change, one of the most influential was the Inter-Ministerial Committee on Young People at Risk (IMC). The IMC was established in June 1995 in response to the crisis following the promulgation of Section 29 of the Correctional

¹² UN Convention of the Rights of the Child adopted by the General Assembly of the United Nations in 1989, resolution 44/25.

Services Act, No 8 of 1959.¹³ This legislation led to the release of over 1000 children from prisons and police cells, most of which were transferred to places of safety from which many absconded. The mandate of the IMC was to contain the crisis and design the transformation of the Child and Youth Care System in South Africa.¹⁴ The IMC delivered a substantial report on the situation of children in conflict with the law in 1996. One of the focuses of the IMC was on children awaiting trial in places of safety, they found that the numbers of children awaiting trial in places of safety had diminished since amendments were made to s 29 of the Correctional Services Act, 1959. The number of children awaiting trial in prisons increased however, following the promulgation of the same amendments.¹⁵

The Community Law Centre at the University of the Western Cape compiled new information concerning both sentenced and unsentenced children in “Children in Prison in South Africa: A Situational Analysis”.¹⁶ This works have provided the basis of further developments in the juvenile justice system. The researchers investigations into the conditions under which children were detained, caused them to criticise the Department of Correctional Services for lack of adherence to the Constitution of South Africa s 28, and s 35(3)(e). They found that children were kept in conditions, which did not comply with the Constitution. The overcrowding of the communal prison cells were one of the main issues the researcher paid attention to. This was a problem area by itself, but caused many other problems to surface to a greater extent, such as violence between the children.

¹³ As amended by the Correctional Services Amendment Act, No 17 of 1995.

¹⁴ “In whose best interest?” Report by the IMC July 1996 p 2.

¹⁵ Ibid p 5.

¹⁶ Community Law Centre, UWC, 1998.

The efforts that have been made have resulted in new legislation, such as the new Correctional Services Act 111 of 1998, which incorporates the new constitutional commitment to children's rights and prisoner's rights. This, together with South Africa's new commitment to international instruments applicable to the field of children's rights and juvenile justice has made an impact with regard to the laws and regulations applicable to children awaiting trial. Several of the chapters of the Correctional Services Act, 1998 has yet to be promulgated. Two of the most relevant chapters which is not in force at present time, is chapter 3, which relates to the custody of all prisoners under conditions of human dignity and chapter 5, which concerns the treatment of unsentenced prisoners.

According to the Department of Correctional Services, the incidence of youth related crime has tripled since 1995¹⁷. On 31 July 2000 6 352 children were awaiting trial in South African prisons, in 1993 the number was 848.¹⁸ According to statistics provided by the Judicial Inspectorate a total of 2 649 children were awaiting trial on charges of aggressive crime,¹⁹ 352 of these children were between the age of 7 and 16. In 1993 the bulk of the crimes committed by children were related to poverty.²⁰ This growth in frequency and increasing seriousness of juvenile crime is a major concern in South Africa.

¹⁷ The Department of Correctional Services Annual Report 1997.

¹⁸ Report on children in Westville Prison. February 1994 p 3.

¹⁹ See annexe 2.

²⁰ See note 18 p 4.

2-2:HISTORICAL BACKGROUND:

2-2-1: International developments:

The approach to the treatment of children and juveniles awaiting trial has undergone drastic changes with the support and backing of the United Nations. Since its foundation the United Nations has formulated numerous international instruments applicable to the treatment of prisoners; both sentenced and unsentenced ones. The work of the UN with regard to prisoners started with the adoption of the Standard Minimum Rules for the Treatment of Prisoners.²¹ This document did not have the particular treatment of children or juveniles awaiting trial in mind, but was meant to apply to all groups of prisoners. Additional standards were endorsed by the General Assembly in 1985 in the UN Standard Minimum Rules for the Administration of Juvenile Justice,²² also known as the “Beijing Rules”. Furthermore, in 1990 both the UN Guidelines for the Prevention of Juvenile Delinquency,²³ “the Riyadh Guidelines” and the UN Rules for the Protection of Juveniles Deprived of their Liberty²⁴ were adopted by the General Assembly. All these instruments have a child-centred approach with regard to the juvenile justice system, and determine that imprisonment should be used as a last resort. I will get back to these international instruments under 2-5.

²¹ Adopted 30 August 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N res.663C.

²² Resolution 40/32 of 29 November 1985.

²³ Resolution 45/112 of 14 December 1990.

²⁴ Resolution 45/113 of 14 December 1990.

2-2-2: Domestic developments:

Immediately after coming into power in 1994 the democratically elected government passed the Correctional Services Amendment Act 17 of 1994. This legislation amended s 29 of the Correctional Services Act of 1959, to prevent the holding of arrested persons under the age of 18 in prisons or police cells for longer than 24 or 48 hours. Prior to 1994 it was common practice to hold children and juveniles awaiting trial in prisons and police cells, even though legislation allowed for children and juveniles to be confined in places of safety.²⁵ The reason for this practice was that places of safety were generally used for the accommodation of children referred to them in terms of the Child Care Act.²⁶ This practice was stopped on 8 of May 1995, when a large group of children and juveniles awaiting trial was released from prisons and police cells into the custody of their parents in terms of the Correctional Services Amendment Act s 1, which substituted s 29 of the Correctional Services Act, 1959. The objective of the legislation was that children should be awaiting trial at home, but this was not possible for many of the children for different reasons, e.g. the children were orphans or had no known relatives. The children, who could not be released into the care of parents or other relatives, were sent to places of safety. The exact number of children remanded to a place of safety is unknown.²⁷ The success of the legislation depended on the infrastructure of the places of safety being able to handle this sudden influx of awaiting trial children. This was not the case. The staff was not trained to take care of awaiting trial prisoners and in some instances the staff were even unwilling to care for the children.²⁸ The facilities were not

²⁵ Correctional Services Act 8 of 1959 s 29.

²⁶ Child Care Act 74 of 1983.

²⁷ See note 14 p 2.

²⁸ IMC Interim Policy Recommendations, November 1996 p 8.

constructed to detain children and as a result of this, many children absconded from the places of safety and failed to return to stand trial.

The aftermath of the crisis caused by the promulgation of the Correctional Services Amendment Act brought about the formation of the Inter-Ministerial Committee on Young People at Risk. The committee's mandate was to contain the crisis and make recommendations for the transformation of the child and youth care systems of South Africa. A situational analysis of state owned and run facilities was undertaken by the IMC from May to September 1995,²⁹ together with a quantitative investigation, that included 5 Reform schools, 17 Schools of Industry and 30 Places of Safety. Out of the total of 6127 placed in these facilities, 15% were awaiting trial, the other 85% had been placed there in terms of the Child Care Act.³⁰ The committee's findings through the qualitative studies were disturbing. The general conditions and standard of care in the facilities visited fell short of standards set by the international instruments as well as the Constitution. Reports and evidence revealed serious intrusion into the children's privacy, the children themselves complained of being victims of emotional, physical or sexual abuse and the committee found a widespread use of isolation cells and corporal punishment.³¹

The issue of the juvenile sentence of whipping was decided on by the Constitutional Court in *S v Williams and Others*³² in 1995. Whipping was found to be inconsistent with

²⁹ Ibid p 9.

³⁰ Op cit note 15.

³¹ Op cit note 16 p 11.

³² 1995 (3) SA 632 (CC).

the prohibition against cruel, inhumane and degrading punishment with reference to s 11(2) of the Interim Constitution,³³ and was therefore abolished. This decision was an important step away from the previous tradition of corporal punishment in South Africa, both in the public and private sphere. It was an affirmation that the new South Africa had other values than the old Apartheid regime, and that these values would bring about many changes to the justice system, for all those involved.

2-3: CRIMINAL CAPACITY:

The age of criminal capacity can have an impact on the numbers of children awaiting trial in prisons or places of safety. If South Africa changed the age of criminal capacity to 14 this would help to bring the number awaiting trial down, to an extent.

South Africa follows the *doli incapax* rule where children between 7 and 14 years of age are presumed to be lacking in criminal capacity. This presumption can however be rebutted, too easily in the opinion of several of the human rights organisations, by the presentation of evidence by the prosecutor to show that the child understood the difference between right and wrong, at the time of the alleged offence, and was capable of acting in accordance with that knowledge. The *doli incapax* rule has de facto caused the minimum age of criminal capacity to be seven years old, which is the lowest in the world together with a few other states.

³³ The Constitution of the Republic of South Africa, Act 200 of 1993.

In the United Kingdom they had the *doli incapax* rule until 1998. The age of criminal responsibility was set at ten years of age, below which no child could be found guilty of a criminal offence. A child between ten and fourteen was subject to a presumption that he or she did not know that what he or she was doing was wrong. The *doli incapax* presumption was abolished with effect from 30 September 1998.³⁴ The reason for this change was prompted by the James Bulger abduction in 1993. In this case, two boys, both of ten years of age took a two-year-old boy on a journey of over two miles and then battered him to death and left him on the railway tracks to be run over. During their trial, the prosecution presented evidence for the purpose of establishing that the two defendants were criminally responsible for their actions in that they knew that what they were doing was wrong. They succeeded in rebutting the presumption and subsequently the boys were found guilty of murder. This case found its way to the European Court of Human Rights (ECHR) where the United Kingdom was criticised for having prosecuted them as adults, but no violation of the European Convention was found.³⁵ The ECHR did observe that the law had been changed so that the UK now has 14 years of age as the minimum age of criminal capability.

The minimum age of criminal responsibility differs greatly through the world³⁶, owing to history and culture. The modern approach is to consider whether a child can live up to the moral and psychological components of criminal responsibility. The question that need to be asked, is whether the child by virtue of his or hers individual understanding can be

³⁴ See section 34 of the Crime and Disorder Act 1998.

³⁵ See Case of V. v the United Kingdom 16 December 1999.

held responsible for what essentially is antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of criminal responsibility will become meaningless. In South Africa efforts should be made to agree on a reasonable lowest age limit for criminal responsibility. The South African Law Commission³⁷ has in its proposed draft bill, entitled the Child Justice Bill³⁸ made recommendations in respect of the criminal capability of children. It proposes to repeal the common law with regard to children below the age of 14 years. Furthermore, the bill proposes to raise the minimum age of criminal responsibility from seven to ten years, and to codify the rebuttable presumption of *doli incapax* with regard to children between 10 and 14 years of age. This proposal is identical to the previous law in force in the United Kingdom prior to 1998. I submit that it seems odd to codify the *doli incapax* rule, which has been overturned by the United Kingdom, recently while it was found to be unsatisfactory.

The international instruments do not contain an unambiguous and unequivocal provision with respect to children's criminal capacity. The UN Convention³⁹ provides merely in article 40(3)(a) that:

“State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as

³⁶ The age of criminal responsibility in some European countries: seven in Cyprus, Ireland and Switzerland, thirteen in France, fourteen in Germany and Austria, fifteen in the Scandinavian countries and eighteen in Spain, Belgium and Luxembourg.

³⁷ SALC was established by the South African Law Commission Act 19 of 1973.

³⁸ SALC project 106: Juvenile justice. July 2000.

³⁹ UN Convention of the Rights of the Child adopted by the General Assembly of the United Nations in 1989, resolution 44/25.

having infringed the penal law, and, in particular: The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”

The “Beijing Rules”⁴⁰ does not specify the age at which criminal responsibility should be fixed. The “Beijing Rules” merely invites the States not to fix it too low.⁴¹

2-4: THE CONSTITUTION:

The Constitution of the Republic of South Africa provides in s 2 that the Constitution is the supreme law of the Republic, and that law or conduct inconsistent with it is invalid. Furthermore, s 2 provides that all obligations imposed by the Constitution must be fulfilled. The Constitution contains two main sections, which have a bearing on children awaiting trial. Section 28 relates to children and section 35 to prisoners but also other groups.

It is important to clarify who are entitled to the protection of s 28, while children are the bearers of the rights enclosed in this section. The Constitution provides for a definition of a “child” in s 28(3). A “child” is a person under the age of 18 years. This is also the definition that the Correctional Services Act of 1998 makes use of, so is also the case in

⁴⁰ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the General assembly in resolution 40/33.

⁴¹ Ibid article 4.

respect to the UN Convention on the Rights of the Child. Awaiting trial prisoners under the age of 18 thus are extra protected through this right.

The Constitution states that the child's best interests are of paramount importance in every matter concerning the child. Section 28 provides:

“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 child enjoys under sections 12 and 35, the child may be detained only for the shortest period of time, has to be kept separately from detained persons over the age of 18 years; and has a right to be treated in a manner, and kept in conditions, that take account of the child's age.”

The Human Rights Committee (HRC) expressed concerns as recently as September 2000 about whether this principle was being complied with.⁴² The Committee's main concerns were the lengthy periods children were awaiting trial, the situation for younger children awaiting trial and the general conditions of the prisons and staffing. According to the HRC large numbers of children under the age of fourteen are regularly remanded to prison without an age assessment. This is clearly contrary to s 28 of the Constitution.

Section 35(2)(e) of the Constitution incorporates the right for prisoners to adequate accommodation, the provision is applicable to all prisoners. There have not been any cases brought before the Constitutional Court, which have challenged the conditions

⁴² Jessica McKay: "Where rights get locked out" Children first, a journal on issues affecting children and their carers. August/September 2000 vol.4, No 32.

under which prisoners live. It is worth noting that nine South African prisons have been closed since 1994 because they did not comply with standards for the detention of prisoners under conditions of human dignity.⁴³ The Department of Correctional Services are currently in charge for about 236 prisons nation-wide, 12 of these are youth correctional facilities.⁴⁴ During 1999 and 2000 new prisons were constructed and completed, among others a new youth correctional centre was opened during November 2000 at Empangeni in KwaZulu-Natal. The erection of new prison facilities is supposed to alleviate the overcrowding and make it possible to close down the prisons that are most hazardous to the prisoners health.

