

**SOUTH AFRICAN LAW COMMISSION**

**DISCUSSION PAPER 91**

**PROJECT 82**

**SENTENCING**

**(A NEW SENTENCING FRAMEWORK )**

**Closing date for comments:**

**31 May 2000**

**ISBN: 0-621-30070-5**

## INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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Professor RT Nhlapo (Commissioner)  
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## PREFACE

This discussion paper (which reflects information gathered up to the end of March 2000) was prepared by Professor D Van Zyl Smit on behalf of the sentencing project committee to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

Respondents are requested to submit written comments, representations or requests to the Commission by **31 May 2000** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position. The researcher allocated to this project, who assisted in the drafting of the discussion paper and who may be contacted for further information, is Mr W van Vuuren.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

The Commission would like to express its appreciation to the Legislative Drafting Project of the GTZ (Deutsche Gesellschaft für Technische Zusammenarbeit) and its project manager, Mr R Pfaff, for the technical and financial assistance. With the assistance of the GTZ two parallel empirical studies were conducted on the attitudes of key role players to the Criminal Law Amendment Act and secondly on sentencing patterns both before and after the introduction of the Act. The research was commissioned to assist the Commission in acquiring data and other information on sentencing practices in South African courts and to provide the Commission with the information it requires to evaluate the impact of the Criminal Law Amendment Act 105 of 1997 on sentencing practices and related court processes. GTZ furthermore provided assistance by contracting the project leader, Professor D Van Zyl Smit to draft the discussion paper in this investigation.

<b>CONTENTS</b>	<b>PAGE</b>
<b>INTRODUCTION</b>	(ii)
<b>PREFACE</b>	(iii)
<b>LIST OF SOURCES</b>	(xii)
<b>LIST OF CASES</b>	(xv)
<b>EXECUTIVE SUMMARY</b>	(xvii)
<b>PART 1</b>	1
<b>SENTENCING REFORM RECONSIDERED</b>	1
<b>INTRODUCTION</b>	1
<b>SHORTCOMINGS OF THE CURRENT SYSTEM</b>	3
<b>LEGISLATIVE RESPONSES TO THE SHORTCOMINGS</b>	4
<b>EARLIER INVESTIGATIONS BY THE SA LAW COMMISSION</b>	6
<b>MANDATORY MINIMUM SENTENCES</b>	6
<b>RESTORATIVE JUSTICE</b>	8
<b>INVESTIGATIONS CONDUCTED BY THE CURRENT COMMITTEE</b>	8
<b>SENTENCING PATTERNS AND THE IMPACT OF THE 1997</b>	

<b>CRIMINAL LAW AMENDMENT ACT</b>	10
<b>QUANTITATIVE RESEARCH</b>	10
<b>QUALITATIVE RESEARCH</b>	16
<b>COMPARISON OF PERCEPTION AND REALITY</b>	22
<b>FURTHER RESEARCH</b>	24
<b>RESPONSE BY THE COURTS TO THE 1997 CRIMINAL LAW AMENDMENT ACT</b>	24
<b>SENTENCING AND PRISON OVERCROWDING</b>	32
<b>INTERNATIONAL DEVELOPMENTS</b>	33
<b>PART II</b>	
<b>A NEW SENTENCING PARTNERSHIP</b>	35
<b>INTRODUCTION - BRIEF SUMMARY OF THE EVIDENCE</b>	35
<b>THE APPROACH OF THE COMMISSION</b>	37
<b>A NEW STRUCTURE</b>	39
<b>THE LEGISLATIVE FRAMEWORK</b>	42
<b>Innovations</b>	42
<b>Codifying, modifying and simplifying existing sentencing     legislation</b>	43

<b>ISSUES THAT WILL NOT BE COVERED BY THE NEW SENTENCING FRAMEWORK BILL</b>	45
<b>PART III</b>	
<b>THE DRAFT BILL</b>	47
<b>CHAPTER 1</b>	47
<b>SENTENCING PRINCIPLES</b>	47
<b>THE PURPOSE OF SENTENCING AND SENTENCING PRINCIPLES</b>	47
<b>RECOMMENDATION</b>	53
<b>SENTENCING GUIDELINES</b>	54
<b>RECOMMENDATION</b>	56
<b>PART III</b>	58
<b>CHAPTER 2</b>	58
<b>SENTENCING COUNCIL</b>	58
<b>THE STRUCTURE OF THE SENTENCING COUNCIL</b>	58
<b>RECOMMENDATION</b>	60
<b>OPERATION OF THE SENTENCING COUNCIL</b>	61
<b>RECOMMENDATION</b>	62
<b>PART III</b>	65

<b>CHAPTER 3</b>	65
<b>GUIDELINE JUDGMENTS</b>	65
<b>RECOMMENDATION</b>	65
<b>PART III</b>	67
<b>CHAPTER 4</b>	67
<b>SENTENCING OPTIONS (PENALTY CLAUSES)</b>	67
<b>INTRODUCTION</b>	67
<b>RECOMMENDATION</b>	68
<b>IMPRISONMENT FOR LIFE</b>	69
<b>RECOMMENDATION</b>	70
<b>IMPRISONMENT</b>	71
<b>RECOMMENDATION</b>	72
<b>DANGEROUS CRIMINALS</b>	72
<b>RECOMMENDATION</b>	74
<b>PERSISTENT OFFENDERS</b>	77
<b>RECOMMENDATION</b>	78
<b>PERIODICAL IMPRISONMENT</b>	78

<b>RECOMMENDATION</b>	80
<b>COMMITTAL TO A TREATMENT CENTRE</b>	81
<b>RECOMMENDATION</b>	81
<b>THE FINE</b>	82
<b>RECOMMENDATION</b>	83
<b>COMMUNITY CORRECTIONS</b>	84
<b>RECOMMENDATION</b>	87
<b>PART III</b>	90
<b>CHAPTER 5</b>	90
<b>RESTITUTION AND COMPENSATION ORDERS</b>	90
<b>INTRODUCTION</b>	90
<b>RESTITUTION AND COMPENSATION ORDERS IN TERMS OF CHAPTER 29 OF THE CRIMINAL PROCEDURE ACT AND THEIR SHORTCOMINGS</b>	91
<b>EVALUATION AND RECOMMENDATION</b>	93
<b>PART III</b>	95
<b>CHAPTER 6</b>	95
<b>SENTENCING VARIATIONS</b>	95

<b>PRIORITY OF NON-CUSTODIAL SENTENCES</b>	95
<b>RECOMMENDATION</b>	95
<b>PRIORITY OF RESTITUTION OR COMPENSATION</b>	96
<b>RECOMMENDATION</b>	96
<b>CUMULATIVE OR CONCURRENT SENTENCING</b>	96
<b>RECOMMENDATION</b>	96
<b>POSTPONED SENTENCES</b>	97
<b>RECOMMENDATION</b>	97
<b>SUSPENDED SENTENCES</b>	98
<b>RECOMMENDATION</b>	99
<b>ANTEDATING OF SENTENCES</b>	102
<b>RECOMMENDATION</b>	103
<b>PART III</b>	105
<b>CHAPTER 7</b>	105
<b>SENTENCING PROCEDURES</b>	105
<b>PROCEDURE AFTER CONVICTION</b>	105
<b>PREVIOUS CONVICTIONS</b>	105

<b>RECOMMENDATION</b>	106
<b>EVIDENCE ON SENTENCING</b>	107
<b>RECOMMENDATION</b>	112
<b>EVIDENCE RELATING TO THE INTERESTS OF VICTIMS</b>	113
<b>RECOMMENDATION</b>	115
<b>POST TRIAL RIGHTS VICTIMS</b>	115
<b>RECOMMENDATION</b>	116
<b>PROCEDURE ON RESTITUTION AND COMPENSATION</b>	116
<b>RECOMMENDATION</b>	116
<b>SENTENCING JUDGMENT</b>	118
<b>RECOMMENDATION</b>	118
<b>WARRANT FOR THE EXECUTION OF SENTENCE</b>	119
<b>RECOMMENDATION</b>	119
<b>SENTENCE BY JUDICIAL OFFICER OTHER THAN THE JUDICIAL OFFICER WHO CONVICTED ACCUSED</b>	119
<b>PART III</b>	121
<b>CHAPTER 8</b>	121
<b>GENERAL PROVISIONS</b>	121

**APPENDIX A EXTRACT FROM ISSUE PAPER ON MANDATORY  
MINIMUM SENTENCES AND COMMENTS**

**APPENDIX B EXTRACT FROM ISSUE PAPER ON  
RESTORATIVE JUSTICE AND COMMENTS**

**APPENDIX C QUANTITATIVE RESEARCH ON IMPACT OF CRIMINAL LAW  
AMENDMENT ACT ON SENTENCING IN SOUTH AFRICA**

**APPENDIX D COMMUNITY CORRECTIONS**

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## A NEW SENTENCING FRAMEWORK

### Executive Summary

1. The South African sentencing system faces various problems. There is a perception that like cases are not being treated alike; that sentencers do not give enough weight to certain serious offences; that imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences; that sufficient attention is not being paid to the concerns of victims of crime; and that, largely because of unmanageable overcrowding, sentenced prisoners are being released too readily.

2. The background research conducted by the Commission has shown that the mandatory minimum sentences introduced by the 1997 Criminal Law Amendment Act, which sought to ensure that some serious offences were punished more severely and also to bring a measure of uniformity to the sentencing process, have effected some changes. Sentences for some crimes, most prominently rape, are now longer than they were before. However, some difficulties remain with the 1997 Act.

3. Judicial officers, many of whom were opposed to the Act from its inception, have continued to criticise it for limiting their discretion. Even if their objection in principle is set aside, there are difficulties for sentencers in applying the new legislation. The Act deals with only some of the crucial issues. Only a limited number of crimes is covered while other serious crimes are not dealt with at all (kidnapping, for example, is not included), thus disturbing the proportionality between various types of crime. Most importantly, judges have interpreted inconsistently the “substantial and compelling circumstances”, which have to be found before departure from the prescribed minima is allowed. Where they have thought that the prescribed sentence would on balance be too heavy they have sought to find that “substantial and compelling circumstances” were present and have described aspects of crimes as making them less serious. In the process they have both incensed the public and defeated the legislative objective of consistent toughness. The finding that a father who raped his young daughter represented no threat to the public at large, and that a ruling of substantial and compelling circumstances justifying the

departure from a prescribed minimum sentence could be based on that “fact”, amongst others, is a notorious example of such a case.

4. When the 1997 Criminal Law Amendment Act was passed no thought appears to have been given to what impact it would have on sentencing patterns, which in turn would have a knock-on effect on the prison system that would have to implement the new longer sentences. The reason for this may be that the legislation was designed to be temporary. The problem was not picked up immediately as the Act only came into force on 1 May 1998. Even then its effect was not felt for a considerable time since it applied only to offences committed after that date. The serious offences for which minimum sentences are prescribed take several months to come to court with the result that only in the latter half of 1999 were the minimum sentences prescribed by the Act regularly being imposed. Nevertheless, the impact of a sudden and significant increase in the number of life sentences, for example, will be felt for many years to come.

5. The research on mandatory minimum sentences, which the Committee conducted at the same time as the 1997 Criminal Law Amendment Act was passing through Parliament, confirmed that there was considerable opposition from the judges in particular to a scheme of legislated fixed sentences, even though it might provide a solution of a kind to the problems of sentencing disparity and of ensuring that serious crimes were punished with sufficient harshness. There was also significant opposition to binding guidelines developed by an independent sentencing commission. The idea of a system operating along the lines of the well-known Minnesota Sentencing Guidelines, which are generated by an independent commission, did, however, receive the support of the majority of the members of the Natal bench of the High Court.

6. The research conducted on restorative justice revealed that there was near universal support for giving victims an increased, although still not dominant, role in the sentencing process. It also found a significant sentiment favouring the use of restorative justice initiatives in less serious cases. In addition, there was no doubt that respondents felt that current measures for the compensation of victims of crime could be improved.

## **THE APPROACH OF THE COMMISSION**

7. The Commission accepts that there is substance to the criticism of the sentencing system that has been advanced in the past decade, both before and after the introduction of the 1997 Criminal Law Amendment Act. An ideal system should be seen to promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the State to enforce in the long term. The Commission therefore proposes a framework that in its view can meet all these desiderata to the greatest extent possible.

8. Such a framework will require the co-operation of the different branches of government. A single branch cannot solve the problem on its own. Reform proposals should combine, as far as possible, the advantages that may be derived from the involvement of all three branches of government in the sentencing process and eliminate the disadvantages inherent in giving a single one of them priority. In the model that the Commission proposes, sentencing decisions will continue to be made by the courts, but these decisions will be informed by new initiatives from the legislative and administrative branches that will meet the need for consistency, as well as for sensitivity to the seriousness of offences, the needs of victims and the capacity of the system to carry out sentences that have been imposed.

## **A NEW PARTNERSHIP**

9. The key recommendation of the Commission is that the different arms of government enter into a new partnership on sentencing. To limit sentencing disparities there must be more guidance for the courts on sentencing. In the first instance this will take the form of more specific guideline judgments and of normative sentencing guidelines. The Supreme Court of Appeal will give the guideline judgments in the course of the normal appellate process. These judgments will set guidelines in the light of principles developed by Parliament in legislation and information provided by a new Sentencing Council on sentencing patterns, the efficacy of various sentences

and the capacity of the State to implement such sentences. The judiciary, key criminal justice departments, sentencing experts, and civil society through representatives of victims' organizations will be represented on this Council.

10. The Sentencing Council will be able to develop normative guidelines for categories of crime for which the Supreme Court of Appeal has not set guidelines. In addition the Sentencing Council will have to collect and publish comprehensive sentencing data on an annual basis. The Council would have to do research and publish reports on the efficacy and cost effectiveness of the various sentencing options provided by legislation and make policy recommendations on the further development of community corrections in particular.

11. The proposed combination of sentencing guidelines set by the courts with a Sentencing Council would have important structural advantages:

- a) The guideline-setting function of the Supreme Court of Appeal will retain a key role for the senior judiciary in sentencing decision-making, while provision for the Court to have placed before it information provided by the Sentencing Council would allow it to take into account factors that cannot normally be entertained when single cases are considered in isolation.
- b) The Sentencing Council constituted in the way proposed will have the advantages of a sentencing commission in the sense that it would be able to take an overall view of the entire system and make recommendations based on requirements of principle in that light. Its information function will also be important, both in assisting the courts and in shaping public perceptions about the reality of sentencing options.
- c) The Sentencing Council will not be isolated from public opinion as it will have a duty to consult widely. In addition, both cabinet ministers and Parliament would be able to ask it directly to consider the development of guidelines for a category of offences that the public might regard as not being treated with the appropriate degree of seriousness.

12. A new sentencing framework requires not only a new partnership amongst the different arms of government. It requires also a new partnership between the State and the public in general and victims of crime in particular. The key to this partnership is improved provision for victim involvement in the sentencing process and recognition of victim concerns in the type of substantive sentences that are handed down.

13. At a substantive level, explicit attention is given to restitution and compensation for victims of crime. Restitution and compensation are key elements of the comprehensive new sentence of community corrections, which also allows victims to benefit from other orders such as community service by the offender and victim-offender mediation. Sentences may also be suspended on condition of restitution or compensation for victims of crime. In every case where neither of these sentences is imposed the court must consider whether a separate restitution or compensation order should be made.

17. The procedural innovations designed to benefit victims of crime include a requirement that prosecutors, when they intervene on sentence, must consider the interests of victims in every case. There is provision for victim impact statements to be presented to the courts so that they may learn what impact the crime had in practice. Victims must be told when and how they may be involved in the eventual release of sentenced offenders from prison. These innovations are backed by detailed rules to ensure that victims are told of their rights. There are also provisions to ensure that the income of offenders is revealed so that they can be ordered to make reparation for their crimes in an appropriate way.

15. The various changes that are proposed will be combined in a new piece of legislation, the Sentencing Framework Act. The Commission is putting forward a draft proposal for such a new Act. The new legislation will contribute to legal certainty by bringing together in one easily accessible law all the provisions dealing with the imposition of sentence. The general principles applicable to sentencing will be clearly stated. The publication of normative sentencing guidelines will simplify the task of the courts, thus contributing to speedy and effective justice and ensuring that offenders know what to expect. Simplified procedural rules will make it clear to the public

what is happening in the sentencing process and encourage public participation in the administration of justice.

**PART 1****SENTENCING REFORM CONSIDERED****INTRODUCTION**

1.1 The sentencing of an offender is a public ritual of symbolic as well as practical significance. It is the moment when a court, speaking on behalf of society as a whole, solemnly declares what penalty is deemed appropriate for the conduct of the offender, which has been found to contravene the criminal law. Sentencing is inherently controversial. There are many reasons for this.

1.2 Individual decisions are announced to a critical public who analyse them against a variety of expectations. They not only ask whether the sentences express public condemnation of the crime adequately and protect the public against future crimes by the reform and incapacitation of offenders and by the deterrence of both the individual offender and other potential offenders, but also whether they are just in the sense that similar sentences are being imposed for offences that are of equal seriousness or heinousness. In addition there is a growing expectation that the sentence must be restorative, in the sense both of compensating the individual who suffered as the result of a crime and of repairing the social fabric that criminal conduct damages. All these concerns are inevitably particularly prominent amongst victims of crime who have a special interest in the offences that they themselves have suffered.

1.3 Many of these potentially contradictory concerns are heightened by the contemporary South African experience. Increased fear of crime has led to calls for heavier sentences from many quarters. It is a public response that cannot be denied. At the same time the values of the new South African Constitution<sup>1</sup> are increasingly being accepted. With this acceptance has come the notion that old practices, including sentencing, have to be reviewed. Some sentences

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<sup>1</sup> All references to the Constitution are to the Constitution of the Republic of South Africa, Act 108 of 1996, unless otherwise indicated.

such as those of capital and corporal punishment have already been rejected on constitutional grounds as contrary to human dignity.<sup>2</sup>

1.4 Recently, the Constitutional Court has again warned that “[o]ne must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights”.<sup>3</sup> At the same time, there is growing recognition that the equal protection of the law that the Constitution promises<sup>4</sup> also means that the rights of victims of crime need to be respected and reflected in appropriate sentences. What is appropriate in sentencing need not be what was always done in the past. There is increasing recognition that community sentences, of which reparation and service to others are prominent components, form part of an African tradition and can be invoked in a unique modern form to deal with many crimes that are currently sanctioned by expensive and unproductive terms of imprisonment.<sup>5</sup>

1.5 Views on best sentencing practice are startlingly diverse. Organs of the State too have different approaches to sentencing. The judicial branch, which is confronted by individual cases and the difficult question of how best to balance the different expectations in respect of sentence, tends to stress the flexibility it needs to fulfil its tasks. The democratically elected legislature is sensitive to public pressure to ensure that specific crimes that are seen as particularly threatening are adequately punished and may seek by legislation to ensure directly or indirectly that such penalties are imposed. The executive and administrative branch has to implement the sentences that are imposed in a manner that meets the standards set by the Constitution and other laws, but it must do so within a budgetary framework that inevitably is constrained by other essential State expenditure.

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<sup>2</sup> *S v Makwanyane and another* 1995 (3) SA 391 (CC) (capital punishment); *S v Williams and others* 1995 (3) SA 332 (CC) (corporal punishment).

<sup>3</sup> *S v Dlamini; S v Dladla and others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) at para. 68.

<sup>4</sup> See section 9(1) of the Constitution.

<sup>5</sup> See, for example, Viven Stern *Alternatives to prison in developing countries* (1999).

1.6 Given the range of public expectations about sentencing and the different emphases that, for structural reasons, the organs of state tend to place on them, it is clear that any sentencing reform requires the making of clear choices. It may well be that all expectations cannot simultaneously be met fully, but the function of a reformist intervention must be to address the major faults of the current system. It was for this reason that a decision was taken at an early stage to develop sentencing legislation that would deal as comprehensively as possible with the law relating to sentencing. Only in this way can explicit choices be made about various options.

1.7 Before putting forward the proposals of the Commission on a new sentencing framework, this discussion paper sets out the shortcomings that have generally been identified in sentencing in South Africa since the first democratic elections in 1994. It then outlines the immediate legislative response to these criticisms. This is followed by a description of the work undertaken by the Sentencing Committee of the South African Law Commission that has provided the background for this discussion paper. Two stages of this work are described. The account of the first stage sketches the problems surrounding sentencing as originally conceptualised when the Committee on Sentencing was established under the leadership of Judge van den Heever in 1996 and the investigations then undertaken. The account of the second stage outlines the work undertaken since Professor Van Zyl Smit became project leader in 1998. The material presented about both stages must be read together, as it encapsulates the information on which are based the substantive reform strategy of a new sentencing partnership put forward in Part II and the detailed proposals for new legislation contained in Part III of this discussion document.

## **SHORTCOMINGS OF THE EXISTING SENTENCING SYSTEM**

1.8 Since 1994 a number of shortcomings have been identified in the way that sentences are imposed in South Africa. Briefly, these persistent criticisms have been the following:

- a. Like cases are not being treated alike because there is unfair discrimination against some offenders on grounds of race and social status in particular. Such allegations are difficult to deal with, for a system in which there are no clear sentencing guidelines results in sentencers having a very broad discretion, which makes it difficult to rebut such accusations. In such a system, justice is not easily

seen to be done.

- b. The judiciary does not give sufficient weight to the seriousness of particular offences and therefore is imposing disproportionately light sentences in these cases. At the moment this complaint is particularly prominent for certain types of sexual offences, but the focus may shift, as other crimes become the object of public concern. In addition, the seriousness of some offences is being downplayed, by not hearing views of victims either in particular cases or about the heinousness of a type of crime generally.
- c. Less serious offences are being dealt with by terms of imprisonment where more imaginative restitutive alternatives could provide solutions more satisfactory to all parties while at the same time saving valuable prison resources for the offenders deserving harsher punishment.
- d. Offenders are released from their prison and other sentences without having served their full sentences, or even a significant part of them, thus undermining the original sentences. Related to this is the charge that these release processes are themselves inadequate because they are done by closed bureaucracies according to unclear criteria, thus mirroring the shortcomings of the sentencing process itself.