2-5: THE INTERNATIONAL INSTRUMENTS:

South African courts recognised the importance of international law as long ago as in 1971, in *South Atlantic Islands Development Corporation Ltd. v Buchan*.⁴⁵ Now, under the new constitutional order, the importance of international law has been emphasised in several sections of the Constitution.⁴⁶ There is furthermore, a presumption in South African law that a statute will not be interpreted so as to violate a rule of international law.⁴⁷ Should however South Africa violate a rule of international law, this would have to be addressed by South African courts. The international community would react politically and perhaps economically through sanctions, but it has few or no means to react judicially or through force.

⁴³ South African Survey 1999-2000 p 87.

⁴⁴ Op cit note 6 p 6.

⁴⁵ 1971(1) SA 234 (C) p 238.

⁴⁶ See note 4 s 231(4) cf. s 39.

2-5-1: UN Convention of the Rights of the Child:

The human rights of children and the standards to which all governments must aspire to implement, are most concisely articulated in one international human rights treaty: the UN Convention on the Rights of the Child. This Convention is the most universally accepted human rights instrument in history. Every country in the world has ratified the Convention except for two; the United States of America and Somalia are the only countries in the world that have not ratified the Convention. By ratifying the UN Convention⁴⁸, South Africa has committed itself to protecting and ensuring children's rights, and has agreed to hold itself accountable for this commitment before the international community.

Article 40(1) of the Convention provide:

“States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”

In January 2000 South Africa presented its first periodic report under the Convention. Introducing this report before the Committee on the Rights of Children was Essop Pahad,

⁴⁷ See note 4 s 233.

⁴⁸ South Africa ratified the UN Convention on the Rights of the Child on 16 June 1995.

Minister of the Office of the Presidency of South Africa. He emphasised the damage that had been done during the apartheid years to children in this country, and claimed that the situation in South Africa had been nothing short of a war on children during this period.

The South African report states that a great deal has been done to change the lives of children since the ratification of the Convention. Pahad expressed that South Africa was committed to changing the lives of children and following through on its responsibility under the Convention. He noted that the Constitution embraces the rights of the child in its crucial section 28, and that legislation has been passed, more is envisaged and policies have been developed⁴⁹

South Africa admitted in its report that its legislation relating to children is fragmented, with responsibility shared among several governmental bodies. The South African Law Commission's Child Justice Bill is an attempt to create a more comprehensive piece of legislation, and thus address the shortcomings of the South African juvenile justice system with regard to the Convention. I will give an account and analyse elements of this Bill later on in this paper.

The different standards set by the Convention with respect to health care, education, legal, civil and social services are benchmarks against which progress can be assessed. States that are party to the Convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child⁵⁰. The applicable articles

⁴⁹ South Africa presents report to Committee on Rights of Children 25/01/2000.

⁵⁰ Op cit note 28, see article 3(1).

concerning the administration of juvenile justice are article 37 and article 40. Article 37(a) provides that:

“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”

The Constitution embraces this principle in its section 12, which off course is applicable to children as well as adults. The group auditing the Department of Correctional Services have found that the overcrowding in prisons have reached such dimensions that it constitutes an infringement of the right not to be treated in a cruel, inhuman or degrading way.

Article 37(b), second sentence provides that:

“The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”

One of the main objects for creating this principle, is the danger to children of “criminal contamination” while in detention pending trial. It is important to stress, not only the basic principle that pre-trial detention should only be used as a last resort and for the shortest possible period of time, but also that no minors should be held in a facility where

they are vulnerable to the negative influences of adult detainees and the need for alternative measures. With this backdrop one can clearly see the importance of age assessments of children charged with a criminal offence when their date of birth is in question.

Article 37(c) is important with regard to detained children. The article states:

“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”

As early as 1996-1997 did the South African Human Rights Commission (SAHRC) make inquiries into the prisons in order to evaluate whether or not South Africa complied with the obligations imposed by art.37(c). In most instances they found that children and juvenile prisoners are accommodated in separate cells within the prison compound, but there were instances where they were not separated according to art.37(c). The Community

Law Centre of the Western Cape found that unsentenced juveniles are accommodated in the same section as unsentenced male adults at the Odi Prison⁵¹.

Another problem facing the judicial system when separating children and adults is to verify the exact age of the alleged offender. Several adults are in fact detained in the juvenile section, claiming to be less than eighteen years of age.

Article 40 of the Convention provides for several “due process rights”. Art.40 (1) provide:

“State Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for human rights and fundamental freedoms of others and which takes into account the child’s age the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”

The presumption of innocence is expressed in article 40(2)(b)(i). This presumption is fundamental to the protection of human rights, and many question if the presumption is adhered to when the children are awaiting trial for lengthy periods.

⁵¹ “Children in Prison in South Africa: A situational analysis” UWC 1998.

2-5-2: “The Beijing Rules”:

The Beijing Rules were the result of the work of the Sixth United Nations Congress on the prevention of Crime and the Treatment of Offenders, which convened in 1980. The Beijing Rules provide guidance to States for the protection of children’s rights and respect for their needs in the development of specialised systems of juvenile justice. The other international instruments provide limited protection concerning juvenile justice⁵². The Beijing Rules were the first international instrument to comprehensively set down norms applicable to juvenile offenders, which had a child-centred approach. The main purpose of the Beijing Rules was to establish a progressive justice system for young persons in conflict with the law. Several of the fundamental principles expressed in the Beijing Rules have been incorporated into the UN Convention on the Rights of the Child.

The Beijing Rules are not binding *per se*, but because some of the principles enunciated in the Beijing Rules have been included international documents,⁵³ which are legally binding on the parties, one could say that the Rules do have binding force through these other instruments. South Africa is only bound by the Rules or elements of the Rules through other international documents that South Africa is party to, such as the Convention of the Rights of the Child.

In terms of detention pending trial, the rules advocate that pre-trial detention should only be used after having considered alternative measures. These measures could be close supervision, placement with a family or counselling. The Beijing Rules advocate that

⁵² The International Covenant on Civil and Political Rights, UN 1966, provides only general human rights provisions, although some are applicable to prisoners.

⁵³ Such as the UN Convention.

once in detention, juveniles should be kept in a separate institution altogether, or in a separate part of an institution also holding adults and only for the shortest possible period of time. The Rules are an ideal for the further development of juvenile justice, and politically they have been of great influence. South Africa are not able to live up to the high standards set by the Rules at this moment in time.

2-5-3: The UN Rules for the Protection of Juveniles Deprived of their Liberty (JDL).

The JDL Rules⁵⁴ seek as their primary goal to regulate the management of institutions for young people who are in conflict with the law. The rules are also applicable to children who are taken from their homes and placed in terms of health or welfare provisions. The rules' intention is to counteract the detrimental effect of deprivation of liberty by ensuring respect for the human rights of juveniles.

The JDL rules describe a juvenile as any person under the age of 18⁵⁵. The children who can seek protection from the rules are those deprived of their liberty; thus it is important to define what constitutes deprivation of liberty according to the rules. Rule 11(b) provides us with this definition:

⁵⁴ Adopted by the General Assembly on 14 December 1990 by resolution 45/113 after recommendations made by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

⁵⁵ JDL rule 11(a).

“The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at free will, by order of any judicial, administrative or other public authority”.

The JDL rules have the same legal status as the Beijing Rules; they are not legally binding *per se*. They are non-binding recommendations, even though some of the rules have become binding by virtue of their incorporation into treaty law.

Even though the JDL rules incorporate standards regulating the entitlement of juveniles under arrest or awaiting trial, a general rule is that detention before trial should be avoided and only be allowed under exceptional circumstances⁵⁶. When a juvenile has been detained the highest priority should be given to ensure a speedy trial.

The JDL rules call for the separation of juveniles from adults in detention⁵⁷, and the classification of juveniles according to their sex, age, personality and type of offence, with the view to ensuring their protection from harmful influences and risk situations.

South Africa is not able to fulfil the aims of the JDL rules at present. Children are awaiting trial for long periods of time, and the South African bail system is *de facto* causing children to be detained while awaiting trial, even if this is not necessary.

⁵⁶ JDL rule 17 second sentence.

⁵⁷ The only times juveniles should be detained together with adults are if they are from the same family, or if a special programme is constructed that has shown to be beneficial to the juveniles concerned. See rule 29.

2-5-4: Other relevant international instruments:

The Beijing Rules and the JDL rules work together with the Riyadh Guidelines⁵⁸ and the Standard Minimum Rules for the Treatment of Prisoners (SMR)⁵⁹. The SMR, which came about as early as 1955, are applicable to all prisoners, and are not especially designed for children and juveniles and their particular needs. The Riyadh Guidelines embrace a positive and pro-active approach to the prevention of juvenile justice. The Guidelines are very comprehensive in that they deal with almost every aspect of social life, and not only children detained in prisons.

The Guidelines, similar to the other two UN instruments on juvenile justice are “soft law”, thus not legally binding for international, national and local legislative or judicial bodies.

2-6: INTERNAL LEGISLATION:

2-6-1: The Correctional Services Act 8 of 1959:

The legal provisions for dealing with children in conflict with the law have been, and still are, scattered across several main statutes dealing with criminal procedures, probation services, childcare and correctional services⁶⁰. A further problem concerning the administration of juvenile justice, is the fact that awaiting trial children are the shared

⁵⁸ United Nations Guidelines for the Prevention of Juvenile Delinquency, adopted by the General Assembly on 14 December 1990 by resolution 45/112.

⁵⁹ The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders brought about the SMR. Adopted by the General Assembly on August 30 1955.

⁶⁰ The Child Care Act 74 of 1983, The Prison Act of 1959 (now the Correctional Services Act 8 of 1959) and the Criminal Procedure Act of 1977.

responsibility of the Department of Welfare and the Department of Correctional Services, which is responsible for their safe custody.

The Correctional Services Act 8 of 1959, initially known as the Prisons Act,⁶¹ before the name changed in terms of s 33(1) of Act 122 of 1991. This act did not contain any definition with regard to children, a juvenile however, is defined as any person under the age of twenty-one years. This definition is still operational, while the Correctional Services Act of 1998 only introduces a definition with regard to children. The Prisons Act included some of the principles included in the United Nation Standard Minimum Rules for the Treatment of Prisoners. In Van Zyl Smit's opinion this was a sophisticated attempt to gain international acceptance for the South African prison system,⁶² but in practice the Prison Act did not adhere to the principles contained in the UN Standard Minimum Rules for the Treatment of Prisoners. Since 1991 far-reaching revision of the 1959 Prisons Act has taken place through several amendments. This was done to make the correctional legislation more in line with the new constitutional commitment to children's rights and prisoner's rights. For example, demilitarisation of prisons was introduced on 1 April 1996⁶³, which was an important signal to the South African public, proving the Department of Correctional Services commitment to change.

The Correctional Services Act, 1959 contains a definition of juvenile, which is not in line with the international instruments. A juvenile is, according to the Act, any person under

⁶¹ Short title, previously 'Prisons Act', substituted by s. 33 (1) of Act 122 of 1991.

⁶² Dirk Van Zyl Smit "South African Prison Law and Practice" 1992 p 31.

⁶³ For further discussion, see Amanda Dissel: "The passing out parade: demilitarisation of the Correctional Services" In *Acta Criminologica*, vol.10, no 1 1997.

the age of twenty-one years. The Act does not include any definition of what a “child” is. This is however made clear by s 28 (3) of the Constitution and article 1 of the UN Convention on the Rights of the Child. In both these provisions, a child is any person below the age of eighteen years. It is clear that the Constitution is the supreme law of the land and overrides or supplements the Act’s definition.

Section 29 of the Act provides for regulations regarding the detention of unconvicted young persons and women. Section 29 (5)(a) provides:

“A person referred to in subsection (1)(b) who is accused of having committed an offence shall before his or hers conviction and sentence, not be detained in a prison or in a police cell lock-up unless the presiding officer has a reason to believe that his or her detention is necessary in the interest of the administration of justice and the safety and protection of the public and no secure place of safety, within a reasonable distance from the court, mentioned in section 28 of the Child Care Act (Act 74 of 1983), is available for his or her detention.”

The section provides furthermore, that the young person in question shall be brought before the court that made the order of such detention every 14 days to enable such a court to reconsider the said order. This provision is a safe guard for the young person detained, but it also puts the judiciary under a lot of strain having to hear these cases again and again every two weeks. The time that is used by the courts on this matter, could

be put to better and more efficient use if other safe guards were provided, so that the courts could concentrate on getting cases through the system.

Section 29 (6) provides for the separation of certain groups of prisoners from other groups. Persons under the age of 18 should be kept separate from prisoners over 18. This is in line with s 28(1)(g)(i) of the Constitution, the “Beijing Rules and the JDL rules.

The Correctional Services Act of 1959 remains operational in respect to sections, which is not repealed by the Correctional Services Act of 1998.