## LEGISLATIVE RESPONSES TO THE SHORTCOMINGS

- 1.8 The Government has responded legislatively to these criticisms in two primary ways:
  - a. **Mandatory minimum sentences** were introduced by the Criminal Law Amendment Act 105 of 1997. The Act is in force in respect of offences committed between 1 May 1998 and 30 April 2000, but it can be extended for a further year. It lists some of the most serious offences such as murder, rape and robbery and describes factual situations in which mandatory sentences, including in some situations, life imprisonment, must be imposed, unless “substantial and

compelling circumstances” indicating lesser sentences are present. This Act has the advantage of indicating clearly that specific offences committed in specific situations must be punished harshly. It therefore meets at least one of the concerns expressed above. However, in other respects the new Act has raised new difficulties, which will be considered below. It must be emphasised that the new Act was designed from the outset to be a temporary measure and that this was pointed out in Parliament by the Minister of Justice, who, when he introduced the Bill that became the 1997 Criminal Law Amendment Act, noted that further sentencing reform was envisaged.<sup>6</sup>

- b. New release procedures** were introduced by the Correctional Services Act 111 of 1998. These procedures, which have not yet been brought into operation, are designed to meet the criticism that accused persons are released too early and by an inappropriate process. In terms of the new law all prisoners must serve at least half their sentences in prison, or 25 years in the case of those sentenced to life imprisonment. After that they may be **considered** for conditional release on parole but they remain subject to recall for their full sentences. For some categories of crime this minimum non-parole period may be two-thirds or even four-fifths of their initial sentences. The procedure for release is also to be made considerably more transparent by the appointment of new quasi-judicial parole boards on which lay people are represented. There is also provision for the views of the victims of crime to be taken into account by such boards in certain instances.

1.9 The new release procedures, which are designed to be a permanent feature of the system, meet many of the objections raised against the current release procedure. However, they face the same criticism as the mandatory sentence law, namely that there has been no attempt to calculate what impact it will have on the prison population, or on the number of offenders subject to community corrections. Indeed, when the new release mechanism was first proposed, the point was made that it would place increased pressure on the prison system unless the number and length of prison sentences would be reduced substantially. Up to now this has not been done.

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<sup>6</sup> Hansard, *Debates of the National Assembly* 16 November 1997, cols. 6087-6088.

## **EARLIER INVESTIGATIONS BY THE SOUTH AFRICAN LAW COMMISSION**

1.10 The Government also responded to criticism of the sentencing system by asking the South African Law Commission to investigate. In 1996 the Minister of Justice appointed a new Project Committee of the Law Commission to investigate all aspects of sentencing. This Committee operated from late 1996 to March 1998 under the leadership of Judge Leonora van den Heever. In practice the investigations of this committee focused almost exclusively on two aspects, namely mandatory sentences and restorative justice. These investigations are significant as they provided important background material for the current discussion paper.

## **MANDATORY MINIMUM SENTENCES**

1.11 At an early stage of its work it became clear to the Van den Heever Committee that the government wished to enact mandatory minimum sentences as a temporary measure. The Committee was opposed to this course but decided that it should launch its own investigation into mandatory sentences as a possible component of sentencing reform. Accordingly it developed an issue paper on mandatory minimum sentences and invited public comment on the subject by 30 September 1997.<sup>7</sup> The issue paper was a more wide-ranging document than its title suggests. It analysed the main characteristics of sentencing in South Africa and also considered sentencing developments in a number of countries in order to isolate various options for reform.<sup>8</sup> On the basis of this analysis comments were invited on the following options for reform:

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<sup>7</sup> South African Law Commission, Issue Paper 11 *Sentencing: Mandatory minimum sentences* June 1997 ISBN 0-621-27253-8.

<sup>8</sup> See chapters 2 and 3 of the Issue Paper and the comments on it in Appendix A.

\* **Enactment of sentencing guidelines: presumptive sentencing guidelines**

One option is to set up a sentencing commission to develop sentencing guidelines in respect of certain offences. In this regard the best example is the Minnesota sentencing guidelines in the USA where the enabling statute directed the sentencing commission to develop guidelines which were to specify presumptively correct prison commitment and prison duration rules. Specific principles are used as determinants of the presumptive correct sentence, for example the severity of the offence and the accused's criminal record. The court is allowed to depart from the presumptive correct sentence if special circumstances exist.

\* **Voluntary sentencing guidelines**

This option requires the development of sentencing guidelines which are not required by law to be followed, but which simply guide the courts in the exercise of their discretion. Such policies are based on past sentencing practices but may be elaborated either by appellate courts or more formally by a sentencing commission or council.

\* **The adoption of legislative guidelines which assist in determining the choice and length of the punishment**

This option is based on the Swedish model, which provides that the legislature determines the nature of punishment and the penal value attributed to the particular offence. The penal value is determined with special regard to the harm, offence or risk which the conduct involved and what the accused realised or should have realised about the conduct including his intentions or motives.

\* **The enactment of principles of sentencing including guidelines which determine the imposition of imprisonment**

This option is based on the proposals of the Canadian Sentencing Commission, which recommended the enactment of the principles of sentencing. Provision is inter alia made for principles governing the determination of the sentence, i.e. that the sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence. In addition a number of factors are listed which the court has to consider in determining the sentence and it includes aggravating and mitigating circumstances, the need for consistency in sentencing of offenders for similar offences committed, the need not to impose excessive sentences, the fact that imprisonment should not be imposed solely for the purpose of rehabilitation, and the circumstances under which imprisonment should be imposed.

\* **The enactment of presumptive sentencing guidelines to guide the imposition of custodial and non-custodial sentences**

Presumptive guidance is statutory orders which impose a predetermined sentence range to the judge. Although presumptive guidelines are statutory in nature they can allow the continued existence of a sentencing discretion if the judge is allowed to deviate from the adopted range under certain circumstances.

\* **The enactment of mandatory minimum sentences combined with a discretion to depart from the sentences under certain conditions**

This option implies the enactment of a mandatory minimum sentence for example 15, 20 and 25 years imprisonment for a first, second and third conviction respectively coupled with a discretion to the sentencing officer to depart from the prescribed sentence if special circumstances exist. In such circumstances the sentencing court is required to record the circumstances and to give written reasons for departure from the prescribed sentence.

1.12 To facilitate a focused debate, respondents were requested to formulate submissions with the following questions in mind:

Is there a need for legislation to regulate the imposition of sentence in respect of certain serious crimes?

If so, which crimes should be targeted for this purpose?

How should the questions of lenient or excessive sentencing and inconsistency and disparity in sentencing be addressed?

Is it agreed that the principal issues are those set out in this paper?

What, specifically, is proposed in relation to those issues (or any further issues) as an effective basis for reformatory legislation?

1.13 The issue paper elicited a wide range of responses. These responses are summarised in Appendix A.

## **RESTORATIVE JUSTICE**

1.14 The work of the Van den Heever Committee was not limited to mandatory sentencing. It also published an issue paper on restorative justice for which it set a closing date of 30 June 1997. This paper dealt with a restorative approach to the criminal justice system and sought

comment on victims and their treatment in South African law; victim's rights; victim and community participation in sentencing; compensation for victims; victim impact statements and victim-offender mediation.<sup>9</sup> For the purpose of this discussion paper reference will only be made to the comments on matters related to sentencing (compensation, victim impact statements and victim participation in the sentencing process), as the other matters will be dealt with in a separate investigation. A summary of the responses received is contained in Appendix B.

## **INVESTIGATIONS CONDUCTED BY THE CURRENT COMMITTEE**

1.15 The Van den Heever Committee completed its term of office without consolidating its work in a discussion paper or legislative proposals. In late 1998 a new committee was appointed by the Minister of Justice and Professor Dirk van Zyl Smit was elected project leader. The new Committee had the same general brief of sentencing reform and was also to consider the position of victims in the criminal justice system. At an early stage the new committee decided that it accepted the challenge of creating a comprehensive legislative framework for sentencing in South Africa. It noted the work of its predecessor and decided not to repeat the investigations that it had done but simply to take the material gathered into account in its own deliberations. However, since those investigations had been undertaken the situation had changed. Most importantly, the mandatory minimum sentencing legislation (sections 51-54 of the Criminal Law Amendment Act 105 of 1997) had been enacted. It therefore commissioned a study that would seek to determine the impact that the new Act had had, both on the sentencing outcomes and on the perceptions of this form of sentencing by key role players in the criminal justice system. In order to understand the thinking behind the minimum sentencing legislation the committee also commissioned a detailed study of the events that led up to its enactment, including an analysis of the submission made about it to Parliament. Finally in this regard, close attention was paid to judgments of the courts that dealt with implementation of sections 51-54 of the 1997 Criminal Law Amendment Act.

1.16 On the question of victims of crime the committee adopted a different approach. It

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<sup>9</sup> See extracts from the Issue Paper on Restorative Justice in Appendix B.

recognised that the earlier investigation of restorative justice, in particular that part of the issue paper that had dealt with the compensation for victims of crime generally, raised issues that went beyond sentencing. In practice, most offenders are not convicted, yet the victims of their crimes still require compensation. Only relatively few victims of crime have the opportunity to be confronted by convicted offenders in whose sentences restorative or compensatory elements can be recorded. Nevertheless, the new Committee was firmly convinced that **victims of crime needed to have their interests specifically recognised and protected in the sentencing process**. Accordingly, the Committee resolved to emphasise, without further investigation in the short term, these interests in the proposed comprehensive sentencing legislation while at the same time launching a separate and wider inquiry into a national compensation scheme for the victims of crime. It was granted permission by the Law Commission to establish a subcommittee to investigate further a national compensation scheme and other wider issues, including a victims charter, that go far beyond sentencing as they affect victims of crime at every stage of the criminal justice process. These wider issues are not the subjects of this discussion paper.

## **SENTENCING PATTERNS AND THE IMPACT OF THE 1997 CRIMINAL LAW AMENDMENT ACT.**

1.17 The primary new investigations commissioned by the current Committee on Sentencing were empirical studies that were undertaken between June 1999 and January 2000, firstly, on sentencing patterns both before and after the introduction of the 1997 Criminal Law Amendment Act and secondly on the attitudes of key role players to the Act. The research was commissioned to assist the Commission in acquiring data and other information on sentencing practices in South African courts and to provide the Commission with the information it required to evaluate the impact of the 1997 Criminal Law Amendment Act on sentencing practices and related court processes. The Commission was assisted in the research by the GTZ (*Deutsche Gesellschaft für Technische Zusammenarbeit*) as part of their co-operative Legislative Drafting Project. The research on relevant quantitative aspects of sentencing was undertaken by experts affiliated to the Institute of Criminology at the University of Cape Town, while the Institute for Human Rights and Criminal Justice Studies at the Technikon South Africa and the Institute for Security Studies focused on the attitudes of key role players on sentencing. A

detailed précis of these studies follows:

## QUANTITATIVE RESEARCH

1.18 The empirical quantitative study on sentencing practices in South African courts and an assessment of the impact of the Criminal Law Amendment Act, 105 of 1997, was undertaken by the Institute of Criminology at the University of Cape Town on behalf of the South African Law Commission.<sup>10</sup> The aims of the study into sentencing patterns were:

- \* to determine some of the factors that affected sentences imposed;
- \* to determine what sentences were given for various crimes in various regions;
- \* to determine the impact of the Criminal Law Amendment Act, 105 of 1997, (the Act) on sentences;
- \* to determine compliance with the Act; and
- \* to determine sentencing practices with regard to convicted juveniles.

1.19 The study targeted eight high crime police areas namely: Western Metropole (Western Cape urban); Boland (Western Cape rural); Port Elizabeth (Eastern Cape urban); Cradock (Eastern Cape rural); Durban (KwaZulu Natal urban); Midlands (KwaZulu Natal rural); Johannesburg (Gauteng urban); and East Rand (Gauteng semi-rural).

1.20 Finalised cases for the target crimes were collected for each police area, both pre-implementation of the Act (crimes committed during 1997 and the first four months of 1998) and post-implementation (crimes committed after May 1998). The target violent crimes pre-implementation were murder, rape, robbery with aggravating circumstances and culpable homicide. The target economic crimes pre-implementation were fraud, stock theft and shoplifting. Post-implementation, only the violent crimes were studied.

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<sup>10</sup> The full report of this important quantitative study is reproduced in Appendix C.

1.21 In excess of 55 000 cases were randomly sampled using the South African Police Services (SAPS) CAS database. The sentence and crime were verified using the SAPS CRIM database (SAP 69 reports). After unverified data were excluded, this representative sample comprised 1 400 cases from both the magistrates' and high courts. A finalisation study, conducted on a sub-sample of pre-implementation cases, found disturbingly low conviction rates. A median of only 5.4 percent of cases reported to police resulted in convictions. A second sample comprised a further 295 high court cases. These were collected directly from the courts. The relevant information that was collected on each case included the age, race and gender of the accused, the age of the victim in rape cases, the offence, date of commission and sentence.

1.22 The results of the study are briefly outlined below:

### **Pre-implementation sentencing practices**

#### *Violent crime*

Before the introduction of the Act, by far the majority of people convicted of serious violent crime were sent to prison by South African courts. The serious violent crimes of murder, rape and robbery with aggravating circumstances had very high levels of custodial sentences, each in excess of 90% of all accused convicted for those crimes.

Both murder and rape had median effective prison terms of eight years while more than 50% of accused were sentenced to between five and ten years imprisonment.

Robbery with aggravating circumstance was intermediate in severity with a median effective imprisonment of six years and 50% of sentences from two to ten years.

#### *Economic crime*

For pre-implementation economic crimes, a far wider variety of sentence types were used than for violent crime. Custodial sentences were only used for 24% of economic crimes.

Stock theft was treated considerably more harshly than fraud and shoplifting. Three-quarters of accused convicted of stock theft went to prison although economic crime in general had fewer prison sentences. It is also clear that many more accused were given custodial sentences when found guilty of stock theft (74.6%) compared to the violent crime of culpable homicide (41.6%).

A fine was generally the most common sentence for economic crimes. Fines were used in 38% of fraud and 50% of shoplifting cases. Of those who were fined, the median for fraud was R1000 and for shoplifting it was R300.

## **Factors affecting sentencing**

### *Region*

There were significant differences in sentences given for the same crime in different regions.

The differences appeared to be associated more with what province the crime was committed in rather than whether the police area was more rural or urban. Gauteng and KwaZulu Natal generally imposed higher sentences than the Eastern and Western Cape.

### *Age of accused*

Age had a significant impact on sentences for juveniles and people over 49. Generally fewer people under the age of 18 got custodial sentences when compared to the over 18's and particularly the over 20's.

Although there were relatively few accused aged 50 or older, they also tended to get fewer custodial and less severe sentences.

### *Race and gender of accused*

From the available data it was not possible to make generalised conclusions about whether or not the race or gender of accused persons affects sentence type and severity. This of course does not deny that race and gender may affect sentencing. Rather, there were insufficient data on all races and both genders to fully analyse the effect of these factors.

### *Previous convictions*

Most adults (56%) convicted of murder, rape and robbery with aggravating circumstances were first offenders and had never been convicted of any other crime previously. An even higher percentage (93%) had never been convicted of those same crimes previously.

Sentences for the more serious crimes (murder, rape and robbery with aggravating circumstances) where the accused had any kind of previous conviction did not show obviously higher use of custodial sentences or more severe sentences than those with no previous records.

Previous convictions impacted more upon sentences for less serious offences.

## **Pre-post comparisons**

### *Sentence severity*

Sentence severity for both rape and robbery with aggravating circumstances committed post-implementation significantly increased when compared to pre-implementation sentences. The effective median years of imprisonment for rape increased from eight to ten and for robbery from six to seven. The increases for murder and culpable homicide were not statistically significant. (The latter offence was not subject to a minimum sentence under the Act.)

### *Rape victim age*

The Act seems to have created a distinction in sentence severity for child rape. Pre-implementation, there was no statistically significant difference in sentence severity for rape of women and girls of different ages. But after the introduction of the Act, people convicted of raping girls under 12 got significantly more severe sentences than those raping older victims did.

#### *Life sentences*

There was a large increase in the percentage of life sentences given for rape and murder after implementation of the Act.

#### *Regional inconsistency*

The Act does not appear to have changed regional inconsistency in sentencing. As with pre-implementation sentences, there were also significant post-implementation sentencing differences among the police areas.

There were also different levels of compliance with the prescribed minimum sentences across the police areas. Johannesburg and East Rand showed the greatest compliance with the Western Metropole and Boland the lowest. It must be noted, however, that sentences prior to the Act were more similar to the minima required by the Act in the Gauteng police areas than were sentences in the Western and Eastern Cape.

The differences were particularly noticeable for murder and robbery with aggravating circumstances. The lowest post-implementation sentences were still recorded in Western Metropole generally followed by Boland and Cradock.

### **Sentencing compared with minimum sentences in the Act**

#### *Pre-implementation*

When the Act was introduced, it imposed minimum sentences for murder, rape and robbery with aggravating circumstances that were in line with only a small proportion of sentencing practice. They were in accordance with the most severe sentences given by courts before its introduction.

Pre-implementation, less than 20% of murder cases, 30% of rape cases and not a single case of robbery with aggravating circumstances used sentences equal to or greater than the new minimum sentences.

The prescribed minimum sentences for murder, rape and robbery with aggravating circumstances were generally in excess of the median pre-implementation sentencing practices in all eight police areas studied.

#### *Post-implementation*

Even post-implementation, not a single median sentence for murder, rape or robbery with aggravating circumstances in any of the eight regions exceeded the minimum sentence prescribed by the Act.

There was generally compliance in a minority of cases (43%) with the minimum sentences in the post-implementation cases finalised thus far.

Like the situation before the Act, the majority of sentences post-implementation, except for rape Part III, were below the prescribed minima.

In Johannesburg and the East Rand the highest compliance was noted (64.5% and 72.5% respectively).

The least compliance was found in the two Western Cape police areas of Western Metropole (8.8%) and Boland (27.7%).

## High Court sentencing

Magistrates' courts handed down the vast majority (96%) of sentences for murder, rape and robbery with aggravating circumstances. The results summarised thus far were representative of the proportions of magistrates' and high courts cases and therefore contained mostly magistrates' court cases. Some analysis was also done of high court sentences using the high court sample. This analysis is discussed below.

The severity of pre-implementation high court sentences was more than double those of magistrates' courts. Murder in the high courts received a median of 20 years compared with 7 in the magistrates' courts. The median sentences for rape in the high courts was 17.5 years compared with 7.5 in the magistrates' courts. Robbery with aggravating circumstances in the high courts was sentenced to a median of 12.5 years compared with 6 years in the magistrates' courts. However, these differences are not surprising because the more serious cases go to the high court.

The minimum sentences imposed by the Act were generally in accordance with high court sentencing practices before its introduction. Eighty-five percent of murder and seventy-nine percent of rape pre-implementation high court sentences were equal to or greater than the prescribed minima. Fewer than half of pre-implementation high court sentences for robbery with aggravating circumstances would have complied with the new statutory minimum sentence.

A comparison of the high courts located in Cape Town, Port Elizabeth, Durban and Johannesburg showed consistency in pre-implementation sentencing for murder and robbery with aggravating circumstances. (There were insufficient rape cases to do a regional comparison.)

There was no significant change in post-implementation high court sentences for murder, rape and robbery with aggravating circumstances compared with pre-implementation sentences for the same crimes.

## Juveniles

### *Proportions of juveniles versus adults*

Adults committed the vast majority of crimes. Juveniles comprised only 8% of the sample.

### *Sentence type and severity*

A custodial sentence was the most common sentence (55%) for people under 18 convicted of murder, rape or robbery with aggravating circumstances.

For economic crimes committed by juveniles, a fully suspended sentence was the most commonly used sentence (50 – 100%).

The proportions of juveniles getting custodial sentences and the severity of their sentences were lower than for adults. Correctional supervision and reform schools were other commonly used sentences for juveniles.

#### *Pre-post comparison*

The Act treats juveniles differently from adults. However, the Act significantly increased the median period of imprisonment for juveniles convicted of rape from 0 years pre-implementation to 5 years post-implementation.

The median sentences for juveniles convicted of murder (6 years), robbery with aggravating circumstances (0 years) and culpable homicide (0 years) remained unchanged.

### **Conclusions**

This study goes some way to creating a clearer picture of sentencing practices in South Africa. This is particularly so because of the representative nature of the sample.

It remains to be seen whether the minimum sentence approach prescribed by the Act will lead to a noticeable reduction in serious crime. However, one of the most telling findings of this study is that a mere 5.4% of more than 30 000 randomly sampled cases reported to the police resulted in a conviction. The question of sentencing therefore remains irrelevant to the vast majority of people who committed those crimes. Until the conviction rate improves dramatically, it is difficult to see how tough minimum sentences will be an effective deterrent to thousands of criminals who evidently do not get apprehended and successfully prosecuted.

What has become clear is that the Act introduced minimum sentences in our law that were out of line with prevailing penal norms in every region studied. While sentences have increased since the introduction of the Act, they generally remain below those prescribed as minimum sentences. Given the low conviction rates and the time taken for cases to be finalised, however, it is perhaps too early to fully understand the impact of the Act.

The impact of this Act on the prison population remains to be assessed. However, given the lengthy prison terms involved, particularly life sentences, this impact is likely to be long term. The effect on prison populations will only be felt in a number of years when prisoners who would otherwise have been discharged (to make way for new admissions) will remain behind bars. The long-term impact on prison overcrowding in an already strained correctional system may be profound.

### **QUALITATIVE RESEARCH**

1.23 The research conducted by the Institute for Human Rights and Criminal Justice Studies

at Technikon South Africa, and the Institute for Security Studies (ISS) on the attitudes to sentencing and the impact of the 1977 Criminal Law Amendment Act<sup>11</sup> adopted the following methodology. Between June 1999 and January 2000 personal interviews were conducted with 102 individuals involved in the sentencing process in South Africa's criminal courts. These role players interviewed were judicial officers (7 judges of the high court and 35 regional court magistrates); state prosecutors (23 public prosecutors working in the regional courts and 8 state advocates appearing in the high court); defence lawyers (19); and lay assessors (10). Interviews were conducted in four provinces, viz. Gauteng, KwaZulu-Natal, Eastern Cape, and Western Cape. Within each province, courts at which interviews took place were selected in such a way that they generally fell into urban, rural (or peri-urban), and previous homeland area categories, although in practice this was not always possible.

1.24 It is important to note that this report reflects the perceptions and opinions of the participants in the survey rather than objective facts. They are highly subjective and are intended to gauge the views of important role players in the sentencing process. The opinions expressed in this survey are not necessarily representative of all judges, magistrates, prosecutors, defence lawyers and assessors. This is so for at least two reasons. First, these groups are not homogeneous. They do not have consensual views on all aspects of a controversial topic such as sentencing. Summarising their diverse opinions is thus inherently subjective and even includes significant views that are held by a minority or that were expressed by only one person. Secondly, the sample size was relatively small and thus where percentages are used to describe the prevalence of particular views in the sample, these may not accurately reflect the true balance of opinion among all judges, magistrates and members of other groups.

1.25 The results of the qualitative research are briefly summarised below.

### **Pre-implementation sentencing practices.**

#### **Estimates of past sentences**

Respondents were asked what sentences were typically given before the Act

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<sup>11</sup> The full report of the qualitative study is not reproduced here but is on file with the South African Law Commission.

came into effect. The most common sentence ranges (chosen by more than 60% of respondents) for five crimes are the following:

- 1 **Murder – (Part I):** ten or more years imprisonment;
- 2 **Murder – (Part II):** from five years up to ten years imprisonment;<sup>12</sup>
- 3 **Rape – (Part I):** ten or more years imprisonment;
- 4 **Robbery (Part II):** ten or more years imprisonment;
- 5 **Fraud (Part II):** five years up to ten years imprisonment

### **Opinions about sentencing for serious crimes in the past**

Judicial officers were evenly split between describing pre-implementation sentences as harsh or lenient. Most magistrates were of the view that previously they had wider discretion but admitted that there was no “consistency” in sentencing. They contended that direct imprisonment was the normative sentence for such crimes but said that their limited jurisdiction prevented them from sentencing heavily.<sup>13</sup> Prosecutors expressed views about inconsistency in the past and said that sentencing depended on what a particular presiding officer viewed as serious. Some defence lawyers said that differences in sentence could be attributed to the severity of the crime or personal circumstances of the accused.

### **Opinions about consistency in pre-implementation sentencing**

Respondents, including judicial officers, were equally divided on whether sentences for offences now covered by the Act were consistent or not in the past. Equal numbers of respondents said that sentences were always or almost always consistent and never or almost never consistent, while just under a third thought that past sentences were sometimes consistent.

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<sup>12</sup> However, four of the seven judges interviewed thought that the sentences would have been ten or more years imprisonment.

<sup>13</sup> Since October 1998, the maximum sentence in a regional magistrates’ court is generally 15 years imprisonment. Before this, the limit was 10 years imprisonment. Currently, for cases under the Act, the maximum regional court sentence is equivalent to the prescribed minimum sentence (except for life imprisonment, which is reserved for the high court).

### **Victims' interests and the use of compensation and restitution in sentencing**

The majority of all interviewees (60%) was of the opinion that the courts never or almost never take the interests of victims into account with regard to possible compensation and restitution when it comes to serious offences. All groups of respondents pointed out that most accused do not have the means to pay compensation to their victims.

There was consensus that victims should feature more prominently in the court process and various steps were suggested to improve victim involvement.

### **The Act**

Preference for the situation before or after the implementation of the Act and opinions on its effect on judicial discretion and independence

Judicial officers and defence lawyers generally preferred the situation before the Act came into effect. This included 63% of those magistrates who expressed an opinion and all seven judges interviewed. By contrast, prosecutors and lay assessors tended to prefer the situation after the Act came into effect.

Reasons advanced for preferring the pre-implementation sentencing regime included:

- 6 It is not possible to legislate for minima when prescribed sentences are so high;
- 7 The Act risks unconstitutionality and decontextualising sentencing;
- 8 It was a piecemeal approach to split the trial in the regional court and require sentencing in the high court;

Reasons given for preferring the post-implementation situation included:

- 9 Increased jurisdiction for the regional courts;
- 10 Pre-implementation, regional courts had to impose lenient sentences to avoid being overturned on appeal; and
- 11 The Act would be a deterrent to criminals.

Judicial officers, prosecutors and defence lawyers generally agreed that the Act limits

judicial discretion. More than 75% of judicial officers and defence lawyers felt that the degree of adverse effect on judicial independence was large. *Inter alia*, they felt that that the Act introduced a lack of individualisation in sentencing and curtailed courts' discretion to impose a sentence appropriate in a particular case. Fewer prosecutors, although still more than 60%, viewed the Act as having an adverse effect on judicial independence to a large degree.

#### Opinions about the impact of the Act on harshness and consistency in sentencing

Respondents in all categories thought that the Act would make sentences harsher but more rigid. Some judges thought that some sentences would be unjust and arbitrary while another said that the Act would not have any impact on sentencing practices. Some magistrates felt that the Act would militate against past leniency and send a positive message to society but another said that some sentences would be overly harsh. Prosecutors emphasised the more punitive aspects of the law.

Almost 70% of all respondents thought that as a result of the prescribed minimum sentences there would be "consistency" in sentencing of crimes covered by the Act. However, for crimes not covered by the Act opinions about consistency were more mixed and closer to those pre-implementation sentences for crimes now covered by the Act. More than a third of judicial officers (38%) said that such sentences would "sometimes" be consistent. There were differing views on the application of the term consistency. One judge opined: "It is important to emphasise that it is the sentencing practices which must be consistent since uniform sentences for the same crime ignore the facts of the case and can lead to grave injustices"<sup>14</sup>

#### Opinions on the prohibition of suspended sentences under the Act

Nearly 55% of judicial officers generally (and five out of the seven judges in particular) thought that the prohibition on the suspension of sentences was either bad or very bad, while only a third were in favour of the provision. Even more defence lawyers (67%) thought the prohibition was bad. By contrast, the provision was well received by 84% of state prosecutors. Those in favour of the prohibition felt that removing the stipulation would negate the purposes of the Act.

#### Effect of the Act on guilty pleas to lesser charges

There was a high degree of uncertainty among respondents about whether the

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<sup>14</sup> For example, premeditated murder of a policeman to facilitate a robbery must be dealt with differently to a premeditated murder of a child molester by his victim when he is about to rape her again.

Act would encourage accused persons to plead guilty to a lesser charge so as to avoid a tougher sentence in terms of the Act. No group had a majority view one way or the other and 20% of all respondents said that they did not know.

#### Opinions on interpretation of various aspects of the Act

Virtually all of the respondents (94%) said that there are no clear guidelines on what “substantial and compelling circumstances” mean. Although various opinions were expressed about the meaning of the phrase, these have subsequently been eclipsed by various reported judgements.<sup>15</sup>

It appears that respondents do not expect difficulty in classifying crimes under Schedule 2 of the Act. Almost all respondents (86 – 88%) said the court would not have difficulty in determining whether or not a murder was planned or premeditated or whether or not there was an element of common purpose or conspiracy in the commission of a crime.

#### **Factors affecting sentences.**

There was general agreement with the rationale of the Act regarding its treatment of **youthful offenders**. Two-thirds of judicial officers, and 60% of respondents generally, believed the fact that an accused is between 16 and 18 years of age does play a role in sentencing under the Act. Some respondents believed that most violent crime is committed by juveniles.

Respondents were asked whether various factors play a role in sentencing. The following percentages of respondents in general (and judicial officers in parenthesis) said that the listed factors did play a role in sentencing.

#### *Factors relating to the accused*

- 12 lack of legal representation:** 32% generally (17% of judicial officers)
- 13 social standing:** 56% generally (41% of judicial officers)
- 14 poverty:** 61% generally (50% of judicial officers)
- 15 culture:** 43% generally (48% of judicial officers)

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<sup>15</sup> These judgments are summarised below in this part of the discussion paper.

16 **race:** 27% generally (17% of judicial officers)

17 **gender:** 54% generally (48% of judicial officers)

*Factors relating to the victim:*

18 **social standing:** 39% generally (24% of judicial officers)

19 **culture:** 28% generally (21% of judicial officers)

20 **poverty:** 34% generally (29% of judicial officers)

21 **race:** 25% generally (19% of judicial officers)

22 **gender:** 62% generally (45% of judicial officers)

*Factors relating to the judicial officer:*

23 **occupational background, character and outlook on life:** 70% - 72% generally (67% of judicial officers)

24 **life experiences:** 80% generally (76% of judicial officers)

25 **race:** 38% generally (26% of judicial officers)

26 **gender:** 41% generally (19% of judicial officers)

Opinions about prison capacity as a factor influencing sentencing

Respondents were almost unanimous in their opinion that the capacity of the correctional system to carry out sentences should not be considered when sentencing accused persons.

**Evidence used in sentencing.**

Opinions about the adequacy of evidence for sentencing

Respondents were considerably more critical of the State's ability to present evidence on sentence than the ability of the defence to do so. Only 23% to 27% of respondents felt that the **State** almost always or always presents adequate evidence to enable sentencing decisions, while a further 28% to 29% said that

prosecutors did so sometimes. Respondents were more positive about the ability of the **defence** to present adequate evidence on sentence. Between 32% and 40% of respondents thought that the defence almost always or always presents adequate evidence to enable sentencing decisions, while a further 37% to 38% said that defence lawyers did so sometimes.

In the opinion of respondents, there was generally not much difference between crimes covered by the Act and crimes not covered by the Act in respect of adequacy of evidence for sentencing.

#### Availability of criminal records

Three-quarters of respondents thought that in 80% to 100% of cases the criminal record of the accused was available and submitted to the court when sentence was imposed in terms of the Act.

#### The role and prevalence of pre-sentencing reports

More respondents thought that pre-sentencing reports played a role in sentencing of crimes not covered by the Act, than for crimes covered by the Act. For crimes **not covered by the Act**, 53% of the respondents thought that pre-sentencing reports played a large role and a further 34% thought they played a small role in sentencing. For crimes **covered by the Act**, 35% of the respondents thought that pre-sentencing reports played a large role and a further 39% thought they played a small role in sentencing.

More than 60% of all respondents thought that legal representatives were more likely to request pre-sentencing reports in cases where the Act applies. This figure was higher for state prosecutors and defence attorneys than for judicial officers.

## COMPARISON OF PERCEPTION AND REALITY

1.26 The opinion survey results of the qualitative study showed what respondents subjectively believed the situation was or what it ought to be. By contrast, the parallel quantitative survey of sentencing practice showed more objectively the real situation. To the extent that the two studies covered similar topics, this provides an interesting opportunity to compare perception and reality. This comparison is set out below.<sup>16</sup>

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<sup>16</sup> These comparisons were formulated by adv. R Paschke, one of the researchers who undertook the quantitative survey.

## Past sentencing

In general, the respondent's perception of what sentences were typically given accords with what sentences were actually given pre-implementation. The quantitative study found that for pre-implementation murder, more than 50% of sentences were in fact from five to ten years imprisonment.<sup>17</sup> Although that study did not distinguish between Part I and II murders, most of these murders would have been Part II and this accords broadly with the respondents perception of sentences for this kind of murder.

The quantitative study did not distinguish between rape that would have fallen under Part I or III but most would have been under Part III. The actual median sentences for all types of pre-implementation rape was eight years imprisonment. It is quite likely that the actual sentences for Part I rape would have been in excess of ten years had it been possible to make this distinction. This is also consistent with respondents' perceptions.

Respondents thought that sentences for Part II robbery were higher than they actually appear to have been pre-implementation. While respondents believed that this crime typically attracted sentences of ten years or more, the actual median sentence was six years with more than 50% of accused in fact getting from two to ten years.

Respondents' estimates of sentences for fraud involving more than R500 000 broadly accord with the few statistics available from the Office for Serious Economic Offences (OSEO).<sup>18</sup> Respondents thought a typical sentence was from five years up to 10 years imprisonment. Of the ten OSEO cases finalised to date and generally involving more than R1m, four fell within this range, four were above and two were below respondents' estimates.

Most magistrates thought that direct imprisonment was the normative sentence for the violent crime listed in Schedule 2 of the Act. This proved to be correct as more than 90% of accused convicted for pre-implementation murder, rape and robbery were in fact given an effective custodial sentence.

## Consistency in pre-implementation sentencing

Respondents, including judicial officers, were equally divided on whether sentences for offences now covered by the Act were consistent or not in the past. The quantitative study did find that there were statistically significant differences among the eight police areas studied in the magistrates' court dominated sample. However, there were no significant differences among the four high courts. There was no measurement of

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<sup>17</sup> Appendix C at 28.

<sup>18</sup> Appendix C at 29.

consistency in length of prison sentence from judicial officer to judicial officer.

### **Use of compensation**

The majority of all interviewees (60%), were of the opinion that the courts never or almost never take the interests of victims into account with regard to possible compensation and restitution when it comes to serious offences. This is borne out by the quantitative survey, which found that compensation was ordered in only 3% of pre-implementation cases for adult accused.

### **Consistency in post-implementation sentencing**

Almost 70% of respondents thought that as a result of the prescribed minimum sentences there would be “consistency” in sentencing of crimes covered by the Act. However, the quantitative study found that post-implementation, there were still statistically significant differences among the regions and that the Act had apparently not improved regional consistency in sentence severity.

### **Youth and sentencing**

Some respondents believed that juveniles commit most violent crime. But the quantitative study found that juveniles comprised a small proportion of the overall numbers of accused convicted for the crimes studied. Juveniles (under 18 year olds) comprised only 8% of both economic and violent crimes and 9% of murder, rape and robbery with aggravating circumstance.

### **Conclusions**

- 27     The estimates of past sentences by respondents were broadly in line with the measured sentences. This was particularly the case with murder and rape. Respondents were also correct in saying that the normative sentence for violent crimes under the Act was direct imprisonment.
  
- 28     While respondents were divided in their opinions on whether pre-implementation sentences were consistent in the number of years imprisonment, the quantitative study did find significant regional differences in sentencing severity in the magistrates' courts.
  
- 29     The factual findings did not support respondents' expectations of greater post-implementation consistency in sentencing. While 70% of respondents expected greater consistency, significant regional differences in fact remained post-implementation.
  
- 30     Respondents were correct in saying that compensation is seldom used as a sentencing option by courts.

- 31 The opinion of a few respondents that juveniles commit most violent crime was not borne out by factual findings of the quantitative study.

## **FURTHER RESEARCH**

1.27 In addition to the two empirical studies, the Committee commissioned detailed research on the events surrounding the passage of the 1997 Criminal Law Amendment Act.<sup>19</sup> This study also analysed the submission made to Parliament at the time that the new law was being considered. The most important conclusion that can be gleaned from this research is that there was considerable divergence of views about the desirability of mandatory sentences or indeed of any attempt to limit sentencing discretion. The views of the different role players were largely similar to those reflected in the earlier research of the Van den Heever Committee and those again uncovered by the survey of attitudes commissioned by the Committee after the 1997 Act had come into operation.

## **RESPONSE BY THE COURTS TO THE 1997 CRIMINAL LAW AMENDMENT ACT**

1.28 In addition to the various studies it commissioned the Committee itself analysed the response, as reflected in the judgments of the courts, to the 1997 Criminal Amendment Act. Initially it appeared as if this would be a difficult task. The mandatory minimum sentencing provisions of the 1997 Criminal Law Amendment Act came into force on 1 May 1998 but it took some time for their effects to be felt as they applied only to crimes committed after that date.<sup>20</sup> There was a time lag before the various divisions of the High Court were called upon to interpret these provisions and there has been a further delay in the reporting of relevant judgments. By the second half of 1999 they started to appear regularly in the law reports. They give an interesting picture of legal problems that the courts have found with this legislation and an indication of the pitfalls to be avoided in new South African sentencing legislation.

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<sup>19</sup> The full report produced for the Committee by Ms Paula Proudlock is not reproduced here but is on file with the South African Law Commission.

<sup>20</sup> *S v Willemse* 1999 (1) SACR 450 (C).

## Sentencing jurisdiction

1.29 The first, and arguably less important, question related to the sentencing jurisdiction of the courts. In particular, there was concern about the provision for offenders who had committed crimes for which the Act prescribed life sentences. Many such offences are tried in the regional courts and the Act provides that they have to be referred to the High Court for sentence as life imprisonment is not within the sentencing jurisdiction of the regional courts. There was a technical dispute about whether the regional court in fact had the jurisdiction to try cases in which a mandatory sentence might have to be imposed, but the question was settled by affirmative answers of full benches in both the Cape and Transvaal Divisions of the High Court.<sup>21</sup> Of more moment is the substantive criticism advanced by a number of judges of the procedure in terms of which the court that imposed sentence was not the trial court. As Davis J explained succinctly in *S v Jansen*: “It is difficult to obtain a sufficient understanding for the matter in its entirety when only matters of sentencing are referred to this [High] Court.”<sup>22</sup>

### **“Substantial and compelling circumstances” as a ground for departure from mandatory minimum sentences**

1.30 The second, and major, question about the legislation that has exercised the South African judiciary is the interpretation of the words, “substantial and compelling circumstances.” It is easy to see why this should be so. If “substantial and compelling circumstances” are found to be present the mandatory minimum sentences prescribed by the Act are not applicable. Then the Court is at large, as it would have been prior to the passage of the Act, to exercise its discretion on the imposition of sentence. There has been a wide range of interpretations of the words “substantial and compelling”. At the one extreme has been the view of Stegmann J in *S*

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<sup>21</sup> See *S v Ibrahim* [1999] 1 All SA 265 (C); *S v Mdatjiece* unreported judgment of the Transvaal Provincial Division SH 375/98 delivered on 30 December 1998, referred to by Stegmann J per *contra* in *S v Mofokeng* 1999(1) SACR 502 (W) at 513h.

<sup>22</sup> 1999 (2) SACR 368 (C) at 372g.

*v Mofokeng*<sup>23</sup> that they allowed the sentencing court virtually no discretion: He explained that

for 'substantial and compelling circumstances' to be found, the facts of the particular case must present some circumstance that is so exceptional in nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case that could be described as 'compelling' the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified.<sup>24</sup>

1.31 In Judge Stegmann's view, factors that ordinarily would be regarded as aggravating or mitigating at sentence could not simply be weighed to see if they are a substantial and compelling ground for departure, unless they were of an "unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes".<sup>25</sup> To do otherwise would mean that the court was preferring its own judgment to that of parliament and would "compromise the integrity of the court".<sup>26</sup>

1.32 At the other extreme was the unreported judgment of Leveson J in *S v Majalefa and Another*<sup>27</sup> which held that notwithstanding the new legislation the starting point remained that consideration had to be given to all aggravating and mitigating factors in the traditional way. In this view the new Act was only an attempt to introduce a measure of conformity in the sentencing process and should therefore not be regarded as introducing a major change in the approach to sentencing.

1.33 Both extremes have found endorsement in unreported judgments in other divisions of the

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<sup>23</sup> 1999 (1) SACR 502 (W).

<sup>24</sup> At 523c.

<sup>25</sup> At 524d.

<sup>26</sup> At 523b.

<sup>27</sup> Delivered on 22 October 1998 in the WLD, quoted extensively in *S v Blaauw* 1999 (2) SACR 295 (W) at 305i to 306i.

High Court. In the Natal Division Squires J in *S v Madondo*<sup>28</sup> emphasised that the intention of Parliament was that penalties for rape of a girl under 16 should be increased and that the court would not easily intervene to impose a lesser sentence as compelling reasons for doing so would not be lightly found. He explained that a “compelling” reason was “clearly more than just a disparity between what the Court feels may be sufficient and the prescribed minimum. To consider such a difference alone as constituting compelling reasons would, I think, be subversive of the legislature’s intention.” Judge Squires explained that compelling was a “strong” word that meant “‘almost irresistible’, constituting at least a strong sensed obligation”. He went on to opine that factors such as the age of the girl; “nearly sixteen years or sixteen months”, or whether she was physically harmed or not, would usually not come into play for the purpose of sentencing under the new Act. The approach of Squires J, which of course is substantially similar to that adopted in *S v Mofokeng*, has been followed in other decisions in the same Division.<sup>29</sup>

1.34 The approach, which suggests that the new Act has changed little in the fundamental approach to sentencing, has also received further support. In *S v Ciman*<sup>30</sup> Jones J of the Eastern Cape Division noted that he would attempt a definition of “substantial and compelling circumstances”. He went to on to hold:

In every case, however, the nature of the circumstances must convince a reasonable mind that a lesser sentence is a proper sentence and that it is justified when regard is had to

- (a) the aggravating and mitigating features attendant upon the commission of what is already classified by the lawgiver as among the most serious of offences, and
- (b) the interests of society weighed against the interests of the offence.

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<sup>28</sup> Unreported judgment of the NPD, case CC22/99, delivered on 30 March 1999.

<sup>29</sup> See *S v Ngubane* Unreported judgment of the NPD, per Squires J, case CC31/99, delivered on 30 March 1999; *S v Shinga* unreported judgment of the D&CLD, per Nicholson J, case CC176/99, delivered on 26 October 1999: and (implicitly) *S v Khuzwayo*, unreported judgment of the D&CLD, per Combrink J, case CC103/99, delivered on 30 August 1999.