2-6-2: The Correctional Services Act 111 of 1998:

The new Correctional Services Act⁶⁴ does provide for a definition of a “child”, which is in line with the Constitution⁶⁵, namely that a child is a person under the age of 18.⁶⁶ This is an improvement, but several of the regulations of the Department of Correctional Services still contain provisions with regard to juveniles,⁶⁷ and the Department of Correctional Services still operate with the term juvenile in most of their statistics with regard to children and juveniles remanded in prison. This makes it a lot harder to find the exact figures and data in connection with children awaiting trial. The relevance of this is that the Constitution provides special protection for children under 18 years of age, and not for those between 18 and 21. It is important in the future that the Department of

⁶⁴ Correctional Services Act 111 of 1998.

⁶⁵ Op cit note 4 s 28(3).

⁶⁶ Ibid s 1.

⁶⁷ See regulation 137.

Correctional Services produce statistics that exclude the juvenile group between 18 and 21. This will make it easier for the Department of Correctional Services to provide the awaiting trial prisoners under 18 years of age with the rights provided for by the Constitution.

The previous Correctional Services Act of 1959 has been replaced by the new Correctional Services Act of 1998. The President has signed the relevant new act, which was published in the Government Gazette for general information on 27 November 1998. Unfortunately, only some chapters of the new Act are in force while several of the most significant changes from the old act are not. There has been no movement within the government recently, which would suggest when the rest of the Correctional Services Act of 1998 would commence. I will in the following go through the sections, which are applicable to children awaiting trial, even though they are not yet in force.

The Act provides for a correctional system where the aim is to provide safe custody of all prisoners under conditions of human dignity. This is now the purpose objectives of the DCS, which are outlined in the annual reports of the Department of Correctional Services.⁶⁸ So even though chapter 3 of the Act is not yet in force, the ideals expressed in chapter 3 has been embraced by the DCS. The new Act is a radical departure from the discriminatory system which were inherited from the past, and ensures that the correctional system will be operated within the frames of the Constitution and the international instruments.

⁶⁸ See Annual Report 1999.

A “child” is a person under the age of 18⁶⁹, and the Act provides that prisoners who are children must be kept separate from adult prisoners and in accommodation appropriate their age⁷⁰. The Act sets out general principles with regard to unsentenced prisoners in chapter 5. Section 46 (1) is a codification of the common law principle of minimum interference in the lives of awaiting trial prisoners⁷¹. Section 46 (1) provides:

“Unsentenced prisoners may be subjected only to those restrictions necessary for the maintenance of security and good order in the prison and must, where practicable, be allowed all the amenities to which they could have access outside prison”.

The chapter also includes provisions with regard to unsentenced prisoners clothing, the right to receive food and drink and the right to receive visitors, letters and to communicate through letters and telephone. These provisions are only to the benefit of unsentenced prisoners, while chapter 3 applies to all prisoners, sentenced or unsentenced.

Chapter 3 embraces the principle that the custody of all prisoners should be under conditions of human dignity. The Department must take such steps as are necessary to ensure the safe custody of every prisoner and to maintain security and good order in every prison⁷². There is no qualification within the provision with regard to that the Department should do what is possible to maintain security and good order in the prison.

⁶⁹ Op cit note 11 s1.

⁷⁰ Op cit note 11 s7(1)(c).

⁷¹ See *Whitaker v Roos and Bateman, Morant v Roos and Bateman* 1912 AD 92.

⁷² See note 11 s4(2)(a).

CHAPTER 3: POLICIES AND NEW LEGISLATION.

3-1: THE DEPARTMENT OF CORRECTIONAL SERVICES:

3-1-1: Introduction:

The Department of Correctional Services is currently in charge of managing a total of 162 638 prisoners nation-wide, sentenced and unsentenced. On 31 December 1999, the Department of Correctional Services managed 236 prisons countrywide, 12 of these are youth correctional facilities.⁷³ The youth correctional centres are prisons that provide solely for the separate detention of young offenders. The Department of Correctional Services' objective with youth correctional centres are, *inter alia*, the provision of distinctive custodial, treatment and development programmes as well as religious care in an environment which is conducive to the development of young offenders.⁷⁴

The Department of Correctional Services has gone through significant changes during the 1990s, with the Correctional Services Act of 1998, which was assented to by the President on 19 November 1998, completing the transformation. This was the perception the public and the Department of Correctional Services had for some time. The year 1999 proved to us all that the Department of Correctional Services still must improve drastically if they want to operate in a manner conducive to human rights, just administrative action and an efficient allocation of resources. 1999 proved to be a very turbulent year for the Department. Allegations of corruption and mismanagement were made in the media, and this eventually culminated in the voluntary withdrawal of the

⁷³ See the DCS Annual Report 1999 p 6 cf. p 8.

Commissioner of the Correctional Services, Dr. Khulekani Sitole. An management audit of the Correctional Services was ordered in the aftermath of this.⁷⁵ The factors that provided the background for the Audit was most notably:

- the resignation of the former Commissioner.
- the report from the Auditor-General arising from a special investigation into alleged irregularities among senior officials of the Department of Correctional Services.
- the comments made by the arbitrator in the case *Bhengu v Department of Corrections*: “the documentation reads like something reminiscent of the goings on in the most basic of banana republics. It is quite clear that in the Province of KwaZulu-Natal from the beginning of December 1998 until February 1999 the situation amongst top level management could only be described as absolutely chaotic....on its own version. The respondent has shown a clear inability to properly manage itself in KwaZulu-Natal.”⁷⁶

The Audit team made several troublesome discoveries during their work, and recommendations were made to the Department of Correctional Services to improve the situation. I deal with the findings of the Audit team below, in terms of their relevance to the safe custody and treatment of awaiting trial children and juveniles.

3-1-2: Restructuring the Department of Correctional Services:

⁷⁴ Ibid p 8.

⁷⁵ Audit ordered by the Minister of Public Service and Administration and the Minister of Correctional Services.

⁷⁶ See Management Audit of the Department of Correctional Services: Final Report February 2000 p 6.

The Audit found nothing inherently wrong with the basic layout of the current organisational design of the Department of Correctional Services, and did e.g. not recommend that the Department should be abolished as a separate department, which was suggested by other departments. The area that caused the Audit team the most concern, was that of the human resource management. Their inspection revealed a deeply flawed system riddled with mismanagement and manipulation for either personal or sectional gain. Some particular areas of concern were the selection process, appointment, promotion, performance awards and transfers. The systems dealing with all these functions were malfunctioning because of favouritism, cronyism and corruption.⁷⁷ According to the Audit team, the breakdown of proper procedures in terms of the management of human resources appears to coincide with the appointment of Commissioner Sitole. He apparently took full advantage of all the powers of his office, and made sure that people he knew were appointed and promoted to posts in the department. The “preferred” candidates were appointed with little or no regard to established and publicised criteria. The Audit group concluded that drastic action had to be taken to be able to remedy the situation. They recommended that the regulations for appointment, promotion and transfer should be strengthened, and any departure from them should require explanation.⁷⁸ Another problematic area is the lack of order and discipline within the Department, which perhaps is a result of poor implementation of the demilitarisation of the prison system.

⁷⁷ Op cit note 72 p 21.

⁷⁸ See note 72 p 25-26.

In a report from the Department of Correctional Services from 3 October 2000, many of the Audit teams grievances and recommendations are addressed. The restructuring of Department follows three phases:

Phase 1: Addressing the obvious dysfunction at head office.

Phase 2: Alignment of the provincial office structure with that of head office.

Phase 3: Refinement of the organisational structure and redemarcation of management areas.

The restructuring of the Department of Correctional Services is to be effected within the bounds of the existing financial limitations.

4-1-3: The overcrowding in prisons:

Overcrowding is the result when the Department Correctional Services' capacity can not compete with the growth in the prison population. The problem of overcrowding is the single most difficult problem for the Department to handle, and it impacts on all groups of prisoners, including the children awaiting trial. The Department of Correctional Services is in the unenviable position that is has to take responsibility for the care and safe custody of all prisoners when referred to the prisons by the courts. The influx of prisoners is outside the control of the Department.

The Audit team found that the levels of overcrowding in some prisons are such that the communal cells are packed to the point where conditions cannot be said to meet the

minimum standards prescribed by the Constitution.⁷⁹ The team also received expert legal advice, which concluded with that if a group of prisoners were to bring a class action against the Government in respect of these conditions, it was likely that it would be successful.

Some of the factors that cause overcrowding are:

◆ Increase in court cycle times:

Since 1995 there has been a significant increase in the time it takes for a case to be settled by the courts. In 1995 it took 76 days on average, while in 2000, the number of days had increased to 140 days. This has caused an increase in the awaiting trial population, both adults and juvenile prisoners.

◆ Awaiting trial prisoners, which have been granted bail, but can not afford to pay:

This is of relevance with regard to children and juveniles awaiting trial. Many children are given bail, but are not able to raise the money needed to be released.

The effects of overcrowding:

The effects of overcrowding are general, but there are no indications that this should not also relate to children and juvenile awaiting trial and their surroundings.

- Causes tension, hostility and aggression with regard to both prisoners and officials.
- Not conducive to efficient application of rehabilitation programmes.
- Restricts effective supervision and control.

⁷⁹ See note 72 p 27.

- Creates unsafe working environment
- Undermines security and safe custody.
- Increases maintenance costs of prison buildings.
- Increases the burden on ablution facilities, kitchens, hot water systems and other prison infrastructure.
- An increase in the deterioration of prisoners health⁸⁰, and a growth in mortalities.

1998

1999

Cause of death	Sentenced	Unsentenced	Sentenced	Unsentenced
Suicide	9	6	10	2
Assault	1	4	6	4
Shooting	1	1	3	0
Drowning	2	0	0	0
Other causes	15	29	11	25
Total	28	40	30	31

There is no explanation in the Annual Report of the Department of Correctional Services with regard to the high number of deaths caused by other causes, or why awaiting trial prisoners seem to have a substantially higher risk of dying in prisons than sentenced prisoners. The Department of Correctional Services do not have any statistics with regard to the number of deaths of children in South African prisons, but the Office of the Inspecting Judge have the numbers for 1999. A total of 25 prisoners under the age of 19

died of natural causes in South African prisons in 1999. 3 of the children were between 10 and 14 years of age. 3 prisoners between 15 and 19 died of unnatural causes, it was not possible for me to establish the reasons for their premature deaths. As of 31 July 2000 21 prisoners under the age of 19 died while in custody.

Measures taken by the Department of Correctional Services to address the overcrowding:

- ◆ A task team was established to focus on the following:
 - *Utilisation of clustering approach to formulate strategies.
 - *Advancement of Community Corrections systems to its fullest extent.
 - *Transfer of unsentenced juveniles to Places of Secure Care.
 - *Conversion of sentences of imprisonment into Correctional Supervision.
 - *Extend the amount of bail that may be set by the SAPS.
- ◆ Release of certain categories of awaiting trial prisoners.⁸¹
- ◆ Optimal utilisation of Asset Procurement and Operating Partnerships.⁸²
- ◆ Electronic monitoring of prisoners, allowing them to be “detained” outside the prison.

⁸⁰ See appendix, table on prisoners with tuberculosis.

⁸¹ See below.

⁸² This is in fact the group which have been chosen by the DCS to build two “private” prisons in South Africa.

- ◆ Extension of the awaiting trial project within the IJS to reduce the cycle time of awaiting trial prisoners.⁸³
- ◆ Identification, renovation and upgrading of existing facilities.

A new prison which will alleviate the overcrowding in KwaZulu-Natal is the prison at Empangeni with a capacity of 1 392, out of which one section is for children and juveniles, both sentenced and unsentenced. One important measure to address the overcrowding and the general conditions for awaiting trial children is to build special secure care facilities. Some upgrading and renovation has been done to make traditional places of safety into secure care institutions, but there are far too few places in secure facilities today to really have an impact on the overcrowding of prisons.

Releases:

In terms of s 67 of the Correctional Services Act, 1959 the Minister approved that the parole dates of offenders who oppose approved parole dates may be advanced with a maximum of 9 months. Aggressive and sexual offenders are excluded from this measure. About 7000 offenders benefited from this measure on October 2 2000. Some of the prisoner awaiting trial was also released in terms of s 66 of the Correctional Services Act, 1959. The Cabinet approved that prisoners awaiting trial for less serious offences, where bail had been set at R1000 or less, may be released. This was done during the week up to 15 September 2000 when a total of 8 262 awaiting trial offenders were released.

⁸³ The DCS own statistics and report uses the word offenders to describe the awaiting trial prisoners, this is

3-1-4: The Department of Correctional Services' HIV/Aids policy:

There are 2 600 registered HIV positive prisoners on 31 December 1999, while 136 have been diagnosed with Aids. There are no statistics with regard to children and juveniles with HIV/Aids, and there are no separate statistics with regard to awaiting trial prisoners. There is no reason to believe that the HIV/Aids policy should not be implemented also for this group.

The Department admits that it has a specific responsibility in supporting national endeavours of HIV/Aids prevention.⁸⁴ The Department has therefore created a management strategy in order to provide for the needs of all offenders, and the policy also include officials as a target group in educational endeavours. The overall escalation of deaths in prison caused by "natural" causes has increased from 186 deaths recorded in 1995 to 737 deaths recorded in 1999. For the first five months of 2000, 440 deaths were recorded. This is an overall increase of ca. 290% during the past five years. The post mortem reports suggest that 90% of these "natural" deaths caused by HIV/Aids.⁸⁵ There was an increase of 38% in the number of prisoners in custody during the same period, but the overall rate of the increase in deaths in prison was substantially higher. A projection was made based on the figures of the past five years of the number of deaths that could occur, should the escalation continue.⁸⁶ The projection is daunting. Based upon this deaths of prisoners related to HIV/Aids will amount to 7000 prisoners per annum in five

not in line with the principle of being presumed innocent until proved guilty.