<sup>30</sup> Unreported judgment of the ECPD, case CC11/99, delivered on 28 April 1999.

1.35 As in *S v Majalefa*, this is really the reassertion of the traditional sentencing principles. With these grounds of departure Judge Jones in *Cimani* found it easy to justify a departure from the prescribed minimum in the case with which he was dealing.

1.36 In more recent judgments a more nuanced approach has developed between the interpretation that would allow the courts almost no room for manoeuvre and a reading that would limit the restrictions of the new legislation to an extent that arguably undermines the intention of the legislature completely. In *S v Blaauw*<sup>31</sup> Borchers J consciously attempted to steer an interpretative course between the two extremes. She found that the Act did narrow the discretion that courts had previously had to impose sentence and that it did so more rigorously than if the court had merely had to find that there were “circumstances” that justified it departing from the prescribed minima. On the other hand, the legislature had not defined what it meant by “substantial and compelling” as qualifiers of circumstances. It had not specified that the circumstances should be “exceptional” which would make them even narrower. To determine if a departure was allowed one need not look for exceptional circumstances but at the cumulative effect of all the aggravating and mitigating circumstances of the case. If, in the light of these, the prescribed sentence would be “startlingly inappropriate” it could depart from them, but otherwise it was bound to impose them.<sup>32</sup> This approach has been followed, with minor qualifications, in subsequent decisions of the Witwatersrand Local Division of the High Court.<sup>33</sup>

1.37 The moderate approach has much to commend it, as it allows the courts some discretion without undermining the intention of the legislature. It remains difficult to apply however, as it requires the courts to consider, albeit within a different framework, all the aggravating and mitigating factors that it has traditionally considered. It is precisely the strategy of spelling out all manner of circumstances that allow a departure from the prescribed minima,

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<sup>31</sup> *Supra*.

<sup>32</sup> At 311a-h.

<sup>33</sup> *S v Dithotze* 1999 (2) SACR 315 (W); *S v Homareda* 1999 (2) SA 319 (W). *S v Segole* 1999 (2) SACR 115 (W) and *S v Zitha and others* 1999 (2) SACR 404 (W), both of which follow the approach adopted by Stegmann J in *S v Mofokeng supra* were both decided prior to the decisions in *Blaauw*, *Dithotze* and *Homarada*.

which has led to some judgments of the courts being severely criticised by the public for having taken inappropriate factors into account. Perhaps the best example of this is *S v Abrahams*<sup>34</sup> where Foxcroft J held that the offender who had raped his own daughter was not a threat to society as a whole and that this was a mitigating factor that could be considered along with others in deciding not to impose the prescribed life sentence. While the public criticism of the judge for articulating a mitigating factor of this kind is entirely understandable and justified, it may be argued that the relatively inflexible structure of the legislation has led courts, who believe that the prescribed sentence would be inappropriate, to put forward ‘mitigating factors’ of this kind.

1.38 The words “substantial and compelling” are not common qualifiers in South Africa. They were probably adopted from the sentencing guidelines that have been developed by the Sentencing Commission in the American State of Minnesota to guide the courts in the exercise of their discretion.<sup>35</sup> Unlike the Minnesota guidelines the South African legislature has not spelt out further what they entail.<sup>36</sup> This is clearly a weakness but it does not mean that words cannot be interpreted without simply reintroducing existing principles. A novel interpretation is propounded by Davis J in *S v Schwartz*.<sup>37</sup> The learned judge emphasises that “the key to the application of ‘substantial and compelling’ must be the crime”. He noted that this required a determination of the moral blameworthiness that could be attached to the offence in the particular circumstance under which it had been committed. This limits the range of factors that can legitimately be considered in determining whether there are “substantial and compelling circumstances” present that can justify a departure from the minimum. The focus on the relationship between the nature of the crime and the length of the sentence also impelled Davis J to emphasise the principle of desert as a single logical point of departure for his analysis. As he explained:

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<sup>34</sup> Unreported judgment of the CPD, case SS 99, delivered 20 September 1999.

<sup>35</sup> D van Zyl Smit “Mandatory Minimum Sentences and Departures for them in Substantial and Compelling Circumstances” (1999) 15 *SAJHR* 270.

<sup>36</sup> *S v Blaauw supra* at 303g.

<sup>37</sup> 1999 (2) SACR 380 (C).

Thus the question arises as to the appropriate principle to guide the sentencing decision. Andrew von Hirsch in Von Hirsch and Ashworth *Principled Sentencing* at 197 submits that in the process of sentencing, the Court should take the principle of commensurate desert into account as a foundational requirement of justice:

‘This principle has its counterpart in common-sense notions of equity which people apply in their everyday lives. Sanctions, disproportionate to the wrong, are seen as massively unfair – whether it be an employee being fired for a minor rule infraction to make an example of him, or a school inflicting unequal punishment on two children for the same misdeed. The principle ensures that offenders are not treated as more (or less) blameworthy than is warranted by the character of the offence. Punishment ... imparts blame. A criminal penalty is not merely unpleasant ... it also connotes that the offender acted wrongly and is reprehensible for having done so...

The sterner the punishment, the greater the implicit blame; sending someone away for several years connotes that he is more to be condemned than does gaoling him for a few months or putting him on probation. In the allocation of penalties therefore the crime should be sufficiently serious to merit implicit reprobation. The principle of commensurate deserts ensures this.’

Given that the minimum sentencing provision of s 51 draws on that of Minnesota and the Minnesota system is predicated on the principle of desert, the latter is an important guideline to be applied in such cases.

1.39 This analysis of the underlying principles of the new Act is novel in South Africa, where various justifications of punishment are often lumped together in a somewhat confusing way. It shows that legislative intervention can lead to fundamental reassessment of principle. This is, however, the view of a single judge. A critic could argue that the use of the words “substantial and compelling” in temporary legislation is not a sufficiently clear basis for such a major innovation. We return to this question of primary sentencing principles when developing the criteria for a comprehensive sentencing system in the next chapter.

## **Constitutionality**

1.40 The constitutionality of the new Act was challenged in a number of cases. These challenges were uniformly rejected but the responses to them are a useful indicator of the relationship between constitutional principle and legislative intervention in this sphere. The issue

can best be summarised as follows.<sup>38</sup> Foreign jurisprudence, both Canadian<sup>39</sup> and Namibian,<sup>40</sup> quoted with approval by South African Courts,<sup>41</sup> indicates that any legislation that resulted in sentences that were grossly disproportionate to the crime would be unconstitutional on the grounds that they would be cruel, inhuman and degrading. A mandatory sentence regime runs the risk of being unconstitutional if in its application it results in grossly disproportionate sentences being imposed. The 1997 Criminal Law Amendment Act, precisely because it allows for departures from the prescribed minima in “substantial and peculiar circumstances”, is not, on the face of it, a mandatory sentence regime of the constitutionally dubious kind. If, however, the interpretation of the departure clause were so narrow that it could result in such disproportionate sentences, it would be open to constitutional challenge. In *S v Homareda*<sup>42</sup> Cloete J suggested that courts should be alert to this danger and, if the result of applying the new legislation was disproportionality, they should refer the matter to the Constitutional Court. It is clear that any new sentencing legislation would have to bear these strictures in mind in determining whether it would pass constitutional muster. It will also have to consider the underlying principle that the constitutionally recognised dignity of all members of society requires that no sentence should restrict the autonomy of an offender more than is justified by legitimate functions of penal law.<sup>43</sup>

## Life and other very long sentences

1.41 The question of mandatory sentences also highlights the confusion that exists on the

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<sup>38</sup> For a fuller constitutional analysis, see D van Zyl Smit “Sentencing and Punishment” in M Chaskalson *et al* (eds.) *Constitutional Law of South Africa* (Revision Service 5, 1999) 28-6 – 28-10a.

<sup>39</sup> *Smith v The Queen* (1987) 34 CCC (3d) 97; *R v Goltz* (1992) 67 CCC 481.

<sup>40</sup> *S v Vries* 1996 (2) SACR 638 (Nm); *S v Likwa* 1999 (2) SACR 44 (Nm).

<sup>41</sup> *S v Jansen supra* at 373g-374g; *S v Schwartz supra* at 383f-j.

<sup>42</sup> 1999 (2) SACR 319 (W) at 326a.

<sup>43</sup> See *S v Schwartz supra* at 386h to 387b.

relationship between life imprisonment and long sentences that may be served consecutively. In *S v Ngubane*<sup>44</sup> the accused was convicted of three counts of premeditated murder. The prescribed sentence for premeditated murder is life imprisonment. The judge seriously considered finding “substantial and compelling circumstances” for not imposing it because he believed that the offender would serve a longer period in prison if three fixed periods of imprisonment were imposed to run consecutively than three life sentences which have to run concurrently. In the end he decided that this was not a compelling circumstance. The fact that it was even considered is in itself worrying. The Supreme Court of Appeal has recently confirmed that life imprisonment is the heaviest sentence that can be imposed.<sup>45</sup> It reiterated that to impose such an exceptionally long term of imprisonment that the offender has no possible hope of ever being released, no matter what happens, does not belong in a civilised legal system.<sup>46</sup> Moreover, the practical justification for the sentence is also disappearing. Section 73 (6) of the new Correctional Services Act provides that all prisoners must be considered for release after they have served 25 years of their sentences. This effectively puts them on a par with prisoners sentenced to life imprisonment, as they in terms of the new Act must be considered for release after having served 25 years. This background is of significance for establishing the place of life sentences in relation to other sentences in any new sentencing system.

## **SENTENCING AND PRISON OVERCROWDING**

1.42 The findings of the study on sentencing patterns commissioned by the Committee is given further weight by recent statistics derived from the Department of Correctional Services.<sup>47</sup> South African prisons are suffering from overcrowding that has reached levels where the conditions of detention may not meet the minimum standards set in the Constitution. In the short

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<sup>44</sup> Unreported judgement of the D&CLD, per Magid J, case 160/99, delivered 8 November 1999.

<sup>45</sup> *S v Siluale en ander* 1999 (2) SACR 102 (SCA) at 106i.

<sup>46</sup> *Ibid.* at 106j-107a.

<sup>47</sup> Statistics presented to the National Council for Correctional Services in January 2000.

term the problem is brought about by an enormous increase of prisoners awaiting trial. This problem is beyond the remit of this investigation. A closer examination of prison statistics shows, however, that in the medium term the change in sentencing patterns will produce an intolerable burden for an already overloaded system. The trend is that prison sentences of between 3 and 7 years have declined since 1995. However, sentences of 7 to 10 years, 10 to 15 years, 15 to 20 years, and 20 years to life have increased in the same period by 50%, 67%, 70 % and 124 % respectively. The longest sentences are clearly increasing the most. The effect of more very long sentences is of course cumulative, raising the spectre of a system eventually driven to drastic release strategies or, failing that, to collapse. Obviously, as the sentencing system regulates this 'input', this tendency has to be borne in mind in any long-term reform strategy.

## **INTERNATIONAL DEVELOPMENTS.**

1.43 Finally in this overview of evidence collected, it must be noted that there have of course been many developments and refinements in the sentencing systems of the countries that are mentioned in paragraph 1.10 above<sup>48</sup> since that research was completed in 1997. For current purposes these details are of less interest. One development though, of potential significance as a hybrid model, is the mechanism created for the development of sentencing guidelines in England and Wales. The Court of Appeal, Criminal Division, has long given guideline judgments that use individual cases to indicate the range within which sentences should be imposed by lower courts for particular offences or subcategories of them.<sup>49</sup> These guideline judgments deal exclusively with sentence levels and with aggravating and mitigating factors specific to the offence. They thus indicate to the lower courts what factors they should consider when deciding on the appropriate sentencing level within the proposed range. Generally these judgments have been somewhat more prescriptive than South African sentencing judgments and, by giving more explicit guidance, provided more consistency. Historically, however, there was no compulsion on the Court of Appeal to give such judgments, with the result that the development of sentencing tariffs was somewhat piecemeal and little attention could be paid to the development

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<sup>48</sup> See also Appendix A.

<sup>49</sup> Andrew Ashworth *Sentencing and Criminal Justice* (2 ed, 1995) 349.

of the sentencing system as a whole.

1.44 This position has been substantially changed by sections 80 and 81 of the omnibus Crime and Disorder Act 1998. Section 81 provides for the creation of an expert Sentencing Advisory Panel to advise the Court of Criminal Appeal on the new functions that it has in terms of section 80. The essence of these functions is that whenever the Court of Appeal deals with an appeal against sentence or when asked to do so by the Panel, it must consider formulating guidelines. Where such guidelines already exist the Court must consider whether it should review them. Section 80(3) goes on to provide:

“Where the Court decides to frame or revise such guidelines, the Court shall have regard to –

- (a) the need to promote consistency in sentencing;
- (b) the sentences imposed by the courts of England and Wales for offences of the relevant category;
- (c) the cost of different sentences and their relative effectiveness in preventing re-offending;
- (d) the need to promote public confidence in the criminal justice system; and
- (e) the views communicated to the Court by the Sentencing Advisory Panel.”

1.45 The procedures specified by section 81 for the operation of the Sentencing Advisory Panel provide that it may, at any time or when instructed to so by the Secretary of State, propose to the Court of Appeal that it frame guidelines. When the Court decides to frame or revise guidelines it must notify the Panel. When the Panel takes a proposal to the Court, or when the Court decides itself to frame or revise guidelines, the Panel must obtain the views of certain bodies and persons, formulate its own views and convey them to the Court, and specifically furnish information to the Court on the matters mentioned in section 80(3)(b) and (c), that is, on sentences imposed for similar offences and the cost and efficacy of different sentences.

1.46 It is too early to judge the efficacy of the Sentencing Advisory Panel. There has been some criticism of the detailed drafting of sections 80 and 81. Thus, for example, Dr. David Thomas has suggested that it is impractical for the Court of Appeal to consider setting guidelines in every one of the many appeals it hears.<sup>50</sup> A number of distinguished sentencing experts were

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<sup>50</sup> David Thomas “Sentencing Guidelines” *Sentencing News* Issue 2, 15 August 1999. 10-11.

appointed to the Panel in mid-1999 and the results of their work are being awaited with interest. The significance of the Panel for South Africa lies not in the details of its operation, but in the apparent acceptance by the English judiciary of the principle of integrating in a novel way expert knowledge and legislated criteria into the judicial sentencing process.

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## **PART II**

### **A NEW SENTENCING PARTNERSHIP**

#### **INTRODUCTION - BRIEF SUMMARY OF THE EVIDENCE**

2.1 It is clear from the evidence collated in Part I that the problems identified as having plagued sentencing in South Africa, continue to cause difficulties. It remains a problem that like cases are not being treated alike; that sentencers do not give enough weight to certain serious offences; that imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences; that sufficient attention is not being paid to concerns of victims of crime and that, largely because of unmanageable overcrowding, sentenced prisoners are being released too readily.

2.2 The research has shown that the provisions for mandatory minimum sentences introduced by the 1997 Criminal Law Amendment Act, which sought to ensure that some serious offences were punished more severely and also to bring a measure of uniformity to the sentencing process, have effected some changes. Sentences for some crimes, most prominently rape, are now longer than they were before. However, the 1997 Act has also caused some further difficulties.

(a) First, judicial officers, many of whom were opposed to the Act from its inception have continued to criticise it for limiting their discretion. Even if their objection in principle is regarded as overstated, it does seem fair to say that there are difficulties for sentencers in applying the new legislation. The Act deals with only some of the crucial issues. A limited number of crimes is covered while other serious crimes are not dealt with at all (kidnapping, for example, is not included) thus disturbing the proportionality between various types of crime. Most importantly, judges have interpreted inconsistently the “substantial and compelling circumstances”, which have to be found before departure from the prescribed minima is allowed. Where they have thought that the prescribed sentence would on balance be too heavy they have sought to find that “substantial and compelling circumstances” were present and have described aspects of crimes as making them less serious. In the process they have both incensed the public and

defeated the legislative objective of consistent toughness. The finding that a father who raped his young daughter represented no threat to the public at large, and that a ruling of substantial and compelling circumstances justifying the departure from a prescribed minimum sentence could be based, *inter alia*, on that “fact”, is a notorious example of such a case.

- (b) Secondly, with the passage of this Act no thought appears to have been given to what impact it would have on sentencing patterns, which in turn would have a knock-on effect on the prison system that would have to implement the new longer sentences. The reason for this may be that the legislation was designed to be temporary. Certainly, the problem was not picked up immediately as the Act only came into force on 1 May 1998 and even then its effect was not felt for a considerable time since it applies only to offences committed after that date. The serious offences for which minimum sentences are prescribed take several months to come to court with the result that only in the latter half of 1999 were the minimum sentences prescribed by the Act regularly being imposed. Nevertheless, the impact of a sudden and significant increase in the number of life sentences, for example, will be felt for many years to come.

2.3 The research on mandatory minimum sentences, which the Committee conducted at the same time as the 1997 Criminal Law Amendment Act was passing through Parliament, confirmed that there was considerable opposition from the judges in particular to a scheme of legislated fixed sentences, even though it might provide a solution of a kind to the problems of sentencing disparity and ensuring that serious crimes were punished with sufficient harshness. There was also significant opposition to binding guidelines developed by an independent sentencing commission. Interestingly enough though, the idea of a system operating along the lines of the well-known Minnesota Sentencing Guidelines, which are generated by an independent commission, received the support of the majority of the members of the Natal bench of the High Court.<sup>51</sup>

2.4 The research conducted on restorative justice revealed that there was near universal support for giving victims an increased, although still not dominant, role in the sentencing process. It also found a significant sentiment favouring the use of restorative justice initiatives

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51 See paragraph 2.73 of the comments in Appendix A.

in less serious cases. In addition, there was no doubt that respondents felt that current measures for the compensation of victims of crime could be improved. This improvement should be applied both to reparation that could be obtained in the sentencing process and to the wider issue of considering the creation of a national victim compensation scheme.

## **THE APPROACH OF THE COMMISSION**

2.5 The Commission accepts that there is substance to the criticism of the sentencing system that has been advanced in the past decade, both before and after the introduction of the 1997 Criminal Law Amendment Act. An ideal system should promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the State to enforce in the long term. The Commission therefore proposes to suggest a framework that in its view can meet all these desiderata to the greatest extent possible.

2.6 Such a framework will require the co-operation of the different branches of government. A single branch cannot solve the problem on its own:

- (a) The legislature has the advantage that it represents the will of the people and can convey the public sentiment about the need to punish a specific type or category of offence in a particular (usually harsher) way. However, an inflexible sentencing framework set by the legislature may result in grossly disproportionate sentences that are unconstitutional. There is also the further disadvantage that legislative intervention dealing with specific crimes without an overview of the whole system of imposing and implementing sentence may lead to sentences that the system does not have the capacity to implement. The long-term result of this can only be early releases, as the prison system gradually becomes intolerably overcrowded.
- (b) The courts have the advantage that they try individual cases and can make sentencing decisions based on the specific facts of the case and information about the particular accused. Some South African judges appear to believe that this advantage alone should give them an unfettered discretion to impose sentence. However, unstructured discretion

is an exercise of absolute power that cannot be tolerated in a democratic state. In response it can be argued that the sentencing discretion of judicial officers is not entirely unstructured. Sentencing jurisprudence, as developed through the appellate system, has led to the emergence of some general sentencing principles. In South Africa, however, even these are relatively poorly developed and historically the higher courts have allowed sentencers a great deal of discretion. It is the view of the many critics who find a lack of consistency in sentencing and a lack of responsiveness to community perceptions of seriousness in sentencing in South Africa, that this discretion is currently too broad.

A further difficulty of allowing the courts unlimited sentencing discretion is that their individual sentences may result in an overall burden of punishments that is ever beyond the capacity of the state administration to implement. While the State must be prepared to budget adequately for the implementation of sentences, it is clearly impossible for the State to spend the bulk of its resources on prisons and other forms of punishment. If this happens there are only two possible solutions: either the prisoners have to be released earlier, thus undermining the authority of the courts in the eyes of the public, or sentences have to be imposed within a framework that bears resource implications in mind and makes trade-offs accordingly.

- (c) The administrative branch has the advantage that (theoretically) it can prescribe a framework that sets sentences at a level that can be accommodated within the correctional budget. It is possible to make reasonably accurate projections about how many convictions there will be for offences of particular types in a particular year and to project what sentences for them will entail for prison and community correction populations. The disadvantages of this approach are clear. A purely administrative body operating in this way would not be accountable for its decisions either to the legislator or to the courts. It would not be sensitive to public opinion on the seriousness of offences of particular kinds and it would not have the insight that comes to sentencing courts from dealing with the details of the specific offences committed by individual offenders.

2.7 The objective of the Commission is to put forward proposals that combine, as far as possible, the advantages that may be derived from the involvement of all three branches of government in the sentencing process and eliminate the disadvantages inherent in giving a

single one of them priority. In the model that the Commission proposes, sentencing decisions will continue to be made by the courts, but these decisions will be informed by new initiatives from the legislative and administrative branches that will meet the need for consistency as well as sensitivity to the seriousness of offences, the needs of victims and the capacity of the system to carry out sentences that have been imposed.

## **A NEW STRUCTURE**

2.8 The key to the proposal is that the different arms of government enter into a new partnership. There will be more guidance for the courts on sentencing. In the first instance this will take the form of more specific guideline judgments and of sentencing guidelines produced by a Sentencing Council. The Supreme Court of Appeal will give the guideline judgments in the course of the normal appellate process. These judgments will set guidelines in the light of principles developed by Parliament in legislation and the information provided by a new Sentencing Council on which the judiciary, key criminal justice departments, sentencing experts, and civil society through representatives of victims' organizations will be represented.

2.9 The Sentencing Council will be able to develop guidelines for categories of crime for which the Supreme Court of Appeal has not set guidelines. It may do so because it believes that binding guidelines are required for a particular category or because the appropriate Minister or Parliament directly has asked the Sentencing Council to make such a request. The Sentencing Council will have to consult widely before advising on the setting of guidelines or developing guidelines for a particular category of offences.

2.10 In addition the Sentencing Council will have to collect and publish comprehensive sentencing data on an annual basis. It will have to publish a comprehensive list of all sentencing guidelines, including both the guidelines set by the Supreme Court of Appeal and those that it has developed itself. The Council would have to do research and publish reports on the efficacy and cost effectiveness of the various sentencing options provided by legislation and make policy recommendations on the further development of community corrections.

2.11 In the judgement of the Commission the proposed combination of sentencing guidelines set by the courts with a Sentencing Council will have important structural advantages:

- a) The guideline-setting function of the Supreme Court of Appeal will retain a key role for the senior judiciary in sentencing decision-making, while provision for the Court to have placed before it information provided by the Sentencing Council would allow it to take into account factors that cannot normally be entertained when single cases are considered in isolation.
- b) The Sentencing Council constituted in the way proposed will have the advantages of a sentencing commission in the sense that it would be able to take an overall view of the entire system and make recommendations based on requirements of principle in that light. Its information function will also be important, both in assisting the courts and in shaping public perceptions about the reality of sentencing options.
- c) The Sentencing Council will not be isolated from public opinion as both the appropriate Ministers and Parliament would be able to ask it to consider the development of guidelines for a category of offences that the public might regard as not being treated with the appropriate degree of seriousness. Cabinet and Parliament would thus be able to take direct steps to bring public opinion to bear on the sentencing framework. However, they would not do so through legislation that might disturb the balance of the sentencing system as a whole or result in sentences that could not be implemented in the long run.

2.12 A new sentencing framework requires not only a new partnership amongst the different arms of government. It requires also a new partnership between the State and the public in general and victims of crime in particular. The key to this partnership is improved provision for victim involvement in the sentencing process and recognition of victim concerns in the type of substantive sentences that are handed down. The proposed new Sentencing Framework Bill addresses these issues in various ways.

2.13 At a substantive level, explicit attention is given to restitution and compensation for victims of crime. Restitution and compensation are key elements of the comprehensive new sentence of community corrections, which also allows victims to benefit from other orders such as the community service that offenders may be compelled to do. Sentences can be suspended on condition of restitution or compensation for victims of crime. In every case where neither of

these sentences is imposed the court must consider whether a separate restitution or compensation order should be made.

2.14 The procedural innovations designed to benefit victims of crime include a requirement that prosecutors, when they intervene on sentence, must consider the interests of victims in every case. There is provision for victim impact statements to be presented to the courts so that they may learn what impact the crime had in practice. Victims must be told when and how they may be involved in the eventual release of sentenced offenders from prison. These innovations are backed by detailed rules to ensure that victims are told of their rights. There are also provisions to ensure that the income of offenders is revealed so that they can be ordered to make reparation for their crimes in an appropriate way.

## **THE LEGISLATIVE FRAMEWORK**

### *Innovations*

2.15 Clearly the new structure will require to be set in legislation. The Commission recognises moreover that a legislative framework will have to be created that goes significantly beyond specifying the bare bones of the structure which it has sketched if a new sentencing system is to be established that is based in principle and is to achieve the somewhat diverse desiderata that it has outlined. The detailed motivation for the specific provisions proposed will be considered in subsequent chapters. For the moment it is necessary only to outline the types of provisions that are required and the justifications for them in general terms.

2.16 The relatively clear framework of normative guidelines that will emerge specifying the sentences to be imposed for all major categories and subcategories of offences will contribute to legal certainty and the elimination of the disparities that are the source of much of the criticism of the current system.

2.17 Clarity on the sentence to be imposed for a particular offence or sub-category of offence will assist in making the operation of the criminal justice system as a whole more efficient. Accused persons would know what penalty they face by pleading guilty to a specific offence. Where counsel for the defence negotiates a plea of guilty with the prosecution, both sides will

know what the likely outcome will be. To a greater or lesser extent such negotiations are a feature of most criminal justice systems and another committee of the Commission is currently investigating how they can best be regulated to eliminate abuses while achieving maximum efficiency. The proposed sentencing framework will assist in this process by ensuring that the sentencing basis for negotiations is established clearly. This would facilitate negotiations, which currently are handicapped by the fact that neither the prosecution nor the defence is able to predict with any degree of certainty the sentences that will result from the pleas upon which they might agree.

2.18 The development of sentencing guidelines by the Supreme Court of Appeal and by the Sentencing Commission requires an articulated basis from which it can proceed. To this end the proposed Sentencing Framework Bill deals in the first substantive sections after the definitions with the purpose of sentencing and the principles to be applied in deciding upon an appropriate sentence.

2.19 There must be clear provisions about what is meant by sentencing guidelines and the process for establishing such guidelines by the Supreme Court of Appeal or the Sentencing Council.

2.20 The proposed Sentencing Council will have to be created by legislation. In the discussion below the principles underlying its composition are spelt out as well as a proposal about how it can be established most cost effectively in the current South African state structure. Its functions are also described.

2.21 Clarity also requires that the public have a clear idea of how the sentence will be implemented. Legislation should specify that the details of the implementation of both custodial and non-custodial (community) sentences must be explained to the sentenced offender in open court when the sentence is announced.

#### *Codifying, modifying and simplifying existing sentencing legislation*

2.22 The new partnership that is envisaged around the sentencing question, implies that the law governing it is accessible to all the parties involved in the sentencing process. In practice

the law describing the sentences that can be imposed and the procedure to be followed on imposition is contained primarily in chapter 28 of the Criminal Procedure Act 51 of 1977. Chapter 29 of the same Act governs compensation and restitution. Both have been amended many times. It is clear that, at the very least, a new Act will require a fresh look at these provisions.

2.23 The punishments that may be imposed must be reconsidered. The Commission is of the view that the present list can be retained largely unchanged, with one major exception, the sentence of correctional supervision. Modern restorative approaches allow for a variety of sentences that can be served in the community. Section 52 of the new Correctional Services Act gives an extensive (and closed) list of forms of “community corrections” that can be imposed. The Commission proposes replacing correctional supervision with the wider concept of community corrections. This will allow close synchronization with the lead given in the Correctional Services Act.

2.24 Careful attention needs to be paid to variations of sentence that allows sentences to be implemented in such a way that the impact of the primary sentence is altered significantly. Here we have in mind particularly the very complex provisions that have grown up around the suspension of sentences. Not only have these provisions become encrusted with amendments that make them very complicated, but the question must also be asked about how they relate to the whole new sentencing scheme.

2.25 There are some classes of offenders who require incapacitatory punishment beyond that which would be reached by applying general principle. Special provision must be made for two classes of such prisoners, viz. persistent or “habitual” offenders, and “dangerous” offenders. Particular attention must be paid to provisions for them that ensure that the permissible departure from the general framework is appropriately restricted.

2.26 The procedure for evidence on sentence is currently very sketchy – see section 274 of the Criminal Procedure Act. The renewed emphasis on the victim of crime in particular requires more comprehensive evidentiary rules. These should include provision both for victim impact statements and for the testimony of victims themselves.

2.27 A practical issue of considerable importance is how sentences should be adjusted to provide for the (increasing) time that many offenders spend in detention before sentence. The current law on this question is not codified and clarity is required.

#### **ISSUES THAT WILL NOT BE COVERED IN THE SENTENCING FRAMEWORK BILL**

2.28 It is important to recognise that certain questions relating to sentence will not be covered by the proposed new Bill, as systematically they fit better in other parts of the legal system.

2.29 In recent years the powers of the State to appeal against sentencing judgments have been increased greatly. There appears now to be procedural equality of arms between the parties in this regard. The Commission believes that the current appellate framework will meet the needs of the new sentencing system and proposes that the provisions dealing with appeals against sentence be left in the chapter of the Criminal Procedure Act dealing with appeals generally. The same applies to reviews of sentence. Any technical alterations that may be required to the appeal and review procedures as a result of the proposed sentencing legislation should be made by amending the existing provisions.

2.30 The punishment jurisdiction of the regional and district magistrates' courts can limit their ability to impose certain punishments. A case can therefore be made for including questions of punishment jurisdiction in comprehensive sentencing legislation, particularly as section 51(2) of the 1997 Criminal Law Amendment Act also increased the punishment jurisdiction of the regional court to some extent. The Commission does not support this argument. Sentencing jurisdiction is one of the bases according to which the hierarchy of courts is established. It is therefore properly dealt with in the legislation establishing those courts, other than the High Court that has inherent jurisdiction to impose all lawful punishments. The Commission notes, however, the criticism of the provision in the 1997 Criminal Law Amendment Act that requires the High Court to impose a sentence in instances where the prescribed sentence is life imprisonment even if the accused is tried and convicted in the regional court. The criticism is well founded. It is inherently undesirable to separate the trial entirely from the sentence. Consideration should be given to mechanisms outside sentencing legislation to ensure that as a matter of general practice courts only try those cases that they have the sentencing jurisdiction to sentence appropriately. This can be achieved by the prosecuting authorities allocating cases for trial in a

way that ensures this result. If there are practical difficulties with this solution the issue of sentencing jurisdiction should be re-examined as part of a wider review of the structure of the criminal courts.

2.31 Compensation is mentioned above as a sentencing option that is to be developed vigorously. Compensation for victims of crime generally is a wider topic outside the scope of the proposed new Sentencing Framework Bill. The Commission is currently also considering whether to recommend a wider scheme of compensation for all victims of crime.

2.32 Finally, it is important that the sentencing of convicted offenders should not be confused with the diversion from the criminal justice system of alleged offenders whose guilt has not been established beyond a reasonable doubt. The proposed Bill deals only with the former, that is, with offenders who have been convicted. The warrant for the State to intervene and limit the rights of an offender is derived from the conviction. This does not mean that, in practice, there may not be an overlap between sentences and diversionary strategies, particularly in the area of community corrections. Diversion of the unconvicted ought, however, to be dealt with in appropriate provisions of the Criminal Procedure Act.

## **PART III**

### **THE DRAFT BILL**

The draft Sentencing Framework Bill attempts to spell out in legislative terms the ideas for a new sentencing system based on a new partnership as described in Part 2 above. The chapters in this part follow the chapters of the proposed Bill. The notes they contain focus on certain provisions that seem to the Commission to be particularly controversial or to require further explanation. Ultimately, of course, if the Bill is adopted by Parliament, the various clauses will have to stand on their own. As this is a discussion paper, the notes are also designed to assist both commentators who wish to challenge the ideas behind some of the provisions and those who wish to assist in ensuring that the provisions of the Bill reflect accurately the intentions of the drafters.

## **CHAPTER 1**

### **SENTENCING PRINCIPLES**

#### **THE PURPOSE OF SENTENCING AND SENTENCING PRINCIPLES**

3.1.1 In establishing a sentencing framework it is impossible to avoid the wider questions of the general approach that should underlie sentencing. The Commission has proceeded from the position that the purpose of a sentence is to punish those offenders, and only those, who have been found guilty of a particular offence and that the punishment must be limited by the restrictions contained in the Constitution, including the constitutional prohibition of cruel, inhuman or degrading punishment or treatment (section 2 of the draft Sentencing Framework Bill). It is necessary to have this provision at the beginning of the Bill to make clear that the legislature is aware that sentences limit fundamental rights and that such limitation is only justified when accused persons have been convicted by due process of law. This is the constitutional basis of the whole criminal justice system. It is why an innocent person cannot be sentenced, even if such a 'sentence' would deter or prevent crime.

3.1.2 The restriction against cruel, inhuman or degrading punishments in section 11(1)(e) of the Constitution is an elaboration of the right to human dignity. In this context it protects the human dignity of the convicted offender - although the right of human dignity of the victim of crime must also be and is borne in mind. It contains limitations of two kinds. First, the types of punishment imposed must not themselves be cruel, inhuman or degrading. This question is addressed directly when the various sentencing options that may be imposed are considered in Chapter 4 below.

3.1.3 The specific reference to the Constitution in section 2 of the draft Bill also draws attention to a second aspect of constitutionally acceptable sentencing. Punishment imposed must not be “grossly disproportionate” to the crime committed. This principle has been recognised in the law of many countries that have constitutions with entrenched bills of fundamental rights.<sup>52</sup> The reasoning is simple. If it is the fact that an offender has been convicted of a crime that allows the state to impose a sentence that limits the rights of the offender, then the right to punish is limited by the seriousness of the offence itself. To punish significantly beyond that level would be to subject the offender to an unjustifiable loss of rights that may well be “cruel, inhuman, or degrading”.

3.1.4 If one of the main problems with the current sentencing system is disparity, in the sense that like cases are not treated alike, then it is not unreasonable to suppose that one must have a clear idea of what the purpose of sentencing is and what principles should be applied to it. The constitutional prohibition of grossly disproportionate punishment allows the legislature considerable scope to set a framework of principles for the determination of appropriate punishments and at the same time points the legislature in the direction of the ideal sentencing system. We would argue positively that it is desirable that punishment in the first instance must be proportionate to the seriousness of the offence so that offenders can get their just deserts. The seriousness of the offence depends in turn on the harm caused by the offence and the blameworthiness of the offender in respect of the offence. The advantage of having the offence as the main focus of the sentencing decision is that if offences can be weighted then one of the main criticisms of the current system, namely sentencing disparities, can be addressed. A clear

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52 D van Zyl Smit “Constitutional Jurisprudence and Proportionality in Sentencing” (1995) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 369-380.

notion of which offences are most serious is a first step towards ensuring that like cases are treated alike. Similarly, a way must be found of determining blameworthiness that does not lead to inconsistency, thereby ensuring equality and excluding unfair discrimination on any of the grounds mentioned in section 9(3) of the Constitution.

3.1.5 The method proposed for determining proportionality is, in the first instance, to focus directly on the seriousness of the offence committed. Courts will have to evaluate this in the light of how seriously an offence of the same kind is regarded by other courts in terms of the punishments they routinely impose for it. In the case of common law offences a single offence category, for example, 'murder' or 'fraud', may encompass a very wide range of seriousness. In such instances it may be necessary to break the offences up into subcategories in order to make a meaningful comparison. This is already being done, not only in the schedule to the 1997 Criminal Law Amendment Act, which specifies penalties of defined subcategories of serious common law offences, but also by concepts such as robbery with a dangerous weapon, which is a sub-category of the common law offence of robbery. It is envisaged that the Supreme Court of Appeal and the Sentencing Council will gradually develop normative guidelines dealing with the major common law offences and that they will introduce subcategories where these are necessary because guidelines for broadly defined offences would otherwise be too rigid. Where there is no sentencing guideline the sentencing court will have to rely on such information as is currently available on sentencing practice or can be made available by the Sentencing Council. Obviously, where the offence is new, or where there is little by way of precedent, the courts will rely more heavily on their own judgment of the seriousness of the offence.

3.1.6 In addition to the seriousness of the offence it is proposed that a further factor be considered in the primary determination of a proportional sentence, namely the presence or absence of relevant previous convictions of the offender. Strictly speaking, this is an additional factor that goes beyond the requirements of offence proportionality and one which desert theorists have difficulty in justifying.<sup>53</sup> Some go as far as rejecting the notion that previous convictions ought to be relevant to sentence. They argue that considering previous convictions

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<sup>53</sup> See, in general Andrew Ashworth *Sentencing and Criminal Justice* (1995) 152-160; Andrew von Hirsch "Desert and Previous Convictions" in Andrew von Hirsch and Andrew Ashworth (eds.) *Principled Sentencing Readings on Theory and Policy* (2ed) (1988) 191-187.

represents a form of double jeopardy. Among those theorists who support the consideration of previous convictions, some have argued that accused persons who have been confronted with the wrongfulness of their conduct by a previous conviction deserve to be punished more harshly if they again ignore the dictates of the law. Other supporters argue that the absence of previous convictions entitles offenders to a type of discount, which they gradually lose as they commit more crimes.<sup>54</sup> It is not possible to settle this difference of opinion here. The proposed provision (section 3(1)(d) of the draft Bill) makes it clear that the offence should be the primary consideration. The presence or absence of previous convictions should merely be a modifier of the appropriate sentence. Restrictions are contained in the term “relevant” previous convictions and in the limitation in the qualifier, “reasonable”. South African jurisprudence has long considered the relevance of some previous convictions rather than others.<sup>55</sup> A restriction of the impact of the previous convictions by a reasonableness test is used also in Swedish law.<sup>56</sup> An implicit restriction on using previous convictions too readily in the determination of sentence is also to be found in the fact that separate provision is made for dealing with habitual offenders who have a large number of previous convictions as an exception to the general sentencing principles.<sup>57</sup>

3.1.7 The focus on proportional punishment does not exclude the possibility that sentencing can achieve other of its traditional objectives. An overall objective of the criminal law is obviously to deter crime. It is also the objective of the sentencing system as a whole, as is recognised in the preamble to the proposed Bill. This does not mean, however, that deterrence should determine sentences directly. Sentences set with deterrent objectives in mind might be grossly

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<sup>54</sup> This is the view adopted by both Ashworth *op. cit.* and Von Hirsch *op. cit.*

<sup>55</sup> See in general, SS Terblanche, *The Guide to Sentencing in South Africa* (1999) 216-218, who discusses the significance for determining the relevance of previous convictions to sentence of how recent they are and of their relationship to the current offence. See also the discussion of the need for a provision that sentences fall away as previous convictions after 10 years has elapsed (chapter 7 and section 15 below).

<sup>56</sup> Chapter 29 section 4 of the Swedish Criminal Code 1988 discussed by Nils Jareborg “The Swedish Sentencing Reform” in C Clarkson and R Morgan (eds.) *The Politics of Sentencing Reform* (1995) 95-124. Cf. also Chapter 6 section 4 of the Finnish Sentencing Law 1996, discussed by Jareborg *loc. cit.*

<sup>57</sup> See chapter 4 below and section 19 of the draft Bill.

disproportionate and therefore not only unfair but also unconstitutional. In any event, the emphasis on the offence will mean that the most heinous crimes, which usually are those most requiring deterrence are punished most heavily. One should also note that the proposal is designed to create a system that is fair in the long run and not the quick fix of a temporary measure, such as the mandatory sentences created by the 1997 Criminal Law Amendment Act. In other words, it is argued that the general function of deterrence of crime is best served by the sentencing system if it is fair in that the penalties it inflicts are not disproportionate to the crimes committed.

3.1.8 A factor that must be accommodated in the determination of the sentence to be imposed is the restoration of the rights of victims. This factor too, is mentioned specifically in the preamble to the proposed Bill. In principle all sentences, even sentences of imprisonment, can be implemented in ways that grant opportunities for restorative programmes. Some forms of community corrections may be particularly effective in this respect. Programmes of mediation and reparation, for example, may be ordered as part of such a sentence. Where these results can be achieved by imposing a sentence that still has the appropriate penal element required by the principle of proportionality, it should be done.

3.1.9 Accommodation may be made if society requires that the offender be incapacitated. It may be possible to impose a sentence other than imprisonment of equivalent penal value that would take the offender out of the community. A difficulty of principle is created if incapacitation requires that an offender be removed from society for longer than is justified by the offence itself. Current South African law recognises the need for an exception in such cases and makes provision for “dangerous criminals” to be detained indefinitely (or for as long as the sentencing jurisdiction of the particular court would allow), that is, beyond the period that would be proportionate to the offence. The Commission accepts this exception, which has been recognised as constitutional in other countries,<sup>58</sup> as long as it is hedged by appropriate safeguards. These should ensure that the additional detention for dangerous criminals is only used for persons who have been convicted of a serious offence so that the disproportionality of the incapacitating sentence is not “gross”, that an adequate procedure exists to assess their

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58 See, for example, the decision of the Supreme Court of Canada in *Lyons v The Queen* (1988) 37 CCC (3d) 1.

future dangerousness, and that there are safeguards to ensure that the procedures for declaring someone a “dangerous criminal” are not used to impose heavier punitive sentences than the law allows. The existing provisions, sections 286A and 286B of the Criminal Procedure Act, would have to be tested against these standards.<sup>59</sup>

3.1.10 Another partial accommodation that needs to be made by way of exception is for so-called habitual criminals. While sentences may be increased to some extent because it can be argued that chronic recidivists are more to blame for not having learnt from their past mistakes, it may be necessary to make provision for harsher punishment for persistent repeat offenders that goes beyond the bounds of offence-oriented proportionality. An exception of this kind has long been recognised in South African provisions dealing with habitual criminals. The Commission proposes that it be continued with the necessary safeguards.

3.1.11 The concern that sentencing has with the rehabilitation of offenders can also be accommodated to some extent within the framework of proportionality. The proposed Act does not deal with the implementation of sentence, but the new Correctional Services Act sets enabling sentenced offenders “to lead a socially responsible and crime free life in the future”<sup>60</sup> as the overall objective of both imprisonment and community corrections. It has to be emphasised that a sentence of adequate weight always has to be imposed. Nevertheless, it may be possible, particularly in offences of medium degrees of seriousness to choose between different sentences on the basis that some may facilitate rehabilitation better than others.<sup>61</sup> It may, for example, be the case that appropriately targeted forms of community corrections are more effective in rehabilitating offenders than imprisonment. If penal equivalence can be established between the two, community corrections would therefore, all other things being equal, be the correct choice.

3.1.12 Finally, it should be noted that the proposal on sentencing principles contains provision

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59 See the further discussion in chapter 4 below and sections **16,17 and 18** of the draft Bill.