⁸⁴ Draft policy document, Management strategy: HIV/AIDS IN PRISON, report 03/10/2000.

⁸⁵ Letter from the Office of the Inspecting Judge to the Commissioner of DCS 20/06/2000. See table A.

⁸⁶ Projection carried out by the Office of the Inspecting Judge.

years time and 45 000 per annum in ten years. The Department must take this into account when planning for additional prison capacity.

The Department of Correctional Services' HIV/Aids policy is based on these principles:

- 1) Confidentiality, respect, sensitivity and kindness in dealing with HIV/Aids matters.⁸⁷
- 2) Promotion and encouragement of voluntary HIV-testing.
- 3) Non-segregation of HIV/Aids offenders from other offenders.
- 4) Availability of pre and post testing counselling services.
- 5) Ensuring full offender, family and community involvement in HIV/Aids activities.
- 6) Adequate management and control of sexually transmitted infections.
- 7) The availability of condoms to enable the offenders to protect themselves.
- 8) Provision of appropriate post exposure prophylactic services in all prisons for personnel who during work are exposed to body fluids, blood, blood-contaminated fluids, and other body fluids and needle pricks.
- 9) Accessibility to adequate health care services for the proper management and effective treatment of HIV/Aids and other complications.
- 10) Consideration of early release of offenders who are terminally ill.
- 11) Proper handling of dead bodies to ensure protection of personnel and offenders.
- 12) Ensuring effective surveillance of HIV/Aids and Sexually Transmitted Diseases and anonymous epidemiological surveys to determine the magnitude of the epidemic.

- 13) Monitoring of HIV/Aids activities to determine the effectiveness of intervention programmes.
- 14) A multidisciplinary approach and accountability in provision of services.
- 15) Ensure that there is a HIV/Aids focal person in each prison who will be actively involved in co-ordinating HIV/Aids programs.
- 16) Multi-skilling of personnel to help reduce the impact of HIV.
- 17) Provision of services that meet the needs of the youth and female offenders.
- 18) Creation of a supportive environment at all levels in HIV/Aids activities or programs.
- 19) Active involvement of the management at all levels in HIV/Aids activities or programs.
- 20) Ensure measures to protect the rights of offenders against possible infection.

These guiding principles are all extremely commendable and the policies seem to have been carefully thought out. Unfortunately there is hard evidence against these principles being adhered to in practice. The children at the Youth Correctional Centre had not been trained in life skills to enable them to take responsibility regarding their own health and lives, and condoms were not available in the prison, see principle 7. It also is a fact that sex does take place in prisons which is non-consensual. According to the Audit teams report most staff accept that the inexperienced younger prisoners are sexually abused and raped. This is an outrage and cannot be accepted by the Department. It is not enough having a good policy if it is not implemented on every level of the Correctional Services. In the last Annual Report of the Department of Correctional Services there is not a lot

⁸⁷ The DCS was found guilty of having neglected a prisoner's right to privacy in *C v Minister of Correctional Services* in 1996.

reported on the Departments battle with HIV/Aids. There was a programme presented by the social workers on HIV/Aids aimed at counselling. 2 333 prisoners participated in the group work, while 3 640 came for individual interviews. There is a present no comprehensive statistics on how many prisoners are infected by the HIV virus. Hopefully this will change soon, so that the Department will in fact know how considerable this problem is and through that be compelled and empowered to take action. It is particularly important to hinder the spread of HIV within the prison system. Prisoners who engage voluntarily in sexual activity, must be provided with condoms and knowledge about STD's and HIV. The prisoners who are abused or raped must be afforded prophylactic treatment immediately, free of charge. If infected they should be provided with the best medical treatment available, while the Department must be held responsible if it can not provide imprisonment under conditions of human dignity and safe custody.

The Office of the Inspecting Judge made an estimation of the numbers of deaths in prison related to HIV/Aids. The estimation shows that 45 000 prisoners will be infected by the year 2010.⁸⁸ The graph includes all groups of prisoners, not only children and juveniles.

3-2: THE OFFICE OF THE INSPECTING JUDGE:

3-2-1: Introduction:

The Judicial Inspectorate was established with effect from 1 June 1998, in terms of s 25 of the Correctional Services Act of 1959.⁸⁹ South Africa's first Inspecting Judge was Judge Tengrove, who was appointed by the President for a period of two years. The Judicial Inspectorate is an independent mechanism established to investigate and scrutinise the Department of Correctional Services. The object 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.⁹⁰ In order to fulfil his mandate the Inspecting Judge must as soon as possible, appoint Independent Prison Visitors for the various prisons throughout South Africa, in terms of s 92(1) of the Correctional Services Act, 1998. This has yet to be done in regard to many prisons. The appointment of such Independent Prison Visitors would be of immense help in recording complaints from prisoners. During the Pilot Project in the Western Cape the 15 Independent Prison Visitors collectively conducted 8272 private interviews with prisoners. During these interviews they received and dealt with a total of 5709 complaints from these prisoners.⁹¹

NATURE OF COMPLAINTS RECEIVED:

⁸⁸ See annexure 3.

⁸⁹ As amended by the Correctional Services Act 102 of 1997.

⁹⁰ Section 85(2) of the Correctional Services Act, 1959.

⁹¹ Inaugural Annual Report Judicial Inspectorate 31 March 2000 p16.

1. Treatment and conditions in prisons.	2 343
2. Transfers	1 035
3. Medical treatment.	942
4. Food	380
5. Parole	365
6. Bail and Appeals	304
7. Assaults	289
8. Solitary confinement	23
9. Hunger strikes	21
10. Deaths	7
TOTAL	5 709

3-2-2: The Inspecting Judge:

The current Inspecting Judge is Judge Johannes Fagan, who until recently was Deputy Judge President of the High Court, Cape Provincial Division. He was appointed by President Mbeki on 1 April 2000. I meet with him in Cape Town on Tuesday the 26th of September 2000, and conducted an interview with him. He came across as being very energetic and optimistic on the behalf of his work and the development of prisoner's rights in South Africa.

The whole object of the Judicial Inspectorate was to have an independent body to look at the conditions in which prisoners are kept in prisons, and to oversee that they are

humanely treated. The Inspectors have full access to any document and so far there have been no problems in connection to their visits to prisons. Their visits are announced.⁹² The independence of the Office is maintained through the Inspecting Judge reporting only to the President and Parliament. The Department of Correctional Services and the Department of Justice have no say in the way the Inspectorate is run. The Judicial Inspectorate is however, dependent on the co-operation of the Department of Correctional Services for the payment of its expenses.⁹³ The Judge felt it is crucial to the authority of the Judicial Inspectorate in achieving its objectives, that the prisoners and correctional officials perceive the Inspectorate to be an independent and impartial reporting authority, and not the extended arm of the Department of Correctional Services.

The Office received many complaints from awaiting trial prisoners, but not so many from children awaiting trial. The Judge wanted to look into the reasons for the lack in complaints from this particular group. He did not conclude with that this was because of their custody being substantially better than the custody of other awaiting trial prisoners. At the time I was there over 8 000 awaiting trial prisoners, amongst them children, had been released from prison. This came about after proposals were made to this effect by the Inspecting Judge.

It is still early to conclude on what kind of impact the Judicial Inspectorate has had on the conditions under which children and juveniles are incarcerated. The Inspectorate is currently embarking on an investigation into the health services of South African

⁹² A Judge can walk into any prison at any time, unannounced.

⁹³ Op cit note 88 p 17.

prisons. They will look into, *inter alia*, if prisoners have access to adequate medical treatment in terms of s 35(2)(e) of the Constitution. This includes both the physical and mental well being of the prisoners. The investigations are of a general nature and do not focus particularly on children or juveniles.

3-3: THE SOUTH AFRICAN LAW COMMISSION:

3-3-1: Introduction:

The South African Law Commission was established by the South African Law Commission Act 19 of 1973. The main objects of the South African Law Commission are to make recommendations for the development, improvement and reform of the law in South Africa. After the ratification of the UN Convention of the Rights of the Child in 1995, the South African Law Commission was requested to look into the area of juvenile justice and to make recommendations for reform in this field of law.

An Issue Paper was published for comment in 1997 which proposed that a separate Bill should be drafted in order to provide for a comprehensive set of procedures for the management of cases where children are accused of a crime. At the end of 1998 the South African Law Commission published a discussion Paper accompanied by a draft Bill. All relevant government departments and non-governmental organisations involved with the field of juvenile justice were involved with the consultation process. Many of their submissions were included in the second draft Bill, which were submitted to the Minister

for Justice and Constitutional Development in July 2000.⁹⁴ It is expected that the Parliament will discuss the Bill some time during 2001.

3-3-2: The Child Justice Bill:

The proposed Bill will apply to any person legally resident in South Africa, who is alleged to have committed an offence and who, at the time of the alleged commission of the offence, is or was under the age of 18 years. This is in line with the UN Convention and the other international instruments applicable to this field of law. The Bill does not stop there, but includes juveniles under 21 years of age in the child justice system in exceptional circumstances.

The main aims and principles of the Bill are, inter alia, to:

- protect the rights of children subject to the Bill;
- promote the concept of ubuntu in the child justice system;
- promote co-operation between the relevant government departments, other organisations and agencies involved in implementing an effective child justice system.

The Bill does not include provisions directly applicable to children awaiting trial in prisons or places of safety, The South African Law Commission are considering reforming the Child Care Act which would contain provisions with regard to children awaiting trial in places of safety, while the Correctional Services Act of 1998 all ready is in place in relation to children awaiting trial in prisons. Even though the proposed Bill

⁹⁴ SALC Project 106 Juvenile Justice.

does not effect the conditions under which children are awaiting trial directly, it will nevertheless have an impact if implemented. The Bill proposes to make diversion a key element in the criminal justice system in relation to children. This will entail that fewer children will be awaiting trial. This will help with the general overcrowding of the prisons and places of safety, thus benefiting the children awaiting trial.

The Bill proposes to rise the age of criminal liability from seven to ten years. As previously discussed under 2-3, it is submitted that the minimum age of criminal capacity should not be set as low as 10 years of age. Other countries have moved away from the *doli incapax* rule, and a low minimum age of criminal responsibility. The *doli incapax* rule should also be abandoned and not remain part of South African law in the future. The problems with age assessment and psychological assessments of children accused of crimes makes this rule very difficult to practice, and it would be much easier to operate with one set minimum age of criminal liability. The Bill proposes that even though children under the age of ten years lack criminal capacity in terms of the draft Bill, it should nevertheless be possible to bring the child before a probation officer for assessment. The probation officer may after such assessment refer the matter to the children's court, or refer the child for family counselling or therapy.

The issue of age determination does however arise even if the *doli incapax* rule is scrapped. This issue will surface in the South African justice system for years to come until the government has established proper means of registration when it comes to births, and keeping comprehensive records of the identity of people. It is not always easy for the

prosecutor or a judge to know how old a child accused of a crime is. Many children do not even know their exact birth date themselves. The South African Law Commission proposes a solution to this problem by providing that where a child's age is uncertain or in dispute, the magistrate presiding at a preliminary inquiry should make an assessment of age based upon all available evidence. The age that is determined should be considered to be the child's age until contrary evidence is placed before the court.

The Bill contains several proposals that will have a great impact on the numbers of children awaiting trial in prisons, if implemented as intended. The Bill proposes making the unconditional release of children into the custody of his or her parents the focal point when children are accused of crimes.

A child can furthermore only be remanded in prison if:

- the child is 14 years or older.
- the child is charged with an offence referred in Schedule 3 to the draft Bill.
- Referral to a place of safety or secure care facility is not possible owing to certain specified circumstances.

The Bill proposes to change the number of days that can pass before a child awaiting trial in prison or place of safety, must appear in court. Currently, a child must appear before the same court that remanded him or her to await trial in prison or place of safety, every

14 days.⁹⁵ The draft Bill proposes to extend this period to 30 days for children in prison, and 60 days for children awaiting trial in a place of safety or secure care facility. This, I believe, does not protect the children from being remanded for too long a period in prison, and might cause children awaiting trial for even longer than under the present conditions.

One of the proposed Bill's strengths is that this legislation provides for the framework which is systematic and individualised when ensuring the protection of the procedural rights of the child. The Bill will however encounter major challenges if promulgated, while the current South African criminal justice system lack both financial and human resources to deal with the implementation of the legislation.

CHAPTER 4: CHILDREN AWAITING TRIAL

4-1: THE ACCOMMODATION OF THE CHILDREN:

The Constitution provides every child the right to be treated in a manner, and kept in conditions, that take account of the child's age.⁶¹ The JDL rule 28 provide us with more details, in terms of the conditions a child should be detained under. The rules provide:

“The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical

⁹⁵ See note 13.

⁶¹ Op cit note 3 s 28(1)(g)(ii).

health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.”

The investigations into the prisons previously undertaken by the South African Human Rights Commission and other groups of researchers have exposed conditions under which children are detained, not to be conducive with the Constitution. In 1998, Jody Kollapen, commissioner of the SAHRC, visited the Nylstroom Prison. He found on inspection of the awaiting trial section that the children were not being detained separately from the adult prisoners. The SAHRC has also reported that at Thohoyandou Prison the juveniles had to share dirty mattresses, that there is a lack of running water and sometimes no hot water and that many of the juveniles were not properly clothed, or with no shoes at all.⁶²

I visited the Youth Correctional Centre at Durban-Westville in Durban, KwaZulu-Natal and Excelsior Place of Safety in Pinetown, KwaZulu-Natal to find out how the situation is for the awaiting trial children today.

⁶² Report of the National Prisons Project of the South African Human Rights Commission 1997 p 28.

4-1-1: FACILITIES:

DURBAN-WESTVILLE YOUTH CORRECTIONAL CENTRE:

Most South African prisons accommodate the children awaiting trial in large communal cells. This is also the situation for the children awaiting trial at the Youth Correctional Centre. Some of the communal cells, which were built to house about 30 children, were at my visit accommodating 64 children.

The children themselves clean the cells every morning and afternoon. Different children were supposed to clean the cells from time to time, but one of the children I interviewed complained over being forced to clean the cell every day. In his opinion he was forced to do this because he was one out of 3 Indians sharing a communal cell with 61 children from a Zulu background. The children did not complain over the standard of the cells as such, but complained over the extreme overcrowding.

The juvenile section at Durban-Westville was opened in 1996 as one of the first youth correctional centres in the country. The juvenile section is physically separated from the main prison and is build to accommodate 160 juveniles. The juveniles are separated into two sections within the prison according to their age. The one section accommodates the children below 16 years of age, the other the children between 16-18. This is in line with the Constitution and the international instruments, I was however, told that there were several adults detained in the juvenile section. The reason for this was the fact that some adult detainees would claim to be less than 18 years old. This was done for two reasons, one reason was to be able to be detained in the juvenile section, which was considered to be an easier and safer place to be detained in. Another reason to claim to be younger than

18 was in order to perhaps secure a lower sentence or receive an alternative sentence than imprisonment. One of the children I spoke with openly admitted to be over 18 years of age and claimed that this was not rare within his section.

The children was not separated according to offence, which resulted in children being charged with theft being detained together with children being charged with murder x 2. The children reported that there was a lot of talk about what each and every child was charged with, and many stories were told in order to gain respect within the group or section.

The children had access to the lavatories twenty-four hours a day, and according to the children the lavatories were at present functioning and in satisfactory condition.

EXCELSIOR PLACE OF SAFETY:

The rooms at Excelsior house three to twelve children. At the time I was there 22 children were accommodated in the section were the youngest children were housed. Altogether 83 children under the age of 18 were accommodated at Excelsior at the time I was there. The facility was created to house about 70 children so institution was crowded. They were all awaiting trial, except for one, who was waiting to be placed in a reform school. The children's ages were recorded for 67 of the children. 16 children had not a known age, but were believed to be under the age of 18. One of the children had been awaiting trial since 28/02/1999; all the other children arrived in 2000.⁹⁶

⁹⁶ See annexure 1.

The section I visited three times was clean, tidy and well maintained. The children washed the areas themselves, but got help from the general cleaners from time to time. I had access to all rooms when I was there, and found the sleeping quarters, the toilets and bathrooms to be in good condition. There were no detectable odours and the toilets all had toilet paper. The children had access at all times to the lavatories.

The children were separated from the older children most of the time, but not for recreation or education. The children in the other section are all supposed to be under the age of 18, but I was told by the social worker that she felt sure that several of the juveniles awaiting trial there were in fact over 18. The children were not separated in any other way, so you had the same situation at Excelsior as at the Youth Correctional Centre, with children being charged with petty crimes being together with those charged with multiple violent crimes.

The children at Excelsior were awaiting trial on very different charges.⁹⁷ 22 of the children had been charged with theft, 25 with housebreaking, 3 with murder 7 with rape, 11 with robbery. Other charges included possession of dagga, attempted murder, fraud, kidnapping and possession of stolen property. The nature of these alleged crimes was mostly economical. Children awaiting trial nation-wide are also charged with a great number of economical offences. 2 502 children were awaiting trial charged with economical offences on 31 July 2000, 2 649 children were charges with aggressive crimes, 876 awaited trial charged with sexual offences and 63 for narcotics.

There were no limitations with regard to what children could be awaiting trial for at Excelsior. I was told by the management team that it was often accidental who were allowed to await trial at Excelsior and not at the Youth Correctional Centre, at least with regard to the group between 15-18 years of age.

4-1-2: OVERCROWDING:

DURBAN-WESTVILLE YOUTH CORRECTIONAL CENTRE:

The YCC was built to accommodate 160 children, but has recently been overcrowded or severely overcrowded. The Human Rights Committee found that in June 2000 an average of 550 children were awaiting trial at the Youth Correctional Centre.⁹⁸ Up to 90 children were sharing a cell meant for 19 children.⁹⁹ At the time of my first visit to the Youth Correctional Centre 413 children were awaiting trial in the facility, the numbers a bit down compared to June 2000. Then on the 15 of December the numbers were up to 437. The overcrowding results in no time for the social workers to do nothing more than assess the children on arrival; it causes the children to have to share mattresses, two or three to one. Furthermore it causes more tension among the children and makes it more difficult to maintain order and control within the prison.

EXCELSIOR PLACE OF SAFETY:

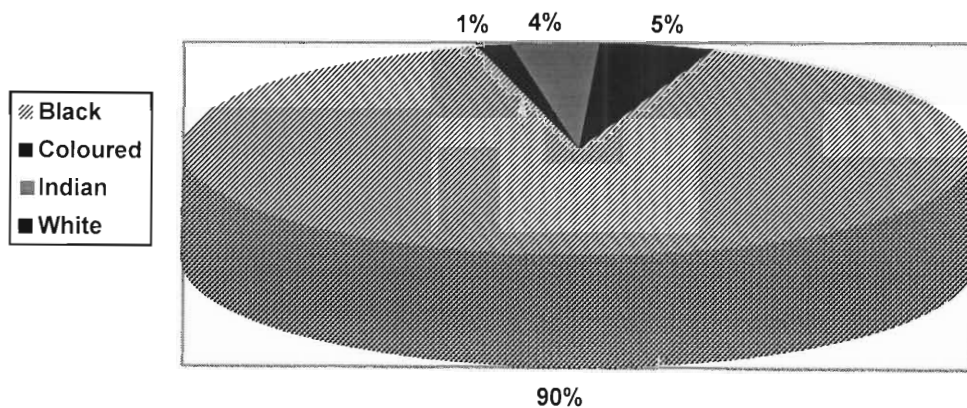
⁹⁷ See annexure 2.

⁹⁸ Op cit note 37 p 18.

⁹⁹ Ibid.

At Excelsior there was little overcrowding at the time I was there, but I was told that often the numbers are up to way above 100 children awaiting trial. The social worker and the superintendent told me when this was the case, that there was not much more they could do than detain the children. There were not enough resources to care for the children, or work on the rehabilitation of the children. On December 12 2000, the number was up again, at this day 104 children were awaiting trial at Excelsior Place of Safety.

Demographics at Excelsior September 2000.



4-1-3: SAFE CUSTODY:

DURBAN-WESTVILLE YOUTH CORRECTIONAL CENTRE:

Several of the children at the Youth Correctional Centre complained to me about assault and intimidation taking place within the prison. Younger and physically weaker children are threatening to wash other children's clothes, or to do their chores for them. It is implicit that if the child refuses to do what he has been told that he will be in trouble, and

if the child pursues to involve the warders he knows that he will take a beating for that too. After all, lock up time is at 13.00. Some of the children I spoke with also complained over abuse from the warders. They felt that it was hard to distinguish between what they would consider a physical reprimand, which they thought was allowed and did not object to, and physical abuse.

One of the social workers listed these grounds why it might be inappropriate to place children at the Youth Correctional Centre:

- 1) Overcrowding
- 2) Sodomy
- 3) Inappropriate remand
- 4) Unduly long court remand dates

EXCELSIOR PLACE OF SAFETY:

At Excelsior, the children I spoke with, both the group I interviewed and others whom I had conversations with, did not complain about any abuse taking place what so ever. The social worker told me that their policy was strict and if abuse was reported or witnessed the person responsible would be removed from Excelsior to the Youth Correctional Centre. The children expressed that they thought that it was all right being at Excelsior when they first had to be detained. They would have liked however, to be released into the custody of their parent or other relatives. The children did admit to fighting with each other from time to time, but emphasised that this was “normal” fighting amongst boys their age. This claim was substantiated by the logbook that the care workers kept and reported events in. I has access to these books and fights and problems amongst the

children was reported every time they took place in the logbook. I did not find that the entries of fights was anywhere near alarming, and my own experience observing the children for three whole days was entirely positive with regard to the general atmosphere at Excelsior.

4-1-4: BEDDING & CLOTHING:

DURBAN-WESTVILLE YOUTH CORRECTIONAL CENTRE:

The children complained about the lack of sheets and blankets. The children are supposed to keep their own sheets but for many of them this is not possible while they are not in contact with their families and have no money. The shortage of these items caused fights to erupt among the prisoners, while older or physically stronger children would steal from the smaller ones. The situation now is not any different from 1998, when it was reported that the unsentenced children at Youth Correctional Centre was not provided with sheets, while the sentenced children were.¹⁰⁰

The children were allowed to wear their own clothes, which is in line with new Correctional Services Act from 1998, even though it is not in force yet. The problem rose when the children did not have sufficient clothing, e.g. only one shift of summer clothing or winter clothing. It was common place to swap or borrow clothes with other children, for a fee off course. Sometimes you could pay off debt by selling your labour, buy lending something valuable, like a watch, to the other person. Cigarettes was much

¹⁰⁰ See note 6 p 21.

sought after commodity, and would get you some nice and warm clothes on a winters day.

EXCELSIOR PLACE OF SAFETY:

The children at Excelsior were allowed to wear their own clothes, but most of them had no sufficient clothing. Most of the children wore relaxed sports wear provided by the institution. Their clothes came in different sizes and colours, and the children could choose their own outfit every day after they showered. The election of the clothes was made one child after the other in the order they finished showering and drying themselves off. It seemed to create no problems.

4-2: THE CARE THE CHILDREN RECEIVE:

4-2-1: Nutrition:

DURBAN-WESTVILLE YOUTH CORRECTIONAL CENTRE:

All the children I was in contact with at the YCC complained about the monotonous menu, the poor quality of the food and lack of food. In the morning they would get two slices of bread, usually with cheese, together with tea. Then before lock up time at 13.00 they would have the day's last meal, which would be more bread and usually some porridge. Juice, milk and vegetables was rarely served.

It has previously been reported that the children at YCC complained about a powder that was being added to their cool drinks, tea or coffee.¹⁰¹ The alleged powder was said to make the children sleepy, lazy and loose their interest in sex. Researchers handed over samples of the powder for analysis at the state's expense in 1996.¹⁰² Two years later the samples was not analysed, and while doing my research no one I spoke to could tell me anything more about these samples.

EXCELSIOR PLACE OF SAFETY:

At Excelsior the Department of Welfare manage their own kitchen. The kitchen facilities were clean and orderly, and at the time I was there the kitchen staff was making cookies for the children's tea break. Usually the children got several slices of bread with tomatoes and cheese for breakfast, together with tea, but sometimes juice or milk. The children ate in groups and carried their plates and cups to the kitchen when finished. For lunch sandwiches was served again and dinner varied from day to day. Altogether, three meals a day was served. None of the children complained of going to bed hungry, and they were satisfied with the quality of the food.

4-2-2: RECREATION, PHYSICAL & MENTAL CARE:

DURBAN-WESTVILLE YOUTH CORRECTIONAL CENTRE:

¹⁰¹ See note 6 p 25.

¹⁰² Ibid.

The Youth Correctional Centre accommodated about 430 children on the occasions I was there. Two social workers, one male one female work at the Youth Correctional Centre full time and a second female social worker is assisting from time to time. The social workers did not feel that they had time to attend to the children's needs, when asked if they could help me with some more background on the children I interviewed, the answer was negative while they did not know the children personally. Their time was generally spent on assessment of the new arrivals, and paper work. The children complained about the lack of access to the social workers or generally disregarded them, as useless and of no help to them. One of the social workers was Zulu speaking, from a Zulu background, while the other was English speaking from an Indian background. None of the children mentioned anything in regard to the social workers language skills or background.

Six child care officers, one female and five males, are at present employed at the Youth Correctional Centre. The social worker could not explain their main function to me when asked.

At the Youth Correctional Centre the children were allowed to watch television during the late morning and early afternoon, before lock up time. The children complained about lack of things to do. Every day was very similar to the previous day, the children not being able to distinguish between the days and to keep track of time in some instances.

The children complained about lack of exercise. The only area they could move around in was the yard within the prison, which is completely surrounded by grey concrete walls with a concrete floor.

EXCELSIOR PLACE OF SAFETY:

At Excelsior one female social worker is presently employed. She admitted that it was a drawback for her not being able to speak Zulu, while a large portion of the awaiting trial population were Zulu speakers. She needed an Zulu interpreter for many of her assessments of the children and general conversations with them.

At present 44 child care officers were working at Excelsior, 33 males and 11 females. Approximately 24 of these are holders of the *Basic Qualification in Child Care Certificate*, 4 are holders of the *UNISA Certificate in Child and Youth Care* and 1 hold the *National Higher Diploma in Residential Care* from the Technikon. This information was not available at the YCC. At Excelsior there were no warders, only child care workers or care workers. The superintendent of the institution felt it imperative to try to create a “non-prisonlike” atmosphere at Excelsior.

The main responsibilities of the child care workers is to:

- to care for the children
- to intervene in the life-space of children
- to complete assessment of the children
- to enable effective and relevant rehabilitation programmes for the children.

At Excelsior the children were allowed to smoke cigarettes and tobacco during their breaks, and the care workers told me that this was a conscious choice made by the institution, it would be very demanding on their resources if they were to uphold a prohibition. They also felt that the children were more easy to manage if they had these few breaks, were they were allowed to smoke.