60 Sections 38 and 50 of Act 111 of 1998.

61 See Norval Morris and Michael Tonry *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (1991) chapters 4 and 5.

for departure only in “substantial and compelling circumstances”. The words are deliberately used rather than “aggravating” and “mitigating” circumstances, as they allow some flexibility while limiting departures in the way that the new partnership requires in order to reduce unwarranted disparities. In the view of the Commission the most recent jurisprudence on the interpretation of these words<sup>62</sup> offers a basis for the development of what is the most complex component of any sentencing system, namely a mechanism to provide for departures in truly deserving cases while ensuring that like cases are treated consistently. The applicability of this jurisprudence is not affected by the fact that in the proposed legislation, unlike the 1997 Criminal Law Amendment Act, a finding of “substantial and compelling circumstances” will allow a departure upwards as well as downwards for what would otherwise have been the correct sentence. Further guidance, albeit at a general level, is offered by the qualification that “substantial and compelling circumstances” must relate to circumstances “that increase or decrease significantly the moral blameworthiness of the offender with reference to the offence committed” (section 3(2) of the draft Bill). This distinguishes the relevant circumstances from the wide, and sometimes discriminatory, range of circumstances that could be considered aggravating or mitigating. In addition the Supreme Court of Appeal, which is charged with giving guideline judgments, is also specifically asked to indicate in such judgments the “substantial and compelling circumstances of specific relevance to the offence or sub-category of offence” being considered (section 12(7) of the draft Bill).

## **RECOMMENDATION**

3.1.13 The Commission recommends the inclusion of the following sections in the draft Bill:

### **2. The purpose of sentencing**

The purpose of sentencing is to punish convicted offenders for the offences they have committed by limiting their rights and imposing obligations on them in ways that are not contrary to the Constitution of the Republic of South Africa, Act 108 of 1996.

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62 See part I paragraphs 1.30 to 1.39 above.

### 3. Sentencing principles

- (1) Subject to the provisions of this Act the following general principles must be applied exclusively to the determination of all sentences:
  - (a) Sentences must be proportionate to the offence committed.
  - (b) In determining the proportionate sentences regard must be had to the seriousness of the offence committed and the social harm caused by it, relative to other categories or subcategories of offences.
  - (c) Subject to the principle of proportionality expressed in subsection (a) sentences must seek to offer the optimal combination of-
    - (i) restoring the rights of victims of the offence;
    - (ii) protecting society against the offender; and
    - (iii) giving the offender the opportunity to lead a crime free life in the future.
  - (d) The presence or absence of relevant previous convictions may be used to modify the sentence to a reasonable extent.
- (2) In order to ensure consistency in sentencing, departures from these principles are allowed only if there are substantial and compelling circumstances that increase or decrease significantly the moral blameworthiness of the offender with reference to the offence committed.

### SENTENCING GUIDELINES

3.1.14 The introduction of sentencing guidelines is the key innovation in ensuring consistency and implementing the sentencing policy of the draft Bill. The sentencing principles underlying

the guidelines have already been explained in the previous section. One important feature needs further elucidation. In the determination of guidelines the capacity of the penal system in general and of the prison system in particular is a further factor that must also be considered. It is important to explain why this is the case. In this regard we can do no better than quote the leading modern penal theorist, Andrew von Hirsch:

It is sometimes said to be unjust and inappropriate to let prison space influence punishment levels. This claim seems plausible on a retributive theory of punishment: why should offenders' deserts depend on how much room there is in penal institutions? On closer analysis, however, the claim does not stand. Granted, it would not be appropriate to use space constraints to impose unequal punishment on offenders convicted of equally reprehensible conduct. But if parity among blameworthy offenders is maintained, and if punishments are graded according to the gravity of the criminal conduct then desert principles allow some leeway in determining the anchoring points and overall severity level of the penalty scale. To the extent that such leeway exists, resource availability may be a legitimate factor in deciding overall severity levels.<sup>63</sup>

3.1.15 There are additional arguments. The South African Constitution explicitly sets the minimum rights of all detainees, including sentenced prisoners. These include the right to adequate accommodation. The government therefore cannot design a sentencing system that will allow these rights to be infringed routinely.

3.1.16 Moreover, in South Africa prison spaces are likely to remain a scarce resource. Introducing this consideration at the level of the guideline will ensure that hard choices are made that prison is reserved for those who deserve it most, while cheaper alternatives are used for others who also have to be punished. The inescapable long-term alternative to guidelines constructed in this way is the periodic mass release of prisoners, a policy which the public rightly regards with skepticism and which the courts view, with justification, as undermining their authority.

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<sup>63</sup> Andrew von Hirsch, Kay A Knapp and Michael Tonry *The Sentencing Commission and its Guidelines* (1987) 13-14.

3.1.17 It is important to recognise that the guidelines have a degree of flexibility. Departures of 15 percent upward or downward from the guidelines may be allowed. In this respect the ordinary principles of aggravation and mitigation of sentence will apply. There may be further flexibility if a guideline allows for the suspension or postponement of sentence. For offences of medium seriousness a guideline may provide for more than one form of sentence; for example, a relatively short term of imprisonment or a fairly strict form of community corrections may both be options. However, this flexibility must be limited in order to achieve the overall goal of increased consistency. For this reason, departures beyond the limits set by the normative sentencing guidelines will only be allowed if there are “substantial and compelling circumstances” justifying such departure.

## **RECOMMENDATION**

3.1.17 The Commission recommends the inclusion of the following provision in the draft Bill:

### **4. Sentencing guidelines**

- (1) A sentencing guideline specifies normative sentencing options for a particular offence or sub-category of offence.
- (2) A sentencing guideline is determined by applying the sentencing principles in section 3(1) by
  - (a) giving a proportionate numerical rating to a category or sub-category of offence on a scale of one to a hundred, in which a hundred is given to the most serious category or sub-category of offence committed by a person with two or more relevant previous convictions and other categories or subcategories of offences are given proportionately lesser ratings in relation to the seriousness of the offence and the relevant previous convictions of the offender; and
  - (b) matching the numerical rating to one or more sentencing options, the

severity of which is set in the light of the capacity of the correctional system to implement them.

- (3) Except that a normative sentencing guideline may not exceed the maximum sentence laid down for a particular category or sub-category of offence, a guideline may be determined regardless of any restriction contained in any legislation other than in this Act.
- (4) Subject to the principle of proportionality between the sentence and seriousness of the offence, the sentencing options provided must create, as far as possible, the possibility of meeting the objectives set in section 3 (1)(c).
- (5) In determining the severity of community corrections different levels of severity may be recognised that depend on the orders that are made as part of a sentence of community corrections.
- (6) A guideline may provide -
  - (a) for an increase or decrease of up to 15 percent in either direction in the severity of a normative sentencing option;
  - (b) for any alternative sentence to a sentence of life imprisonment;
  - (c) that a part or the whole of any normative sentencing option, other than a sentence of imprisonment of more than five years, be suspended in terms of section 34; and
  - (d) that the passing of sentence be postponed conditionally in terms of section 32 or unconditionally in terms of section 33.
- (7) When an offender is convicted of an offence that falls within a category or sub-

category of offence for which a sentencing guideline has been determined, a court must, subject to subsection 8, impose one of the normative sentencing options prescribed by the guideline within the range of any increase or decrease that the guideline may allow.

- (8) In order to ensure consistency in sentencing, departures from sentencing guidelines that have been published by the Sentencing Council in terms of section 8(3) are allowed only in substantial and compelling circumstances that increase or decrease significantly the moral blameworthiness of the offender with reference to the offence committed.

**PART III****CHAPTER 2****SENTENCING COUNCIL****THE STRUCTURE OF THE SENTENCING COUNCIL**

3.2.1 The Sentencing Council, which together with the Supreme Court of Appeal will determine sentencing guidelines, will be a key player in the new sentencing partnership sketched in Part II of the discussion paper. Its membership should reflect this function. It should be as representative as possible without becoming unwieldy. The proposal is therefore straightforward. The Council should include representatives of the judiciary and the magistracy, members of the relevant criminal justice departments, experts on sentencing from outside government and members of the public with special expertise on victims of crime. There should also be provision for the necessary logistic support for the work of the Council.

3.2.2 There may be some concern about whether judges should be involved in a policy-making organ, which would generate sentencing guidelines that the judiciary itself would later have to apply. Concerns of this kind were decisively rejected by the Supreme Court of the United States of America in *Mistretta v United States*,<sup>64</sup> which held that although Congress had formerly delegated an almost unfettered sentencing discretion to judges, the scope of judicial sentencing discretion remained within congressional control. Congress therefore had the constitutional authority to take back this wide discretion and to delegate it, within statutorily defined limits, to an independent commission.

3.2.3 A practical difficulty is presented by justifying the establishment of a new council, given the constraints on state finances. A related question is which of the criminal justice departments should have the responsibility for the administration of a new council.

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109 Supp Ct 647 (1989).

3.2.4 The Commission carefully considered whether the functions of the proposed Sentencing Council could be met by any of the existing statutory councils. In particular, it considered whether the National Council on Correctional Services that has been established in terms of the Correctional Services Act, could meet the bill. It noted that this Council already has the statutory duty to advise on the development of sentencing policy in the correctional context.<sup>65</sup>

3.2.5 Two considerations weighed against this option, however. First, a sentencing council would need expertise on technical sentencing and victims' issues that is not taken into account when the members of the National Council of Correctional Services are appointed. Secondly, the imposition of sentences is rightly the primary concern of the Department for Justice and Constitutional Development, in the same way as implementation is the primary concern of the Department of Correctional Services. It is therefore appropriate that Justice takes the leading role, although provision must be made for representation of Correctional Services.

3.2.6 At the initial stages a representative and therefore relatively large council is required to involve all stakeholders in the process of developing normative guidelines. The composition of the Sentencing Council has been weighted accordingly. It may well be possible to reduce the size of the Council after the first five-year period.

3.2.7 A secretariat will be required to provide the technical support the Sentencing Council will need. It will have to be structured in such a way that the independence of the Sentencing Council is not threatened. The Department for Justice and Constitutional Development will provide the infrastructure for the secretariat. Other government departments will also have to assist in providing the information that the Sentencing Council will require.

3.2.8 On the question of cost it should be noted that, while setting up the Sentencing Council will be expensive, it should be offset by sentences that will not only be just but also less expensive to implement, as the capacity of the correctional system will be taken into account when the guidelines are set.

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<sup>65</sup> Section 84(1) of Act 111 of 1998.

3.2.9 Finally in this regard, the Commission wishes to emphasize that the size, location and detailed way of working of the proposed Sentencing Council are pragmatic issues. They do not raise major questions of principle. Other suggestions on these matters could therefore be contemplated without threatening the proposed new framework . The specific proposals with regard to the Sentencing Council should not be a stumbling block for the proposal as a whole.

## **RECOMMENDATION**

3.2.10 The Commission recommends the inclusion of the following provisions in the draft Bill:

### **5. Structure of the Sentencing Council**

- (1) The Minister must appoint the Sentencing Council for a period of five years at a time.
- (2) The Sentencing Council consists of -
  - (a) a judge of the Supreme Court of Appeal or the High Court appointed after consultation with the Chief Justice;
  - (b) a magistrate of a regional division appointed after consultation with the chairperson of the Magistrates Commission;
  - (c) the National Director of Public Prosecutions, a Deputy National Director of Public Prosecutions or a Director of Public Prosecutions appointed after consultation with the National Director of Public Prosecutions;
  - (d) a member of the South African Police Service, of or above the rank of director, appointed after consultation with the National Commissioner of the South African Police Service;

- (e) a member of the Department of Correctional Services, of or above the rank of director, appointed after consultation with the National Commissioner of Correctional Services;
  - (f) the head of the office of the Sentencing Council;
  - (g) two persons not in the full-time employ of the State with special knowledge of sentencing; and
  - (h) two representatives of the public with knowledge of the position of victims of crime.
- (3) The Sentencing Council elects its own chairperson at its first meeting by a majority from amongst its own members other than the head of the office of the Sentencing Council.
- (4) (a) If there are valid grounds for doing so the Minister may terminate the appointment of a member and appoint another member, who qualifies for membership of the Council on the same basis as the member whose appointment has been terminated, for the remainder of the term of that member.
- (b) A member who has served a term of five years may be reappointed for one further period of five years.
- (5) A member of the Sentencing Council who is not in the service of the State may receive such allowances as may be determined by the Director-General in consultation with the Minister of State Expenditure.

## **6. Office of the Sentencing Council**

- (1) An independent office under the control of the chairperson of the Sentencing Council must support the work of the Council.
- (2) The office is managed by a head, who must be an official of the Department.
- (3) The staff complement of the office of the Sentencing Council and the salaries of such staff members must be determined by the chairperson in consultation with the Director-General.
- (4) Such staff members, if not officials of the Department, are deemed for administrative purposes to be such officials but are under the control and authority of the chairperson of the Sentencing Council.
- (5) The Director-General must provide adequate financial and logistical support for the work of the office and of the Sentencing Council.
- (6) All government departments must provide statistical and other information required by the Sentencing Council.

## **OPERATION OF THE SENTENCING COUNCIL**

3.2.11 The principal ideas underlying the operation of the proposed Sentencing Council have already been mentioned in Part II above. The primary function of the Council is to create sentencing guidelines itself and to assist the Supreme Court of Appeal in doing so. In addition it has the function of providing information on the guidelines and on other aspects of sentencing. An accessible pool of sentencing information is a precondition for any sophisticated sentencing system and the Council will have a key role in developing and co-ordinating it.

3.2.12 The Commission realises that initially it will be a large task to establish guidelines for all the major offences. It accordingly suggests that the Council gradually work towards doing this. After five years guidelines should be developed for all the major offences and the primary function of the Sentencing Council will then be to revise and adjust them.

3.2.13 In the process of creating and revising the guidelines, it will be essential that the Sentencing Council stay in touch with public opinion on the relative seriousness of various offences. There must therefore be provision for cabinet ministers and Parliament to approach the Council directly. In addition the Sentencing Council will have to consult widely before making its decisions.

## **RECOMMENDATION**

3.2.14 The Commission recommends the inclusion of the following provisions in the draft Bill:

### **7. Functions of the Sentencing Council**

- (1) The primary function of the Sentencing Council is to take the initiative in establishing and revising sentencing guidelines in terms of the general principles of, and in the manner prescribed in this Act.
- (2) The Sentencing Council must respond to a request from the Supreme Court of Appeal for assistance in terms of section 12(2).
- (3) The Sentencing Council must act upon a request made in terms of section 10 by the Minister or Parliament.
- (4) (a) The Sentencing Council may advise, and must advise when requested by the Minister, on the development of community corrections or other sentencing options.

In performing its advisory function it must liaise with the National Council for Correctional Services established in terms of section 83 of the Correctional Services Act.

The Sentencing Council must provide annually a report to Parliament that includes -

a statistical overview of all sentences that have been imposed and that are still in force, and of the costs associated with implementing such sentences;

projections of the estimated cost of continuing to implement such sentences in the future;

as far as is practicable, information on the efficacy of sentences in reducing crime;

a statistical overview of the development of the use of community corrections as a sentencing option and its effectiveness; and

a consolidated list of all the guidelines that it has developed and those that have been set by guideline judgments of the Supreme Court of Appeal.

The Sentencing Council must publish annually, electronically or otherwise, information on sentencing, including a consolidated list of sentencing guidelines and guideline judgments of the Supreme Court of Appeal, that will assist the courts in imposing sentences in terms of this Act.

## **8. Establishment of Sentencing Guidelines**

- (1) The Sentencing Council may establish a sentencing guideline for any category or sub-category of offence, provided that within five years of commencing work the Sentencing Council must establish sentencing guidelines for all offences for which sentenced offenders make up more than five percent of the sentenced prison population or for which more than 20 percent of offenders in any calendar year are sentenced to terms of imprisonment without an option of a fine.

When establishing sentencing guidelines the Sentencing Council must determine what are to be regarded as relevant previous convictions for the purpose of calculating a proportionate numerical rating for an offence or sub-category of offence.

The Sentencing Council must publish sentencing guidelines that have been established in the *Gazette*.

## **9. Revision of Sentencing Guidelines**

- (1) The Sentencing Council may revise any sentencing guideline for any category or sub-category of offence after the guideline has been in operation for at least one year by giving a new numerical rating to a category or sub-category of offence and matching the new rating to the sentencing options.

When a new numerical rating is given to a category or a sub-category of an offence, the relevant previous convictions may be determined afresh.

The Sentencing Council may also issue new guidelines annually by reviewing the matching of the numerical ratings and the sentencing options.

## **10. Action of the Sentencing Council on request**

- (1) The Minister, the Minister of Correctional Services or Parliament may request the Sentencing Council to establish a sentencing guideline or to review an existing guideline.

If the Sentencing Council receives a request made in terms of subsection (1) it must act upon such request, following the same procedures as if it were itself taking the initiative.

## **11. Procedures of the Sentencing Council**

The Sentencing Council may take decisions about establishing or revising sentencing guidelines only after -

- (a) consultation; and

considering sentences imposed by the courts for comparable offences.

Consultation in terms of subsection (1) must include publication of draft guidelines for comment as well as the time frame set for such comments.

The majority of members of the Sentencing Council, which must include the chairperson, constitutes a quorum for a meeting of the Council.

A decision of the majority of members of the Sentencing Council present relating to the setting or revising of sentencing guidelines and any other decisions that the Sentencing Council may take in terms of this Act shall be a decision of the Council.

A member of the Sentencing Council who is not in the service of the State may receive such allowances as may be determined by the Director-General in consultation with the Minister of State Expenditure.

## CHAPTER 3

### GUIDELINE JUDGMENTS

3.3.1 The development of a framework of sentencing guidelines as described in section 4 is a complex task that will require close co-operation between a court operating at a national level and a specialist body. The involvement of a court is essential if the judicial branch is to be part of the new partnership setting a normative framework and not only of applying the framework to individual cases. It is clear that the primary guidelines must apply nationally if they are to achieve a measure of uniformity. Moreover, it would be entirely impractical to have a national Sentencing Council that interacted with provincial divisions of the High Court in setting varying standards that would eventually be made consistent on appeal to the Supreme Court of Appeal. In the English hybrid example the role of passing guideline judgments is played by the Criminal Division of the Court of Appeal.<sup>66</sup> In South Africa at the moment the closest equivalent court is the Supreme Court of Appeal. The Commission recommends that the Supreme Court of Appeal be given this vital function. The Commission notes that the possibility of establishing a national court of criminal appeals for South Africa has been mooted.<sup>67</sup> If such a court were established, it would be the ideal court give guideline judgments of the kind envisaged in section 12.

### RECOMMENDATION

3.3.2 The Commission recommends the inclusion of the following provision in the Draft Bill:

#### **12. Guideline judgments of the Supreme Court of Appeal**

- (1) The Supreme Court of Appeal when considering an appeal against sentence may give a guideline judgment on sentence and it must do so when a party to an appeal against sentence requests it to do so.

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66 (See Part 1 paragraph 1.43 and further above).

67 See recommendations in the South African Law Commission *Interim report on appeal procedures* (1994).

- (2) When the Supreme Court of Appeal anticipates giving a guideline judgment it must notify the Sentencing Council of its intention and ask the Council to provide it with the information it requires for a guideline judgment.
- (3) When the Sentencing Council is notified in terms of subsection (2), it may in addition make representations to the Supreme Court of Appeal on any aspect of the guideline judgment that the Court proposes to give.
- (4) A guideline judgment must determine by applying the principles set out in section 3, in the same manner as in the determination of a sentencing guideline, the sentencing option or options and their severity that are proportionate to the category or sub-category of offence within which the offence committed falls.
- (5) A guideline judgment may revise an existing sentencing guideline which is the subject of an appeal, including a sentencing guideline applied by a court against whose sentence an appeal is considered.
- (6) A guideline judgment may also contain an indication of substantial and compelling circumstances of specific relevance to the category or sub-category of offence that may be taken into account in departing from a sentence laid down in subsection (4).
- (7)
  - (a) A guideline judgment is binding on all other courts in respect of all offences of the same category or sub-category of offence.
  - (b) In order to ensure consistency in sentencing, departures from guideline judgements are allowed only in substantial and compelling circumstances that increase or decrease significantly the moral blameworthiness of the offender with reference to the offence committed.

**PART III****CHAPTER 4****SENTENCING OPTIONS****INTRODUCTION**

3.4.1 Before a sentencing officer can start the search for the most appropriate sentence in a particular case, the types of sentences that may legally be imposed have to be determined. At present, section 276 the Criminal Procedure Act, 51 of 1977, makes provision for different types of sentencing options. This section is the general enabling statutory provision as far as the various forms of punishment in criminal trials are concerned. The section is, however, subject to the provisions contained in the Criminal Procedure Act itself, as well as those contained in other laws or the common law. Courts of law may therefore impose the punishments they are entitled to impose under other legal provisions or under the common law, and section 276 is merely complementary to other penal provisions in statutes and common law. To determine the precise meaning of the section is no easy task. The reference to “any other law” refers to all statutes, including provincial laws, ordinances under the previous dispensation and legislation issued by local authorities. The reference to the common law is more complicated. Du Toit *et al.*<sup>68</sup> explain that it means that all punishments recognised by our common law can thus be imposed by our courts, save in so far as they have been expressly repealed or amended. It is, however, difficult to cite an example where such an interpretation is valid because punishments that were imposed under common law have been completely replaced by statutory provisions. It would therefore be surprising if any common law penalty that is not expressly mentioned in the Act, will ever play a role in sentencing in our law. A possible interpretation of the section would be to read the reference to the common law only in relation to the imposition of sentences itself and not in relation to the list of sentences that follows. Section 276 is therefore not a general provision enabling courts to impose forms of punishment that do not fall within their jurisdiction. A court of law is still limited to its own sentencing jurisdiction prescribed in other statutes. A

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<sup>68</sup> *Commentary on the Criminal Procedure Act (1997)* at 28-9.

further problem with the current section is the inconsistent use of the terms “sentences” and “punishment”. These inconsistencies must be ascribed to careless drafting in the absence of any other logical explanation.