The children at Excelsior were able to play football in a large field surrounded by fairly high walls to prevent escapes, when the weather permitted this activity. They children played against each other or against some of the care workers. The children could also play together in the courtyard were games had been marked up on the ground. There were also indoor activities for the children to do, e.g. puzzles, card games and other games. The children were allowed to watch television in the evenings, and every Friday they were shown a video.

Neither the Youth Correctional Centre nor Excelsior has a psychologist employed to take care of the children.

4-2-3: EDUCATION:

DURBAN-WESTVILLE YOUTH CORRECTIONAL CENTRE:

There are some teaching being done at the Youth Correctional Centre, but the children I interviewed all complained over the difficulties having large classes with children on very different levels of education and skills. Two of them found it much better to read on

their own, but complained that there were few books available and reading material in general. When they were lucky enough to get a hold of some newspapers this created problem, while some of the other children would rather that one used the newspaper as cigarette paper.

EXCELSIOR PLACE OF SAFETY:

The children at Excelsior go to school from Monday to Wednesday and none of the children I spoke with had anything in particular to say about school, neither positive nor negative.

4-2-4: CONTACT WITH FAMILY OR COMMUNITY:

DURBAN-WESTVILLE YOUTH CORRECTIONAL CENTRE:

The children I spoke with had no or very little contact with their families. The reasons the children had no other little contact with their families were numerous. Some of the children were orphans, others had only one parent. Some of the children did not want any contact with their relatives while others did. The children who had no contact with relatives or others from outside the prison were put at a disadvantage compared to the ones who did get visitors. They had no means of getting extra clothes, cigarettes or money. The children felt abandoned and alone, which perhaps was one of the reasons they agreed to speak with me? When I asked why the children agreed to speak to me, some of the children told me they had nothing else to do with their time.

The community came to the Youth Correctional Centre in the form of “missionaries”. Three to five adults from Christian churches came to the Youth Correctional Centre every Tuesday to tell the children about God. Not all the children felt comfortable with having to listen to their sermons, but understood that it was difficult to separate the children who did not want to take part in a religious meeting from those who did. The shortage of warders made this very difficult, if not impossible to separate the children during religious meetings.

EXCELSIOR PLACE OF SAFETY:

At Excelsior the situation was more or less the same as at the Youth Correctional Centre. Some of the children did get visitors from time to time, but most of the children did not. The reasons for the lack of communication between the children and their parents were many. Some of the children were street children and had no or very little contact with their families, others were orphans. One child that I spoke with was lucky enough to get visitors frequently. He was very happy about this, and told me that he got tobacco from his relatives, which he sold to the other children and made a nice profit. He did however say that it was nice to receive visits from relatives besides getting tobacco, but the tobacco was important for his day to day life inside the place of safety.

4-3: AWAITING TRIAL CHILDREN & HIV/AIDS:

The Department of Correctional Services does not have any records as to how many children or juveniles under their care and safe custody are infected with HIV. In the Annual Report from the Department of Correctional Services 1999, it is reported that

2600 prisoners are infected with HIV, and 136 are diagnosed with AIDS out of a total prison population of 162 638.¹⁰³ There are no statistics directly related to children and juveniles in prison, sentenced or unsentenced.

As far as I have been able to establish, no efforts have been made by the Department of Correctional Services to look into the infection rate of HIV/AIDS among the children and juveniles awaiting trial, or any other group for that matter. In fact the Department of Correctional Services have tried to obstruct current plans to test adult prisoners at Durban-Westville by researchers from the Health Economics and HIV/Aids Research Division at the University of Natal. The researchers were to be admitted into the prison if they signed a form, presented to them by the Department of Correctional Services, stating that they “would not make any false generalisations based upon the results gathered at Durban-Westville.” At present this matter has not been resolved, and the researchers are still waiting to be permitted to pursue with their research.

The Department of Correctional Services did however commemorate the World Aids Day, together with the World Tuberculosis Day at all levels.¹⁰⁴ In the Annual Reports there is no further information on effort made by the Department of Correctional Services to monitor and prevent the spread of HIV within the prisons.

¹⁰³ DCS Annual Report 1999 p 19.

¹⁰⁴ Ibid.

DURBAN-WESTVILLE YOUTH CORRECTIONAL CENTRE:

At the Youth Correctional Centre, three of the children denied that HIV was a problem at all. It was never discussed amongst the children, nor had they received any information about HIV/AIDS from anyone within the prison system. One of the children did express the view that there were children that obviously were infected, and as far as he knew these children was treated unconventionally with traditional *Muti*. One of the children expressed concerns over HIV being transmitted within the prison when the prisoners had consensual sex or when it was not consensual. Sexual abuse did take place within the Youth Correctional Centre. This was acknowledged by two of the children, while one child denied that sexual abuse took place, or at least that it did not take place in “his” section. The latter seem to be the “norm” among children in prison. Researchers have come across these views previously too. Anne McKay said in “Children in Prison in South Africa: A Situational Analysis that:¹⁰⁵

“ It is common knowledge that assault by fellow prisoners is a major problem in South African prisons. The difficulty is finding evidence of how widespread it is, who is doing it and then making disciplinary charges stick. I have interviewed children of all age and cultural backgrounds, and have been told: ‘no, it is not a problem’.”

The children did not give details with regard to the extent of the abuse, but one child claimed that it was “common”. The sexual contact was in for of anal sex and not oral.

¹⁰⁵ See note 6 p 52.

Some of the sexual contact was voluntary, but one of the children expressed that most of the sexual contact between the children awaiting trial was not.

EXCELSIOR PLACE OF SAFETY:

The children at Excelsior that I spoke with did not know of any HIV within the institution. They observed however, that it was not likely that any child would tell anyone about having HIV if they knew they were infected. They did not worry about HIV, and stated that there was no sexual activity going on between the children. The children I spoke with at Excelsior was considerably younger than the ones I spoke to at Westville. They were also monitored to a much greater extent, making it much more difficult to commit assaults of any category.

4-4: THE INTERVIEWS:

4-4-1 AT DURBAN-WESTVILLE YOUTH CORRECTIONAL CENTRE:

I meet with social worker, Artie Rajcoomar at 09.30 at Westville Youth Correctional Centre on Monday 09.10.2000. It was a sunny and hot spring day in Durban and I was here to have a preliminary meeting with four young men awaiting trial at this facility. I did not know any of these young men yet. I did not know their social background or the reasons for their incarceration.

The centre was opened in 1996 and it is one of the most modern youth correctional facilities in the country. The impression it gives is one of hard concrete floors and walls, moderately clean and quite spacious. When I arrive I am surprised by the lack of security measures. Having been in this country for 8 months there is one thing that always baffles me, and that is to which extent security is a part of life here. I found it a bit amazing that I was able to meet with four awaiting trial juveniles without supervision, without ever being questioned, asked for identification or searched. Perhaps the reason for this treatment was that I, being a white female, might not be perceived as much of a security threat.

On the day I was there, 413 children and juveniles were awaiting trial in the awaiting trial section of the facility. Most of the children came from poor African backgrounds, but there were children from other ethnic backgrounds there too. I had to be accompanied by a member of staff down four floors to get to the section where the children were held. I catch a glimpse of a large courtyard made of concrete and bricks, with groups of children hanging around, some in groups, other staying by themselves. Many of them look up and acknowledge that I am there, then they get back to what they were doing.

I am shown into a room with a few chairs and a table. This is where I meet with the four boys the social worker randomly picked out in the yard after asking them whether or not they are interested in talking to me. The four boys automatically sit down on the floor while the social worker is in the room. When she leaves I ask them to join me at the table and I greet them all with a handshake.

I am told the boys are all 16 years old, two of Zulu origin, one from an Indian background and one from a coloured background. All of them speak some English, but to communicate with ease with the children from a Zulu background I need the other two to interpret for me. I proceed to tell them about myself, and what I am doing at the Youth Correctional Centre in the first place. I feel it is important to try to give them the impression that I am not a person they should feel threatened by. This to establish a relationship were they will be able to share some of their thoughts and experiences with me when we meet for the actual interview in a few days.

We talk about football and I tell them a little about Norway. They think it is amusing that we have snow and ice for 4-6 months a year, and can appreciate that I like Durban with its subtropical climate. We do not talk a lot about why the kids are there or how they are experiencing being awaiting trial prisoners. I am told however, that two of them have been there since May, while the other two have been there since June and July. Since the interviews take place in the beginning of October 2000, the children have all ready been there for 3-5 months.

The boy that arrived the latest at the Youth Correctional Centre is the only one of them that has been granted bail. The bail is set at R1000, and he tells me there is no way his family can come up with that sort of money. He thinks that he is going to be awaiting trial at the Youth Correctional Centre for a long while.

The meeting with the boys goes on for about an hour, and before we part I ask them once more if they are interested in contributing and make sure they understand that they are at liberty to decide on this matter alone. I do not promise them anything in return with regard to their co-operation. They all seem to understand why this cannot be done, and they maintain their willingness to be part of my qualitative study at a later stage.

I make arrangements with the social worker to come back to the Youth Correctional Centre at Friday the 13.10.2000. In the following, my interviews with the children are reported. The names have been changed to comply with the children's right to privacy. The interviews were recorded and notes were taken, both by myself and by the interpreter when he was party to the interview. The amount of information, and also the nature of the information encouraged that I could not rely on memory only.

PETER:

Age: 17

Born: Chatsworth, Durban, and Kwazulu-Natal.

Cultural background: Indian.

Religious background: Tamil.

I spoke to Peter on his own, without my interpreter or any other children or warders around. Peter was awaiting trial on a robbery charge. He had been awaiting trial for three months when I meet him at the Youth Correctional Centre at Westville Prison. He was waiting for his bail application to be heard and hopefully be released or moved to a place

of safety. His worst fear was to have to stay at the Youth Correctional Centre after having his bail application heard. He has not had any visitors while awaiting trial, neither his parents nor grandparents. He tells me that prisoners, like him, who are not getting visitors, are being called “farfar”. He did not know the origin of this word, only its meaning. The “farfar’s” had a lower standing with the other prisoners, because they had less or no money compared to the other prisoners. This resulted in a lack of all commodities for this group of prisoners, such as cigarettes, toilet articles and clothes. Peter, being a “farfar”, washes some of the other children’s clothes in return for a drag of a cigarette or maybe even a whole cigarette.

From Peter’s point of view he was constantly at risk of being physically or sexually assaulted by the other children and juveniles awaiting trial. He had been beaten so badly, that he had lost his hearing in one ear. The fellow inmates that did this tried to intimidate him and to hide his wounds, smearing a white lotion on the side affected the most. They were not successful. Luckily Peter was noticed by the warders, taken aside and questioned about what has taken place. The warders then physically reprimanded the children responsible for Peter’s injury. Peter was not moved to another unit or cell.

Peter has not yet been assaulted sexually, he tells me, but he lives in constant fear of such assault. He tells me about some of the gangs that are part of prison life. The “26’s” and the “28’s”. The “26’s” deals mostly in money, cigarettes, watches and other valuables, often searching the children on arrival. The “28’s” concern themselves with “sexual transactions” of sorts. In Peter’s words: “they deal in sex”.

During the three months that he has been at the Youth Correctional Centre, Peter has been threatened with razor blades, steel wires and knives five or six times. He has been emotionally threatened, “almost every day”. The other prisoners tell him the offences with which they have been charged, and what they are capable of doing. When I ask him what the warders are doing to prevent this victimisation, he answers that they are trying to protect him during the day, but after lock up time at 15.00, “they are not there”. Peter has never been disciplined or assaulted by a warder, and Peter is the only of the interviewees that is relatively positive when commenting on warders and their behaviour.

Peter complains to me about being harassed and victimised because he is of Indian origin. He is one of three Indians in a communal cell he is sharing with 61 children from a Zulu background. The cell is designed to house approximately 30 children, but the current number stands at 64. The awaiting trial prisoners all sleep on mattresses lying on the floor, two children to one mattress. Peter explains to me how the children are dealing with the shortage of bedding and blankets. They steal from each other and fight over them, sometimes these fights are observed by the warders who interfere to stop the fight. The warders then punish one or both of the children; Peter feels this punishment is arbitrary and often unfair.

Peter did not know any of the other children before he came to the Youth Correctional Centre. Most of the other prisoners do not even call him by his name; they simply call him “Indian”. He has not made any “friends” at the centre, but feels that Michael is the

closest he has to calling a friend. Michael is powerful, Peter tells me. He made himself respected shortly after arriving at the Youth Correctional Centre through fighting for some sheets and blankets that he had taken from some other prisoners. For Peter, being physically small and somewhat timid in his approach, Michael is good to have around. The two of them share a common interest, to read books and magazines. Unfortunately there are few books available at the Youth Correctional Centre, and newspapers often get taken from Peter because the other children need them to roll cigarettes. Peter would much rather have better access to books and other reading materials, than having to participate in the education offered at the Youth Correctional Centre. Peter feels that the standard of the education offered is much too low for him, having passed standard eight as his highest level of education.

During the three months that Peter has been awaiting trial at the Youth Correctional Centre he has not heard anything about HIV/Aids from the staff. It is a taboo topic, and the juveniles do not discuss this among themselves. There are no condoms available for the prisoners, even though sexual practice and sexual assault is common, according to him.

When Peter arrived he was given toilet paper and toothpaste. Unfortunately these items were taken from him by the other prisoners the second day he was there. He complains about the struggle to get sheets and blankets between the prisoners, and that many of the blankets are filled with lice. The prisoners clean their cell and the toilets every morning and every afternoon. The prisoners are supposed to all take their turn. Peter tells me that

he must clean every single morning, because he is Indian. The awaiting trial prisoner's are allowed to wear their own clothes, but most of them only have one set of clothing. The children are very aware of the importance of washing their clothes and keeping themselves clean, they do not want the lice problem to get more serious than it all ready is.

Peter shares the same view as the other awaiting trial prisoners when it comes to the nutrition they are getting. He receives the last meal of the day at 1 p.m. consisting of bread and porridge, which leaves him hungry again by 6 p.m.

MICHAEL:

Age: 17

Born: Johannesburg, Guateng.

Cultural background: Coloured.

Religious background: Christian.

I interview Michael without an interpreter and there are no other people around while we talk. Michael is serious and a bit reserved when I start talking to him. He has been at Westville Youth Correctional Centre for over four months when I meet with him. I start with asking him about his background, and he tells me that he has been living in Durban North the last three years with his aunt, after both his parents were killed in a car

accident. He has one older brother living in Johannesburg but he does not have any contact with him. His aunt and him do not relate well he tells me. She has not been to see him while he has been in prison and she has not responded to the court's request for her to appear in court when Michael is presented every fortnight. Michael is bitter because of this, since he could have been released into the custody of his aunt if she had approached the court to assume guardianship. As far as he knows no bail has been set, but the social worker informs me that they have recommended him for release into the custody of his aunt.

Michael is very sceptical about his court appointed legal representative. He has meet with his lawyer once, over two months ago. It was a very brief meeting where only a few words were exchanged. Since their meeting someone else had been standing in for the lawyer in court. Michael has no faith in that the lawyer will be able to help him. His next court appearance is in nine days, until then nothing is going to happen.

Michael, like every other new arrival, had to go through an initiation procedure when he first arrived. The other prisoners watch the new arrivals carefully, and the way you handle yourself the first few days at the prison will determine your position with the group. He had no sheets or blankets the first night in the prison, so Michael decided to take four sheets from another prisoner. Two for him and two for Peter (the previous interviewee) who could not manage to steel some sheets for himself. Naturally, the person he had taken the sheets from tried to take them back, but Michael managed to fight him off and was "awarded" the sheets. This incident gave Michael a reputation for

being though and able to stand up for himself. This is why he now manages to hold on to items that he is given, such as toothpaste or toilet paper.

The prison life is monotonous and Michael feels that there is a lot of “indoctrination” going on. He explains that there is a lot of peer pressure taking place between the prisoners. He himself tries to stay clear of the gang members. “I try to refrain myself from a lot of contact with the other prisoners”. I ask him how the relationship between him and the other prisoners is, the answer is quick and clear: “there is no relationship”. Even though Michael does not feel that he is at any physical risk at the time being, he does find that the other prisoners are emotionally threatening towards him, mostly because he is in the minority at the prisor. When we discuss his relationship with the warders Michael laughs and states: “it is impossible to have a genuine relationship with the warders. At the end of the day, they want to make something out of you”. Michael is not very positive when it comes to the warders and their role. He was “disciplined” by a warder once, and feels that the warder saw what he wanted to see, not what was behind the actual problem. Michael feels that it is hard to separate between discipline and assault. “Assault goes with discipline in this place” is his opinion.

I ask Michael if there is a lot of talk about HIV/Aids among the prisoners or from the prison officials. He cannot remember any information given about HIV/Aids while he has been at the Youth Correctional Centre. He can only recall a meeting, which dealt with drugs in the prison. The prisoners themselves do not talk about HIV/Aids. Michael states that “some keep themselves in the blind when it comes to this issue”. There are over 420

awaiting trial prisoners at the Youth Correctional Centre, and he is of the opinion that there several of the prisoners must be infected by the disease. He remembers that he heard some children talking about *Muti*, but does not know if this had anything to do with treatment for HIV/Aids.

With regard to religion and religious practice Michael opines that Christianity is being forced on them, because two or three Christian women visit the prison every Tuesday and give a sermon. There are no other options for the prisoners who do not want to be part of the sermon. Michael also complains that the sermon is given in Zulu so even if he were interested in following it, he would not understand much. For Michael this is “yet another example of the indoctrination that takes place in this prison”.

Michael feels that besides being deprived of his freedom, the lack of activities offered to the prisoners, together with the blankets and bedding being contaminated by lice is the worst for him being incarcerated. He is particularly annoyed with the lack of reading material, such as books and newspapers. He also mentions that the few newspapers they do come across often disappear before they get to read them, because other prisoners take them to use to role cigarettes with. Michael finally has a set court date for his trial. By the time Michael appears in court on charges of housebreaking, he would have spent well over six months at the Youth Correctional Centre awaiting trial. Whatever the outcome of the trial, Michael’s chances will be slim in getting further education or acquiring skills that will bring him a position where he can fend for himself.

LUCKY:

Age: 16 (unofficial: 18)

Born: Umlazi, Kwazulu/Natal.

Cultural background: Zulu

Religious background: Christian/African traditional.

I interviewed “Lucky” with the help of my interpreter. There were no other persons around during the interview. “Lucky” has been living on the streets of Durban the last two years, after his mother passed away. He does have two elder brothers living in an informal settlement in Umlazi, but he does not have a lot of contact with them. His mother, together with his two brothers brought up “Lucky”, while the father was absent. “Lucky” has been awaiting trial for two weeks at the adult section before coming to the Youth Correctional Centre. At the time I meet with him he has been awaiting trial for 3 ½ months. “Lucky” was placed in the adult section while an age assessment was made. When it was established that he was likely to be 16, he was moved to the youth section.

When “Lucky” arrived he was told to contact his relatives and to get the relatives to visit them within the next few days. “Lucky” managed to get a hold of his brothers, but they did not have money to come and visit him. The reason for this ‘instruction’ is that the other prisoners are interested in finding out if you have a support system or not. If you do not get any of your relatives to come and visit you during the first days that you are at the YCC you will be forced to sleep in the toilets, and you will be at greater risk in being abused. “Lucky” was fortunate, he only had to spend two nights sleeping in the toilet, and so far nothing else has not happened.

“Lucky” is awaiting trial on charges of possession of firearms and robbery. He is not likely to be awarded bail since he has no permanent residential address. “Lucky” has meet with his legal representative at least five times and has no problem with her. One of the problems in “Lucky’s” case at the moment is that some of the case documents are missing. So for the time being everything is very uncertain.

“Lucky” feels that his relationship with the other prisoners is “okay”, even though he is sharing a dorm constructed to house around 20 prisoners with over 40 juveniles. He admits that it is a problem that some of the prisoners awaiting trial in the Youth Correctional Centre are over 18 years of age. Several of the prisoners are in their twenties, lying about their ages to be placed in the Youth Correctional Centre rather than in the adult section of the prison. Even though “Lucky” admits to be lying about his age too, he does feel that it is a problem, particularly when some of the prisoners are 24-25 years of age.

“Lucky” is of the opinion that most of the warders that work during the weekdays are okay, but is more reserved when it comes to the warders that are during weekends. Some of the warders have a reputation in that they have bad temper and use a “rougher” tone with the prisoners. “Lucky” feels that this causes the atmosphere to be more aggressive during the weekends than during the week. “Lucky” tells me that he has been in a fight with the one of the warders once. Some money was missing from one of the other juveniles in his dorm and he was accused of stealing it. “The warder gave me a beating, without even asking me if I took the money or not”.

“Lucky” has passed standard four and is now following a school programme for 1 ½-2 hours, four days a week. He is moderately enthusiastic about the schooling, but his main reason for attending is to get a break in the monotonous prison life. The same goes for the Tuesday sermons, which he enjoys. He feels that it is nice to try to think about something else sometimes.

“Lucky” does not so much complain about the hygiene and the access to sheets, as he objects to the food. In the morning they get two slices of bread and porridge, and in the afternoon they get four slices of bread and porridge. Sometimes they get juice or milk with their breakfast, but usually it is tea or coffee that is given to them. “Lucky” is always hungry in the evenings and sometimes this causes him to not being able to get to sleep when he tries.

When I ask “Lucky” about abuse, of any kind, he tell me that this does not happen in his section, only in the other section do such things take place. He finds it outrageous and ridiculous that prisoner have sex with each other, voluntarily or not. “Lucky” also emphasise that “Dagga” is not used in his section, at least he has never seen any of it. There might be some drug abuse in the other section though, he tells me.

DUMILE:

Age: 16

Born: Umlazi, Kwazulu/Natal.

Cultural background: Zulu.

Religious background: Christian/African traditional.

Dumile is interviewed with the help of the interpreter. Dumile, like “Lucky” grew up in the informal settlements of Umlazi. He was raised by both his mother and father, together with four younger siblings. His father died in 1998 after being sick for some time. Dumile is awaiting trial for possession of firearms and armed robbery, and has been at the YCC for 3 ½ months at the time we meet. He has never been awaiting trial before, and as far as he knows he will have to stay at the YCC until the case comes up. No bail has been set, not that Dumile cares about whether or not bail has been set, because there is no way he or his family would have been able to raise any bail under any circumstance.

Dumile is very negative towards his legal council. He is supposed to be represented by a lawyer, but he has not met with his lawyer and the lawyer has not appeared in court the times he has gone to court. He feels that he does not need a lawyer and that all lawyers are just running favours for the state, serving the state’s interests and not his.

Dumile, being co-accused with “Lucky”, has quite a different story than “Lucky” to tell. Even though he gets on okay with most of the other prisoners, he is concerned about the gang activity within the prison. He tells me that several times a week he gets propositioned by gang members to join their gang. So far he has been able to stay away from the gangs, but it is getting harder and harder to stand up to them. The gangs can provide him with some supplies of cigarettes, toothpaste, soap and maybe clothes. All these are valuable commodities inside the prison, particularly if you do not have visitors coming frequently, or at all. Dumile’s mother has been to see him a couple of times and

she has been able to give him some small change and some clothes, and for him that has been of great help.

Dumile's worst experience as an awaiting trial prisoner was when he was beaten up with a belt by a warder. This happened during a weekend after he had been in an argument with another prisoner. The warder took him to the kitchen and beat him with a belt to "set him straight". The incident was not reported, because Dumile felt that if he told anyone he would be at risk afterwards, being beaten up by other warders, or having the warders doing nothing if he was in trouble with some of the other prisoners. In his opinion he found it unlikely that the warder responsible would be transferred to another section or suspended temporarily either, so he kept quiet.

Dumile has the same complaints as the other awaiting trial prisoners, the food being of poor quality and quantity, the bedding and blankets being infested by lice and too little exercise. The only exercise the prisoners get is "if they give a warder a problem, then he will give them exercise".

4-4-2: EXCELSIOR PLACE OF SAFETY:

Excelsior is a place of safety in Pinetown, Kwazulu/Natal where at my first visit; about 70 children are awaiting trial. There are two sections, one for the children under 14, and one for those between 14 and 17. I spent two days there to get familiar with the children and the place before I approached three of the younger boys to try to set up an interview.

I asked these particular boys to talk with my interpreter and me since I felt they had been the most approachable ones of the children during the two days of my visit.

At Excelsior some of the rooms house 3 children, others house 12, all the boys have their own bed or mattress, while there is no overcrowding for the time being. The numbers have been as high as around 130 earlier on, during June 2000. In such circumstances, the personnel at Excelsior cannot do more than keeping the children in safe custody. During the times when it is heavily overcrowded at Excelsior the caretakers are not able to offer any extra support or counselling. Things are much better now, at the time of the interviews, and they can take some time to talk to each child and arrange for some extra activities to take place. The management at Excelsior does not believe that this change is permanent and expect that the numbers awaiting trial at Excelsior will increase sooner or later.

The children are able to play cards, do puzzles or other indoor activities if the weather is poor. Usually they are able to play football in the football field. The football field is surrounded by a concrete wall, which is supposed to make it impossible for the children to abscond. Some of the children tell me that there have been some children that have managed to escape even though the wall is about 6 meters high. The children are able to escape by standing on each other's shoulders and leaping over the wall.

Sandile, Zizwe and Senzo are all from a Zulu background, as the case is with the majority of the children awaiting trial at Excelsior. They were very accommodating and I spoke

with them, together with an independent interpreter that I brought with me. They told me that they rather would be interviewed as a group, than one on one. They did not explain to me why they felt most comfortable with being interviewed as a group, and I did not probe. The interpreter that I used completed his LLB in 2000 at the University of Natal, and he comes from a similar background to these children. He proved to be very valuable to me in the way he communicated with the children.

While I was talking to a particular child the others started to be a bit restless so I gave them some blank paper and some pencils so that they could make some drawings. It was interesting to see how their different styles of drawings reflected some of their backgrounds. Zizwe, who has had no formal education drew very simplistically, like a four or five-year-old would draw in most cases. Sandile, who had finished standard one was much better, and managed to create a colourful and vivacious picture. Senzo was by far the better artist. He had completed standard five and his composition was well balanced and innovative. The children did all this during quite a short time, while I was talking to one of the others. I would have liked to include these pictures in connection with these interviews, but they were more than happy to keep the pictures themselves.

Sandile is 13 and he has been awaiting trial for 3 ½ months. He usually stays with his grandmother, an older brother and a cousin in Umkomaas. Both his parents are dead, his

mother died in March of this year.¹⁰⁶ The grandmother drinks a lot, so the 19-year-old brother is left in charge of raising the two younger boys.