3.4.2 The Commission is of the view that the Sentencing Framework Act should largely retain the provisions presently contained in the Criminal Procedure Act that deal with sentencing options. The most important change is that correctional supervision as a sentence will be subsumed into the expanded sentencing option of community corrections. However, where necessary, amendments to provisions dealing with other sentencing options will be proposed and the detailed legislative framework for them will be explained in this chapter.

## **RECOMMENDATION**

3.4.3 The Commission recommends that provision be made for a general clause specifying the following sentencing options:

### **13. Sentencing Options**

Subject to the provisions of this Act and any other law that restricts the punishment jurisdiction of a court or sets a maximum limit on sentences that may be imposed, the following sentences may be passed upon a person convicted of an offence if justified by the sentencing principles referred to in section 3 or allowed by a sentencing guideline or guideline judgment applicable to the offence:

- (a) imprisonment for life;
- (b) imprisonment;
- (c) imprisonment for an indefinite period following an order declaring an offender a dangerous person;
- (d) imprisonment for an extended period following an order declaring an offender an habitual criminal;
- (e) periodical imprisonment;
- (f) committal to an institution;

- (g) a fine;
- (h) community corrections; and
- (i) a caution and discharge.

## IMPRISONMENT FOR LIFE

3.4.4 Life imprisonment is the longest prison sentence that a court may impose.<sup>69</sup> As far as the courts are concerned it lasts for the whole of the natural life of the prisoner.<sup>70</sup> Life imprisonment has been expressly provided for in the Criminal Procedure Act by the Criminal Law Amendment Act of 1990, but the Supreme Court has always been empowered to impose it.<sup>71</sup> It may only be imposed by the High Court because of the jurisdictional limitations of the other courts. Technically it may be imposed for any common law offence but with regard to statutory offences it is only allowed as a legitimate sentencing option if there are specific provisions for its imposition. The Criminal Law Amendment Act 105 of 1997, which provides for mandatory minimum sentences for certain offences, contains provisions for the imposition of life imprisonment in respect of certain statutory offences. Before the abolition of the death penalty life imprisonment was considered to be an alternative for the death penalty, should the latter not be the only proper sentence. Even then, life imprisonment was imposed only in cases of extreme seriousness where the protection of society was imperative.

3.4.5 Since the abolition of the death penalty life imprisonment is the most severe sentence that the courts can impose.<sup>72</sup> In *S v T*<sup>73</sup> the court explained that the sentence of life imprisonment authorises the State to keep offenders in prison for the rest of their natural lives. Unless this result is considered to be appropriate this sentence should not be imposed. The

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69 See Part I paragraph 1.41.

70 *S v Mda* 1991 (1) SA 169 (A).

71 *S v Mzwakala* 1957 (4) SA 273 (A).

72 *S v Martin* 1996 (1) SACR 378 (W).

73 1997 (1) SACR 496 (SCA) at 498.

question is when is this option appropriate? From case law it appears that this option is not limited to exceptionally extraordinary circumstances.<sup>74</sup> It is clear though that the crime has to be very serious and that mitigating factors should have little effect on the blameworthiness of the offender.

3.4.6 Some presiding officers have been concerned that the release policy of the Department of Correctional Services may have the effect that, despite the imposition of a life sentence, the offender may be released after having served only a few years of the sentence. If life imprisonment is an appropriate sentence, its imposition should not be avoided merely because the administrative machinery of the executive allows for the early release of the offender.<sup>75</sup> In any event, when the new Correctional Services Act 111 of 1998 comes into operation all prisoners will have to serve 25 years before they can be considered for release.<sup>76</sup> Only if the prisoner is older than 65 years of age will release be considered after 15 years. Moreover, the release of prisoners sentenced to life imprisonment, unlike other sentences, will be considered by the court that imposed the original sentence. The court itself thus has the power to extend the term actually served beyond the 25-year minimum.

3.4.7 It is unlikely that life imprisonment will be imposed with another sentence for a single crime. In practice other sentences are imposed for additional crimes of which the offender has also been convicted. If such sentences consist of any form of imprisonment they run concurrently with the sentence of life imprisonment. Very long terms of imprisonment cannot extend the period after which release is considered, because the new Correctional Services Act provides that all offenders, no matter how long their terms, must be considered for release after 25 years. This provision ensures that the life sentence remains the most severe sentence in practice.

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<sup>74</sup> *S v Ngcongco* 1996 (1) SACR 557 (N).

<sup>75</sup> *S v Mhlongo* 1994 (1) SACR 584 (A).

<sup>76</sup> Section 73(6)(b)(iv) of Act 111 of 1998.

## RECOMMENDATION

3.4.8 The Commission recommends that the power to impose the life sentence be qualified only by the requirement that it must be limited to cases where it is justified by the extreme gravity of the offence. This qualification follows a similar provision in the Statute of Rome, which establishes life imprisonment as the most severe penalty that the new International Criminal Court will be able to impose, even for crimes against humanity such as genocide.<sup>77</sup> The Commission recommends the following provision:

### **14. Imprisonment for life**

Imprisonment for life is the most severe sentence and may be imposed only where the offence is extremely serious.

## IMPRISONMENT

3.4.9 Presently the Criminal Procedure Act contains some provisions relating to a sentence of imprisonment. It provides that in construing any provision of any law (not being an Act of Parliament passed on or after the first day of September 1959, or anything enacted by virtue of powers conferred by such an Act), in so far as it prescribes or confers the powers to prescribe a punishment for any offence, any reference in that law to imprisonment with or without any form of labour, shall be construed as a reference to imprisonment only. A reference to any period of imprisonment of less than three months which may not be exceeded, shall be construed as a reference to a period of imprisonment of three months. A reference to any fine of less than R50, shall be construed as a reference to a fine of R50.

3.4.10 In terms of the Act the court also has a discretion as to punishment and a person liable to a sentence of imprisonment for life or for any period, may be sentenced to imprisonment for any shorter period, and a person liable to a sentence of a fine of any amount may be sentenced to a fine of any lesser amount. These provisions, however, do not apply to any offence for which

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<sup>77</sup> Article 77(1)(b) of the Rome Statute for the International Criminal Court (A/Conf.18309, 1998).

a minimum penalty is prescribed in the law creating the offence or prescribing a penalty for it. Provision is also made that the minimum period of imprisonment shall be four days unless the sentence is that the person concerned be detained until the rising of the court.

3.4.11 The Commission recognises that the provisions relating directly to imprisonment in the Criminal Procedure Act are of a highly technical nature. It notes that the key rule in relation to imprisonment, namely that it should not be imposed where the objectives of punishment can be met by non-custodial sentences, is contained in section 29 of the proposed Sentencing Framework Bill. Nevertheless, the Commission recommends that a provision be retained to deal with old laws that may still refer to imprisonment with labour or that prescribe sentences of less than three months.

3.4.12 The Commission also recommends that a brief provision preventing prison sentences of less than seven days be retained to deal with impracticably short sentences. The Commission considered proposing that prison sentences of less than three months be eliminated entirely, but decided not to do so, on the basis that the effect might be that courts that were determined to send someone to prison would simply impose a sentence of three months. It noted that the general rule in favour of non-custodial sentences would serve to inhibit the use of very short prison sentences, but that the option of imposing them should be retained for the unusual circumstances when they might be appropriate.

## **RECOMMENDATION**

3.4.13 The Commission recommends the inclusion of the following provision dealing with imprisonment:

### **15. Imprisonment**

- (1) A reference in any law to imprisonment with or without any form of labour as a punishment must be construed as a reference to imprisonment only and a reference to any maximum period of imprisonment of less than three months must be construed as a reference to a period of imprisonment of three months.
- (2) No person may be sentenced by any court to imprisonment for a period of less than seven days unless the sentence is that the person concerned be detained

until the rising of the court.

## DANGEROUS CRIMINALS

3.4.14 At present provision is made for declaring a person a dangerous criminal and the Criminal Procedure Act prescribes an indefinite sentence in such a case.<sup>78</sup> The provision was introduced relatively recently, in 1993, to replace the outmoded legislation that dealt with the detention of so-called psychopaths. The Commission accepts that potentially indefinite detention for truly dangerous criminals, who represent a danger to the physical or mental well-being of other persons and against whom the community should be protected, is a justifiable exception to the general rule that sentences should be determined primarily by the seriousness of the offence committed.<sup>79</sup> The Commission therefore proposes that a simplified version of the existing provision be re-enacted. In two important respects there should be substantive modifications to what is contained in the Criminal Procedure Act.

- Only persons who have been convicted of offences of which **serious violence** is an element should be declared dangerous offenders. In practice current legislation is being applied this way, but it is nevertheless important to ensure statutorily that someone who commits a lesser, non-violent offence does not run the risk of being detained indefinitely.

- A careful analysis of the idea underlying the indefinite detention of dangerous criminals shows that it has two elements, namely punishment for serious crimes of violence and further detention, which is not punishment in the narrow sense but a form of preventive detention. The Commission's view is that these two elements should be distinguished in legislation, so that someone is not detained when they have served the penal element of their sentence and may no longer be dangerous. It proposes to do so by requiring the courts to set the date of first review by determining the sentence they would have imposed, had they not declared the offender a dangerous criminal. The

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<sup>78</sup> Sections 286A and 286B.

<sup>79</sup> See Part III chapter 1 paragraph 3.1.9 above.

continuing dangerousness of the offender must then be considered at the time the offender would have been considered for conditional release had a fixed term (or life) sentence been imposed. Of course, the court at this point may decide to continue the detention. The result is that the power to detain dangerous criminals indefinitely is not undermined, but the safeguards are strengthened.

## **RECOMMENDATION**

3.4.15 The Commission recommends the inclusion of the following provisions in the Bill:

### **16. Declaration as a dangerous criminal**

A High Court or a regional court that convicts a person of any offence of which serious violence is an element, may, subject to the provisions of section 17, decide not to apply the sentencing principles referred to in section 3 or to follow a sentencing guideline or guideline judgment applicable to the offence and declare him or her a dangerous criminal, if the court is satisfied that such person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him or her.

### **17. Inquiry into a potentially dangerous criminal**

- (1) If, after conviction of an offence of which serious violence is an element but before sentence, it appears to a court having jurisdiction that the person concerned may be a dangerous criminal, the court may direct that the matter be enquired into and be reported on in accordance with the provisions of this section.
- (2) Before a person is subjected to an inquiry in terms of subsection (1) the court must inform him or her of its intention and explain the relevant provisions of this Act as well as the gravity of those provisions.
- (3)
  - (a) Where a court orders an inquiry under subsection (1), the inquiry must be conducted and reported on by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court and by a psychiatrist appointed by the person concerned.
  - (b) A psychiatrist appointed under paragraph (a), other than a psychiatrist appointed by the person concerned, must be appointed from the list of

psychiatrists referred to in section 79 (9) of the Criminal Procedure Act: except that where such list does not include a sufficient number of psychiatrists who may conveniently be appointed for an inquiry under this Act, a psychiatrist may be appointed although his or her name does not appear on such list.

- (c) A psychiatrist designated or appointed under paragraph (a) and who is not in the full-time service of the State, must be compensated for his or her services in connection with the inquiry, including giving evidence, according to a tariff determined by the Minister in consultation with the Minister of State Expenditure.
- (4) The person concerned may, for the purposes of the inquiry, be committed to a psychiatric hospital or other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may determine, and if in custody while so committed, the person is deemed to be in the lawful custody of the person or the authority in whose custody he or she was at the time of committal.
- (5) When the period of committal in terms of subsection (4) is extended for the first time such extension may be granted in the absence of the person concerned unless he or she requests otherwise.
- (6) The report on the inquiry must be in writing and submitted to the registrar or the clerk of the court, who must make a copy thereof available to the prosecutor and the person concerned.
- (7) The report must include a description of the inquiry and a finding as to the question whether the person concerned represents a danger to the physical or mental well-being of other persons.
- (8) If the persons conducting the inquiry are not unanimous in their finding, that must be stated in the report and the individual conclusions recorded.
- (9) The contents of the report is admissible in evidence at criminal proceedings: provided that a statement made by the person concerned at the inquiry is not admissible in evidence against him or her at the criminal proceedings, except when it is relevant to the determination of the question whether the person concerned is a dangerous criminal or not.
- (10) (a) If the finding in the report is the unanimous finding of the persons who conducted the inquiry, and the finding is not disputed by the prosecutor or the person concerned, the court may determine the matter on such report without hearing further evidence.  
(b) If the finding is not unanimous or, if unanimous, is disputed by the prosecutor or the person concerned, the court must determine the matter after hearing evidence. For this purpose the prosecutor and the person

concerned may present evidence to the court, including the evidence of any person who conducted the inquiry. Where the finding is disputed, the party disputing it may subpoena and cross-examine any person who conducted the inquiry.

## **18. Imprisonment of dangerous criminals for an indefinite period**

- (1) A court that declares a person a dangerous criminal must sentence such person to imprisonment for an indefinite period.
- (2)
  - (a) The court must also decide on the sentence that it would have imposed had it not declared the person concerned a dangerous criminal and in this regard it must take into account any sentencing guideline or guideline judgment that deals with the relevant category or sub-category of offence.
  - (b) Such sentence must be within the sentencing jurisdiction of the court.
- (3) In the light of the decision referred to in subsection (2) the court must order that the person whom it declared a dangerous criminal must appear before it at a stage when such person would normally appear before a Correctional Supervision and Parole Board or a court to be considered for conditional release in terms of section 73 of the Correctional Services Act.
- (4) A person sentenced in terms of subsection (1), must be brought before the court that imposed the sentence within seven days after the expiration of the period contemplated in subsection (3) in order to enable such court to reconsider the sentence: provided that -
  - (a) in the absence of the judicial officer who imposed the sentence, any other judicial officer of that court may reconsider the sentence; or
  - (b) when practical or other considerations make it desirable that a court other than the court which imposed sentence should reconsider the sentence, the Commissioner may, with the concurrence of the National Director of Public Prosecutions, apply to the registrar or the clerk of the court of the other court, which court must have jurisdiction equal to that of the court which sentenced the person, to have such person appear before the other court, for that purpose.
- (5)
  - (a) On receipt of an application referred to in subsection (4)(b), the registrar or the clerk of the court must, after consultation with the prosecutor, set the matter down for a date not later than seven days after the expiration of the period determined by the court in terms of subsection (3).
  - (b) The registrar or the clerk of the court must submit the case record to the judicial officer who is to reconsider the sentence within a reasonable time

before the date contemplated in paragraph (a) and inform the Commissioner in writing of the date for which the matter has been set down.

- (6) (a) Whenever a court reconsiders a sentence in terms of this section it must obtain a report from the Correctional Services and Parole Board contemplated in section 75(1)(b) of the Correctional Services Act.
- (b) In the light of this and other information before the court the court must consider whether the person is still a dangerous criminal.
- (7) After a court has reconsidered a sentence in terms of section (6), it may-
  - (a) confirm the sentence of imprisonment for an indefinite period, in which case the court must direct that such person be brought before the court on the expiration of a further period determined by it, which may not exceed five years; or
  - (b) release the person unconditionally or on such conditions as it deems fit.
- (8) The jurisdiction of the regional court is not exceeded by any further detention that may be ordered in terms of subsection (7)(a)
- (9) At the expiration of the further period contemplated in subsection (7)(a) the provisions of subsections (2) up to and including (8) apply with the necessary changes.

## **PERSISTENT OFFENDERS**

3.4.16 At present provision is made in the Criminal Procedure Act for imposing imprisonment as an appropriate sentence in the case of persistent offenders. Section 286 of the Act makes provision for the declaration of a person as an habitual criminal. A High Court or a regional court that convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him or her, declare such person an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which the person is convicted.

3.4.17 No person may be declared an habitual criminal if he or she is under the age of 18 years; or if in the opinion of the court the offence warrants the imposition of punishment, which by itself or together with any punishment warranted or required in respect of any other offence of which

the accused is simultaneously convicted, would entail imprisonment for a period exceeding 15 years. A person declared an habitual criminal must be dealt with in accordance with the laws relating to prisons.

3.4.18 The Commission is of the view that the existing provision dealing with persistent habitual offenders should be retained as a limited exception to the rule of offence-based proportionality, to deal with offenders whose offences will not themselves rate as sufficiently serious to justify longer periods of detention, and whose many previous convictions will not be fully recognised, given the relatively limited role that previous convictions play in the new system of principles and guidelines. The scope of the current provision has been circumscribed by the case law<sup>80</sup>. Moreover, the effect of section 73(6)(c) of the Correctional Services Act, 111 of 1998 will be to ensure that a person who has been declared an habitual criminal may not be detained for longer than 15 years, thus eliminating the possibility of an indefinite detention.

## **RECOMMENDATION**

3.4.19 The Commission recommends the inclusion of the following provision dealing with habitual offenders:

### **19. Declaration as a habitual criminal**

A High Court or a regional court which convicts a person of one or more offences, may, subject to the provisions of subsection (2), decide not to apply the sentencing principles referred to in section 3 directly or to follow a sentencing guideline or guideline judgment applicable to the offence and declare such person a habitual criminal, instead of any other punishment for the offence or offences of which he or she is convicted, if the court is satisfied that the said person habitually commits offences and that the community should be protected against him or her.

No person under the age of 18 years may be declared an habitual criminal, nor may such order be made where the offence, in the opinion of the court, warrants the imposition of punishment which by itself or together with any punishment for any other offence of which the person has been convicted at the same time, would entail imprisonment for

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<sup>80</sup> See the discussion in SS Terblanche *The Guide to Sentencing in South Africa* (1998) 270-274.

more than 15 years.

## **PERIODICAL IMPRISONMENT**

3.4.20 At present provision is made for periodical imprisonment in the Criminal Procedure Act.<sup>81</sup> A court convicting a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, may, in lieu of any other punishment, sentence such person to undergo in accordance with the laws relating to prisons, periodical imprisonment for a period of not less than 100 hours and not more than 2,000 hours. The court that imposes a sentence of periodical imprisonment upon any person shall cause to be served upon him or her a notice in writing directing him or her to surrender himself or herself on a date and at a time specified in the notice or (if prevented from doing so by circumstances beyond his or her control) as soon as possible thereafter, to the officer in charge of a place so specified, whether within or outside the area of jurisdiction of the court, for the purpose of undergoing such imprisonment. A copy of this notice serves as a warrant for the reception into custody of the convicted person by the said officer.

3.4.21 Any person who, without lawful excuse, fails to comply with a notice to render himself or herself to serve a sentence of periodical imprisonment, or when surrendering himself or herself for the purpose of undergoing periodical imprisonment, is under the influence of intoxicating liquor or drugs or the like, or impersonates or falsely represents himself or herself to be a person who has been directed to surrender him or herself for the purpose of undergoing periodical imprisonment, is guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months. The court that tries any person on any of these charges must cause a notice to this effect to be served on such person.

3.4.22 If, before the expiration of any sentence of periodical imprisonment imposed upon any person for any offence, such person is undergoing a punishment of any other form of detention imposed by any court, any magistrate before whom such person is brought, must set aside the unexpired portion of the sentence of periodical imprisonment and, after considering the evidence recorded in respect of such offence, may impose in lieu of such unexpired portion any punishment within the limits of his or her jurisdiction and of any punishment prescribed by any law as a punishment for such offence.

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<sup>81</sup> Section 285.

3.4.23 The Commission is mindful of the fact that the sentence of periodical imprisonment is rarely used because of practical difficulties with its implementation. It nevertheless recommends that it be retained as the principles underlying it are sound: it can serve as a custodial penalty with some impact, while allowing offenders to retain their employment and other desirable aspects of their civilian lives. The problems of implementation should be addressed outside the framework of the legislation proposed here.

3.4.24 As the proposed Sentencing Framework Bill deals only with the imposition of sentence, questions of implementation, such as the procedures to be followed when an offender does not return to prison as prescribed, should be moved from the Criminal Procedure Act to the Correctional Services Act.<sup>82</sup>

## RECOMMENDATION

3.4.25 The Commission recommends the inclusion of the following provision on periodical imprisonment:

### 20. Periodical imprisonment

- (1) A court convicting a person of any offence, may, instead of any other sentence but subject to the sentencing principles referred to in section 3 or a sentencing guideline or guideline judgment that may be applicable to the offence, sentence such person to periodical imprisonment for a period of not less than 100 hours and not more than 2,000 hours.
- (2) The court which imposes a sentence of periodical imprisonment upon a person must have served upon him or her, a notice in writing directing such person to surrender him or herself on a date and at a time specified in the notice or, if prevented from doing so by circumstances beyond his or her control, as soon as possible thereafter, to the person in charge of a specified prison, for the purpose of undergoing such imprisonment.
- (3) A copy of the notice referred to in subsection (2) serves as a warrant for the reception into custody of the convicted person.
- (4) The court which tries any person on a charge of contravening section 117 A (a)

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82 See the proposal in this regard at the end of the Sentencing Framework Bill.

of the Correctional Services Act, must, subject to subsection (5), cause a notice referred to in subsection (2) to be served on that person.

- (5) The unexpired portion of the sentence of periodical imprisonment must be set aside if a person serving such sentence is detained or sentenced to imprisonment on another charge, and a fresh sentence must be imposed in place of the unexpired portion of the sentence of periodical imprisonment.

## **COMMITTAL TO A TREATMENT CENTRE**

3.4.26 The sentence of committal to a treatment centre is a further exception to the principle that the offence should determine the punishment. It is explicitly oriented to the treatment and rehabilitation of the individual. The Commission was concerned that it could be used as a means of imposing what could be in fact disproportionately harsh punishments. However, the constraint that it applies only to an offender who objectively is dependent on drugs and the procedural requirements of a probation officers report, as well as the fact that the provision has been used conservatively in the past, persuaded the Commission to allow it to be continued. The Commission recommends that the provision should be reviewed if it is abused in order to significantly distort the sentencing system or threaten individual liberty.