Sandile is awaiting trial on a rape charge. He tells us that he, together with his friend, was at home and that a girlfriend of one of his friends came over. They were not happy about this and they told her to leave, the girl did not want to leave and she started accusing Sandile for taking some money from her. Sandile got very upset about her accusations and beat her up and threw her out of the house. Later the same evening the police came over and arrested him. Apparently the girl had gone home to her parents and accused Sandile of rape. Sandile is very upset about the whole thing and he hopes the case will be come up soon. He is sure he will be acquitted.

Sandile passed standard one, and he did not attend school after that. At Excelsior they go to school for some hours every Monday to Wednesday, and Sandile thinks school is okay even though he has problem following the classes. He enjoys the classes more they are allowed to draw. That does not happen very often though, because they do not have access to pens and paper.

Sandile likes being at Excelsior even though he would rather be with his brother and friends. In his opinion the food is good, they have a bed to sleep in and he has made some friends. Sandile has no complaints about the caretakers who work at Excelsior, some of them are really okay he feels.

The year 2000.

Zizwe is the most talkative of the boys. He is 13 years old and has been raised by his father and a step- mother. His mother died when he was very young. He does not get along well with his stepmother so he often stays away from his home. Zizwe is the only one of the boys who is not from the Durban area. He grew up in Camperdown, just outside Pietermaritzburg. His father, he tells me, would have liked to come to visit him at Excelsior, but he cannot afford it. Zizwe has been at Excelsior for 3 months, but he was at a prison in Pietermaritzburg for two weeks before he came to Excelsior. Zizwe tell me that prison is awful and that being at Excelsior is much, much better.

Zizwe is at Excelsior because he tried to break into a factory site, twice. The police detected him the first time, but was let of with a warning. He came back later on with some friends to try to steal something from the same factory again. This time he was caught again, and he was charged with housebreaking. Zizwe laughs when he tells this story. He is also charged with theft of a copper cable from the municipality. He explains that they tried to break a cable, which was lying on the ground, to steal the copper and sell it. All they managed was to ruin the cable.

Zizwe does not know about the possibility of having a lawyer assigned to him, and he is not so worried either. He does not know when he has to be back in court, but that is not a problem because the personnel at Excelsior makes sure that the children appear before the courts when they are supposed to. He is quite positive about being at Excelsior, but he agrees with the other boys that it would have been better to be free.

Senzo is the quietest of the boys, and it takes some time for him to participate in the conversation. He is 14 years old and normally living with his grandmother, whom he calls Oma. His two sisters and an older brother are also living at the same house. Both his parents are dead, the father in 1994 and his mother died in 1998. Senzo is awaiting trial on charges of housebreaking. He has been awaiting trial for four months now. He admits to us that his accomplice and himself used to break into people's homes to steal hi-fis, videos and CD's, for the most part.

Apart from admitting to the housebreaking, the only thing Senzo is very direct about is that he is very sceptical towards the justice system, lawyers in particular. He states that he "doesn't have a lawyer, doesn't want a lawyer and doesn't trust lawyers".

CHAPTER 5: CONCLUSIONS:

5-1: THE SOUTH AFRICAN LEGISLATION:

South Africa is now committed to a new constitutional order where children and prisoner's rights are protected. This fact, together with South Africa's re-entry into the international arena, becoming a signatory to several human rights conventions and instruments, makes it safe to conclude with that the legal instruments are in place. What is crucial now, is the day to day implementation of the law of the land. It is fair to say that this is the problem lie at present. The Department of Correctional Services do not have the management skills, or the human resources to implement the provisions laid down by the Constitution in a way that is conducive to the letter and spirit of the Constitution. One can only hope

that the restructuring of the Department of Correctional Services and the new-found determination to fight corruption and other practices that are harmful to the management of the prison system, will in time succeed in managing a correctional system which comply with the Constitution.

The Department of Correctional Services do not have any mean of influencing the number of children being remanded in prison while awaiting trial. The DCS must simply admit the children who are sent there by the courts, even if the prison all ready is under a lot off pressure in terms of overcrowding. Hopefully will the awaiting trial numbers decrease, if the Child Justice Bill gets promulgated and diversion become an alternative to the conventional justice system. In the words of Ann Skelton:

“The rhetoric of children’s rights is still on the lips of some politician, and in the heart of a few. We must hold them to the commitments they have made”.

5-2: AWAITING TRIAL IN PRISON CONTRA IN A PLACE OF SAFETY:

My personal observations and the children’s accounts of what it is like being an awaiting trial prisoner at Durban-Westville Youth Correctional Centre, leaves no doubt that these children are not being detained under conditions of safe custody. Some of the problems the children described can be related to the severe overcrowding, but not all. The children should be under closer surveillance in order to prevent abuse, particularly at night. This would demand more human resources, or at least a change in the allocation of the present human resources. It is submitted that the children should be tested for HIV when

admitted to the prison, in order to take proper steps to prevent further transmission of the virus. It would also allow the children a better chance to hold the Department of Correctional Services liable if they were to be infected while awaiting trial. This is of course an extremely difficult position for the Department to be in. Nevertheless, the Department of Correctional Services should regard the health and lives of the children entrusted to them with greater value, than the financial implications of such a policy.

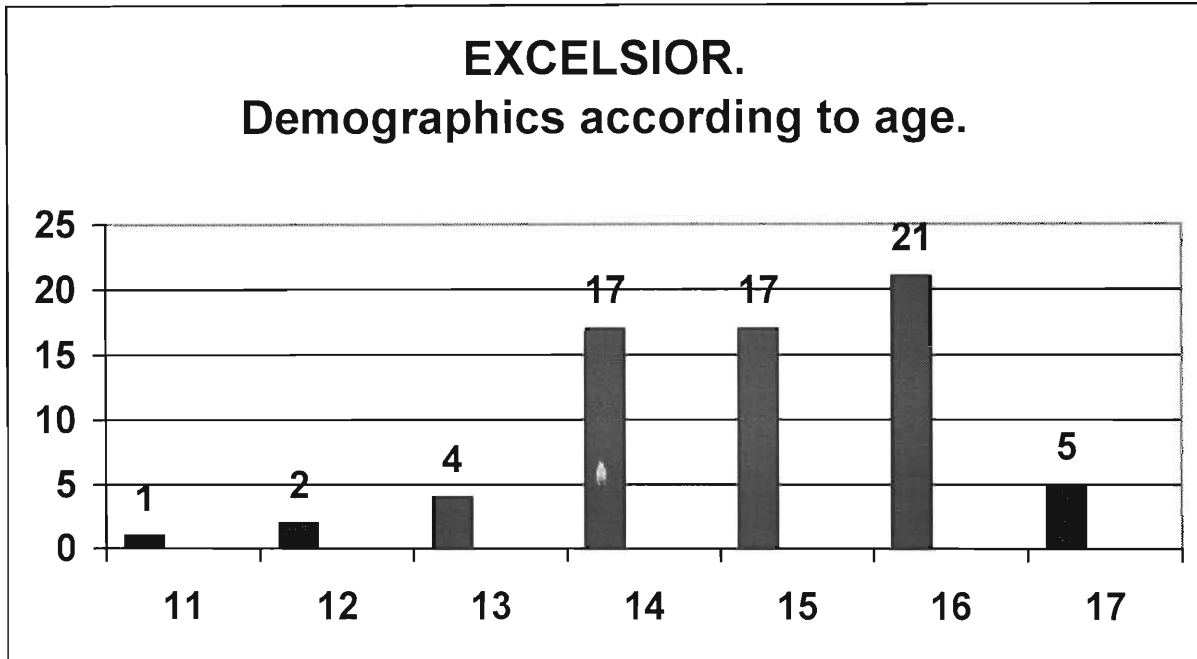
The situation was very different for the children awaiting trial at Excelsior Place of Safety. The emphasis there was to give greater care to the children, the staff-child ratio was substantially better, thus affording the staff to give more care and to keep closer control of the children. The facilities themselves were also of a very different standard, providing the children more opportunity for exercise and recreation. It is submitted that the children awaiting trial at Excelsior were kept under conditions consistent with the Constitution and the international instruments.

5-3: POLICIES AND NEW LEGISLATION:

The establishment of the Judicial Inspectorate has the potential to be of great importance for all groups of prisoners. Prison Visitors have yet to be established in all ten provinces, but in the provinces where they have been appointed, the amount of complaints received by the Judicial Inspectorate have declined drastically. The reason for this is likely to be that the Prison Visitors are able to deal with the prisoner's grievances and to give advice to them.

The inspections of the Inspecting Judge are announced. It is submitted that this is not to the advantage of the prisoners, since it gives the management of the prisons time to prepare for the visit. Given the Department of Correctional Services record with human rights prior to 1994, and taking into account that many of the Departments employees still are having trouble with the transition towards a humane and egalitarian correctional service, it is my opinion that the Inspection Judge should be able to enter a prison unannounced, at any time.

ANNEXURE 1:



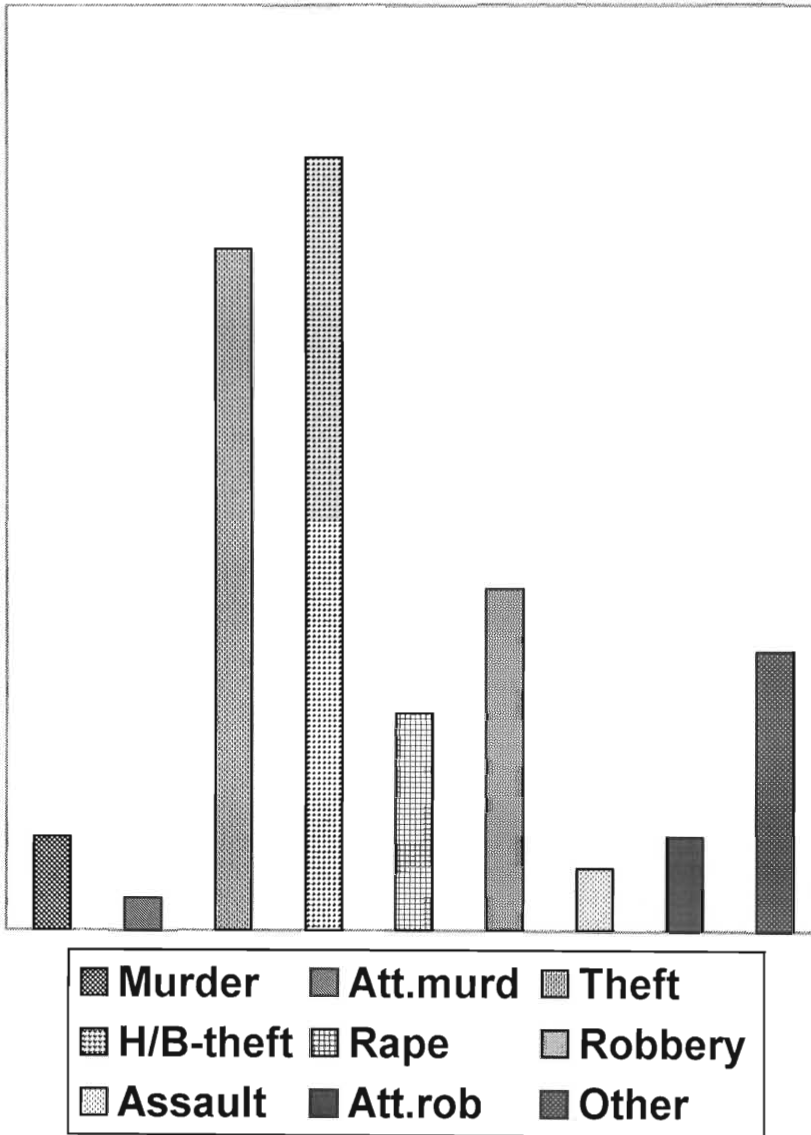
Number of children: 83

Number of children with recorded age: 67

Number of children with unknown age: 16

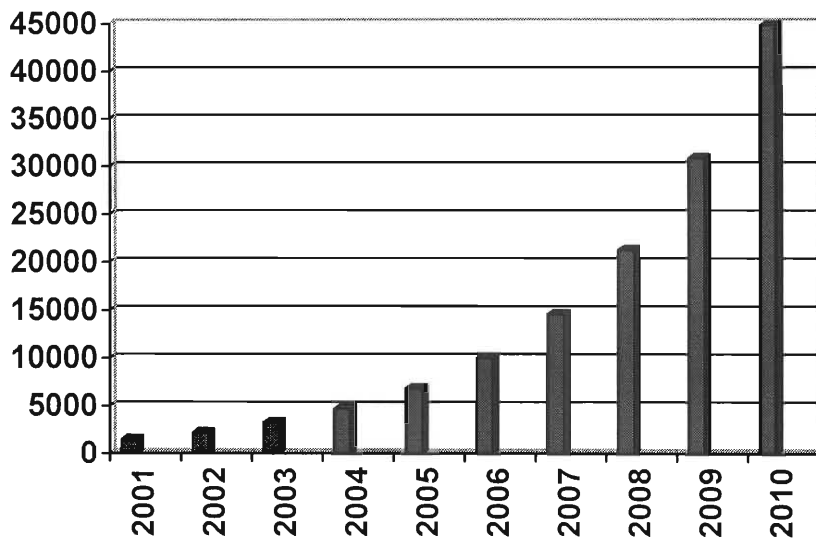
One child had been awaiting trial since 28/02/1999. All the other children arrived in 2000.

ANNEXURE 2: EXCELSIOR. CHARGE PROFILE OCTOBER 2000.



ANNEXURE 3

**PROJECTED DEATHS IN PRISON
DUE TO HIV/AIDS.**



The graph includes all groups of prisoners.

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