## **RECOMMENDATION**

3.4.27 The Commission recommends that the provision for committal to a treatment centre, which is in the current Criminal Procedure Act, be retained with the necessary editorial changes:

### **21. Committal to a treatment centre**

A court convicting any person of any offence may decide not to apply the sentencing principles referred to in section 3 or to follow a sentencing guideline or guideline judgment applicable to the offence and order that the person be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act 20 of 1992.

An order may be made in terms of subsection (1) if the court is satisfied from the information placed before it, which must include a report of a probation officer, that such person is a person as described in section 21 (1) of the Prevention and Treatment of Drug Dependency Act 20 of 1992, and for the purposes of the said Act such order is

deemed to have been made under section 22.

- (a) Where a court has referred a person to a treatment centre under subsection (1) and such person is later found not to be fit for treatment in such treatment centre, such person may be referred back to the court for re-sentencing.
- (b) Whenever a court reconsiders a sentence in terms of paragraph (a) it has the same powers as it would have had if it were considering sentence after conviction.

## THE FINE

3.4.28 It is likely that fines will continue to be an important component of the criminal justice system. The provisions relating to fines in the current Criminal Procedure Act allow the courts considerable scope in determining how fines should be imposed. It also allows them considerable flexibility in tailoring the methods of payment to the ability of the accused to pay. The Commission proposes to retain these features, subject only to the normative guidelines that may be developed for specific offences.

3.4.29 Serious consideration needs also to be given to a formalised system for relating the fine to the ability of the accused to pay. In this regard the so-called unit- or day-fine system is particularly attractive as it presents a model for linking desert and personal circumstances. In this system the seriousness of the offence is reflected in units of days. The accused is then fined an amount that is calculated by multiplying the day-units by their daily income minus deductions for basic needs.<sup>83</sup> The system works well in a number of continental European jurisdictions where sophisticated information on individual income is easily available. It was also introduced in England in the early 1990s. However, public resistance and practical problems in implementing it proved so severe that it was abandoned shortly thereafter.<sup>84</sup> In South Africa, where accurate information on personal income is hard to come by, such a system may well

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<sup>83</sup> See H Thornstadt "The Day Fine System in Sweden" 1985 *Criminal Law Review* 306; Judith Greene "The Unit Fine: Monetary Sanctions Apportioned to Income" in Andrew von Hirsch and Andrew Ashworth (eds.) *Principled Sentencing* (2 ed 1998) 268.

<sup>84</sup> For a fuller account of the failure of the English scheme and a defence of the principle, see Andrew Ashworth *Sentencing and Criminal Justice* (2 ed 1995) 262-4.

prove too cumbersome to administer on a large scale. The Commission accordingly is not proposing a formal day-fine mechanism at this stage. Inputs that take the discussion of this issue further will be welcomed.

## RECOMMENDATION

3.4.30 The Commission recommends the following provisions in relation to fines:

### **22. Fines**

If justified in terms of the sentencing principles, a fine may be imposed for any offence by any court having jurisdiction to impose such sentence unless otherwise provided for by any other law or if a sentencing guideline or guideline judgment does not make provision for a fine as a sentencing option for a category or sub-category of offence.

### **23. Enforcement and payment of fines**

Where a person is sentenced to pay a fine, whether with or without an alternative period of imprisonment, the court may in its discretion enforce payment of the fine, whether in whole or in part -

- (a) by the seizure of money upon the person concerned;
- (b) if money is due or is to become due as salary or wages from any employer of the person concerned-
  - (i) by from time to time ordering such employer to deduct a specified amount from the salary or wages so due and to pay over such amount to the clerk of the court or registrar in question; or
  - (ii) by ordering such employer to deduct a specified amount from the salary or wages so due on specified times and to pay over such amount to the clerk of the court or registrar in question; and
- (c) by allowing the accused to pay the fine on the conditions and in instalments at the intervals it deems fit.

### **24. Recovery of fines**

Whenever a person is sentenced to pay a fine, the court passing the sentence may issue a warrant addressed to the sheriff or messenger of the court authorizing him or her to levy the amount of the fine by attachment and sale of any movable property belonging to such person even if the sentence directs that, in default of payment of the fine, such person must be imprisoned.

The amount which may be levied in terms of subsection (1) must be sufficient to cover, in addition to the fine, the costs and expenses of the warrant and of the attachment and sale in terms of it.

If the proceeds of the sale of the movable property are insufficient to satisfy the amount of the fine and the costs and expenses, a High Court may issue a warrant, or, in the case of a sentence by any lower court, authorize such lower court to issue a warrant for the levy against the immovable property of such person of the amount unpaid.

When a person is sentenced only to a fine or, in default of payment of the fine, to a term of imprisonment and the court issues a warrant under this section, it may suspend the execution of the sentence of imprisonment and may release the person upon his or her executing a bond with or without sureties as the court thinks fit, on condition that he or she appears before such court or some other court on the day appointed for the return of such warrant, such day being not more than 15 days from the time of executing the bond. In the event of the amount of the fine not being recovered, the sentence of imprisonment may be executed at once or may be suspended as before for a further period or periods of not more than 15 days.

In any case in which an order for the payment of money is made on non-recovery of which imprisonment may be ordered, and the money is not paid at once, the court may require the person ordered to make such payment to enter into a bond as prescribed in subsection (4), and if the person does not do so, may at once pass a sentence of imprisonment as if the money had not been recovered.

## **25. Alternative to a fine**

Whenever a court convicts a person of any offence punishable by a fine, whether with or without any other direct or alternative punishment, it may, in imposing a fine, impose any other sentence as an alternative: provided that the alternative is not more severe than the punishment which may be imposed for that offence.

Whenever a court has imposed upon any person a fine without an alternative sentence and the fine is not paid in full or is not recovered in full, the court which passed sentence may issue a warrant directing that the person concerned be arrested and brought before the court, whereupon the court may impose such other sentence as could have been imposed if the court were considering sentence after conviction.

## **COMMUNITY CORRECTIONS**

3.4.31 Sanctions that are implemented in the community have for some years been key elements in South African sentencing practice. Initially, such sentences were imposed indirectly, primarily as conditions of suspension or postponement of sentences of imprisonment. Since 1991 it has been possible to impose correctional supervision directly as a community based sentence.<sup>85</sup>

3.4.32 The Commission had several intimations in the course of the response to its issue paper on restorative justice that it should consider the expansion of the scope of the community-based sanctions already on offer. In order to assist it in the evaluation of these requests it also conducted further comparative research, the findings of which are contained in appendix D (community corrections). This research revealed, not surprisingly, that specific legislative provision was made in other jurisdictions for a wide range of community-based sentences, including participation in victim-offender mediation and family group conferencing, which are prominent forms of restorative justice. It also showed that compensation for victims and reparation to the community could form a key part of community-based sentences.

3.4.33 The Commission considered whether the current provisions for correctional supervision in the Criminal Procedure Act could be modified to meet the emerging needs for community-based sentences in South Africa. On the one hand, they were very flexible and allowed various forms of mediation and compensation to be ordered. On the other hand, this flexibility was a potential problem. It did not give the sentencing court a clear indication of what community sentences should entail. It was also dubious from the point of view of the rule of legal certainty, as the sentencer was not constrained by sufficiently clear rules.<sup>86</sup> Even more problematic was that those responsible for the implementation of the sentence of correctional supervision could manipulate it in such a way that the sentence as served could be significantly different from what

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<sup>85</sup> See sections 276(h) and (i) and 276A, which were inserted in the Criminal Procedure Act by Act 122 of 1991.

<sup>86</sup> This point was recognised by Kriegler AJA in *S v R* 1993 (1) SA 476 (A). For a discussion of the constitutional requirements of legality in the context of community-based sentences, see Dirk van Zyl Smit "Sentencing and Punishment" in Chaskalson *et al.* (eds.) *Constitutional Law of South Africa*. (1996) 28-2 – 28-3.

the sentencer had intended.

3.4.34 Fortunately, the Correctional Services Act 111 of 1998 has set out to curb some of these abuses by creating a closed list of conditions that could be imposed in community sentences, including community corrections. The Commission proposes to build on this legislative initiative. It is of the view that the sentencing option of correctional supervision provided for in the Criminal Procedure Act should be replaced by the sentencing option of community corrections. One of the major points of criticism against sentencing practice in South Africa has been that it does not provide adequately for community participation in the sentencing phase and that the interests of victims are often overlooked. The introduction of this more comprehensive sentencing option would address these concerns by providing for specific orders that would deal with these issues.

3.4.35 The introduction of the sentencing option of community corrections will also entrench principles of restorative justice in our criminal justice process. Restorative justice represents a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which caused it. It is also, more widely, a way of dealing with crime generally in a rational and problem-solving way. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control.

3.4.36 Restorative justice is therefore in the first instance, a form of criminal justice based on reparation. Actions are aimed at repairing the damage caused by the crime, either materially or at least symbolically. When someone wrongs another, he or she has an obligation to make things right. The goal of the process is to heal the wounds of persons affected by the crime. In this context reparation to the victim and community is regarded as a duty of or obligation on the offender.

3.4.37 Secondly, communities are also affected by the commission of crime. Crime is best controlled when members of the community are the primary controllers through active participation in persuading offenders to accept responsibility for their actions, and, having done so, through concerted efforts of participation, to reintegrate the offender back into the community of law abiding citizens.

## RECOMMENDATION

3.4.38 The Correctional Services Act, 111 of 1998 already contains provisions for community corrections and the Commission therefore recommends the inclusion of the following provisions in the new Act, which are largely based on those provisions. The provisions, however, have been modified so as to ensure that sentences of community corrections can be structured to fit in with the overall scheme of the proposed Sentencing Framework Act and particularly with the requirements that specific types of orders and conditions may be required to fit community corrections into a sentencing guideline.<sup>87</sup>

### 26. Community Corrections

- (1) The primary purposes of the sentence of community corrections are to restore the rights of victims and allow persons subject to the sentence to lead a socially responsible and crime-free life during the period of their sentence and in future.
- (2) The particular orders that make up a sentence of community corrections must be tailored to the purposes set out in subsection (1), while still applying the sentencing principles referred to in section 3 and any sentencing guidelines or guideline judgments that may be applicable to the offence for which the sentence is being imposed.
- (3) A sentence of community corrections must be imposed for a fixed period not exceeding three years and must include one or more of the following orders. The orders are that, subject to the supervision of a probation officer or a correctional official, the person concerned-
  - (a) is placed under house detention;
  - (b) does community service;
  - (c) seeks employment;
  - (d) takes up and remains in employment;
  - (e) makes restitution or pays compensation to a victim;
  - (f) takes part in treatment, development and support programmes;
  - (g) participates in mediation between victim and offender or in family group

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<sup>87</sup> See section 4(5) of the draft proposed above that provides:

“In determining the severity of community corrections different levels of severity may recognised which depend on the orders that are made as part of a sentence of community corrections and the conditions that are attached to them.”

conferencing; and

- (h) if a child, attends educational programmes whether or not he or she is otherwise subject to compulsory education.

- (4) The court may, in addition to any of the orders in subsection (3), order, specifying details as indicated, that a person –

contributes financially towards the cost of the community corrections to which he or she has been subjected;

- (b) is restricted to one or more specified magisterial districts;
- (c) lives at a specified ascertainable address;
- (d) refrains from using or abusing alcohol or drugs;
- (e) refrains from committing a specified criminal offence or class of criminal offences;
- (f) refrains from visiting a specified place;
- (g) refrains from making contact with a specified person or persons;
- (h) refrains from threatening a specified person or persons by word or action; and
- (i) is subjected to a specified form of monitoring.

- (5) A sentence of community corrections may not include any order other than those listed in subsections (3) and (4) but the court may, subject to the provisions of the Correctional Services Act, elaborate on the conditions to be attached to the order.

- (6) The conditions attached to the orders must include at least the following information:

- (a) Where house detention is ordered in terms of subsection (3)(a) the court must stipulate the number of days for which the detention is to operate and the hours to which the person is restricted daily to his or her dwelling.
- (b) Where community service is ordered in terms of subsection (3)(b) the court must stipulate the number of hours which the person is required to serve, which may not be less than 16 hours per month.
- (c) Where payment of compensation or damages is ordered in terms of subsections (3)(e) the court must stipulate the amount to be paid.

A sentence of community corrections is served in accordance with the provisions of the Correctional Services Act and the conditions attached to the orders that comprise the sentence may be further elaborated as provided in that Act.

**27. Requirements for imposing community corrections**

A sentence of community corrections may only be imposed after a report of a probation officer or a correctional official has been placed before the court.

A report referred to in subsection (1) must contain -

- (a) recommendations on the conditions on which the sentence should be imposed;
- (b) recommendations on how the conditions can be utilised to achieve the objectives of the sentence;
- (c) the reasons why the accused is a person suitable to undergo a sentence of community corrections;
- (d) a proposed programme for the offender;
- (e) the reasons why the offender would benefit from the sentence;
- (f) information on the family and social background of the offender; and

a report on any matter which the court may request the probation officer or correctional official to consider.

**PART III****CHAPTER 5****RESTITUTION AND COMPENSATION ORDERS****INTRODUCTION**

3.5.1 The general introduction to this discussion paper has already recognised the increased emphasis that should be placed on reparation for the victims of crime in any new sentencing arrangement in South Africa.<sup>88</sup> Reparation covers both restitution and compensation. Restitution, in the narrowest sense, means the restoration of an item of property to its lawful owner. Compensation goes further and encompasses the making good of damage resulting from the commission of a crime.

3.5.2 The proposals set out in this paper seek to encourage both forms of reparation. It has been noted, however, that a general compensation scheme for all victims was beyond the scope of the current inquiry and that it was being examined separately. Moreover, compensation linked to pre-trial diversion is also not the subject of an investigation into sentencing. These qualifications aside, there remains much that the sentencing system itself can do in respect of reparation for the victims of crime. The imposition of sentences of which restitution and compensation are elements is one way of intervening for the sake of the victim. Such sentences form part of the proposals in this paper. Restitution and compensation may be ordered as part of a sentence of community corrections; indeed they may be the only substantive order in such a sentence (see section 26 of the proposed Act). Restitution and compensation may also be conditions on which the passing of sentence is postponed or another is suspended (see sections **32** and **34** of the proposed Act).

3.5.3 This discussion paper proposes to take the matter further and suggests that there should also be provision for restitution and compensation orders that are not sentencing options in the narrow sense but that offer a cheap and efficient means of reparation for victims of crime. The

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88 Paragraph 1.16.

reason is that there may be occasions where neither a sentence of community corrections with a compensatory element nor a suspended sentence may be appropriate but where it would nevertheless be desirable to order restitution or compensation by the convicted offender. Orders of this kind have been part of South African law for some time, but both comparative analyses conducted in the course of the research for the issue paper on restorative justice and public response to it suggest that more can be done by way of compelling victims to make reparations for their deeds. The first step, therefore, is to analyse the current South African system and its weaknesses and then to consider how these provisions can be improved.

### **COMPENSATION AND RESTITUTION ORDERS IN TERMS OF CHAPTER 29 OF THE CRIMINAL PROCEDURE ACT AND THEIR SHORTCOMINGS**

3.5.4 Section 300 of the Criminal Procedure Act, 51 of 1977, makes provision for the payment of compensation to certain victims of crime at the request of the prosecutor. Claims for damage or loss are limited to damage or loss of property. For purposes of determining the amount of compensation; the court may refer to the evidence and the proceedings at the trial or hear further evidence. In *S v Baloyi*<sup>89</sup> the court held that section 300 should not be invoked where an accused is not able to make repayments, has no assets and has to serve a long term of imprisonment. In *S v Wildschut*<sup>90</sup> the court held that, where a compensatory order was made against a married woman and there was no allegation that she was married out of community of property and with the exclusion of the marital power, the marriage was presumed to be in community of property and the woman had no *locus standi* to have a compensatory order made against her unless assisted by her husband. The order was consequently set aside.

3.5.5 In *S v Msiza*<sup>91</sup> the appellant had been convicted of a contravention of section 140 (1) (a) of the Lebowa Road Traffic Act 8 of 1973 (L) and had been ordered, in terms of the provisions of section 300 of the Criminal Procedure Act, to pay an amount of R625 to the complainant as compensation, or, on default, to undergo a further 100 days imprisonment. It appeared that the complainant had not applied for the award of compensation to him, that there was insufficient evidence from the complainant to prove the amount of his damages, and that at no stage had the appellant been given an opportunity to give evidence or to make representations regarding

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<sup>89</sup> 1981 (2) SA 227 (T).

<sup>90</sup> 1983 (4) SA 604 (C).

<sup>91</sup> 1979 (4) SA 473 (T).

the amount of the damages. On appeal, the court held that the magistrate had not been authorised by any law to impose imprisonment as an alternative for the payment of compensation. It was further held that the compensation order also had to be set aside because the complainant had not made application nor given evidence regarding his damages, and also because the *audi alteram partem* rule had not been applied by giving the appellant an opportunity to lead evidence or make representations regarding the amount of the damages.

3.5.6 In *S v Liberty Shipping and Forwarding and others*<sup>92</sup> the accused was convicted of fraud having fraudulently avoided paying customs duty and the Department of Customs and Excise was seeking an order for payment in terms of section 300(1) of the Criminal Procedure Act. The court held that the section was ambiguous. The section was held to cover damage to property of a person only and not any other damage suffered by him. The Department did not suffer loss of property belonging to it and the application for an order in terms of section was therefore refused.

3.5.7 In *S v Tlame*<sup>93</sup> the court held that a compensatory order in terms of section 300 of the Act, could only be made in the event of a conviction. The application for such order has to be made after conviction and a time limit for payment of compensation is not appropriate unless compensation is ordered as a condition of suspension of sentence. An award of compensation in terms of section 300 of the Criminal Procedure Act is akin to a civil remedy and it can only be made in the event of a conviction. The inquiry into compensation should consequently only commence after conviction. The inquiry commences with an application for compensation. The application should be made after conviction and not during the criminal proceeding. The inquiry should be conducted as in civil proceedings without the customary pleadings. The court should give the applicant an opportunity to place evidence before it and should then give the accused an opportunity to challenge this evidence and to place evidence in rebuttal before it. Thereafter the court should give the applicant and the accused an opportunity to address it. In practice, evidence relevant to compensation is often led during the criminal proceedings. Section 300(2) of the Act empowers the court to have regard to this evidence. During the inquiry the accused should be given an opportunity to challenge this evidence. The court should also investigate whether the accused can pay the amount of compensation. If the accused has no assets that can be sold in execution or if he has no income, a compensatory order cannot be enforced. An

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<sup>92</sup> 1982 (4) SA 281 (D).

<sup>93</sup> 1982 (4) SA 319 (B).

order in terms of section 300 has the effect of a civil order and can only be enforced by levying execution.

3.5.8 Section 301 of the Act provides that where a person is convicted of theft or of any other offence whereby he has unlawfully obtained property, and it appears to the court on the evidence that such person sold the property or part thereof to another person who had no knowledge of the real situation, the court may, on application of such purchaser and on restitution of the property to the owner, order that out of any money taken from the accused on his or her arrest, a sum not exceeding the amount paid by the purchaser be returned to him or her.

3.5.9 The Act, however, does not make provision for compensation to victims for injuries sustained as a result of crime nor for the payment of compensation to the family if the victim was killed. In practice South African courts seldom pay any attention to losses suffered by victims of crime. Orders for compensation will furthermore not be considered unless the complainant requests the public prosecutor to apply to the court for an order and complainants seldom make use of the provisions because they are either not present or they don't know about the provisions of the Act.

## **EVALUATION AND RECOMMENDATION**

3.5.10 The Commission carefully considered the current position with regard to compensation orders. It was manifest that the shortcomings were both substantive and procedural. The Commission decided to deal with the two aspects in separate chapters. Accordingly in this specialised chapter the Commission deals only with the substantive scope of restitution and compensation orders. Procedural aspects are included in chapter 7 of the proposed Sentencing Framework Bill that deals with all the procedural matters related to sentencing. This is done in order to integrate restitution and compensation fully into the sentencing system as a whole. To deal with the substantive scope of restitution and compensation orders that may be ordered after conviction, but separately from a sentence, the Commission proposes the following:

### **28. Restitution and compensation orders**

- (1) The court may, in addition to any sentence except a sentence that requires restitution or compensation as part of community corrections or as a condition of postponement or suspension, order the person convicted to make restitution or pay compensation -
  - (a) in the case of damage to, or the loss or destruction of property, including

money, belonging to another as a result of the commission of the offence by returning the property concerned or by paying to the party concerned an amount equal to the value of the loss or damage or an amount not exceeding the replacement value of the property as of the date of the order less the value of any part of the property that has been returned to such person, where the amount is reasonably easy to ascertain; or

- (b) in the case of bodily injury to or death of any person as a result of the commission of the offence by paying to the person concerned or, in the case of death, to the dependants of the deceased, an amount not exceeding all pecuniary damages, including loss of income or support, incurred as a result of the injury or death, where the amount is reasonably easy to ascertain.
- (2) (a) The awards made by a regional court or a magistrate's court in terms of subsection (1) may not exceed the amount determined by the Minister from time to time by notice in the *Gazette* in respect of the respective courts.
  - (b) Where the award that a regional court or magistrate's court wishes to make exceeds the amount of an award that may be made in terms of subsection (a) the matter should be referred to the High Court for consideration of an appropriate award.
- (3) In cases where the amount of the actual damage or loss exceeds the amount of an award made in terms of subsection (1) such additional amount can be claimed in a civil action.
  - (4) Where a court determines the amount of restitution or compensation in terms of this section, it must also determine the time for payment and the method of payment.

**PART III****CHAPTER 6****SENTENCING VARIATIONS****INTRODUCTION**

3.6.1 Sentencing does not consist only of applying sentencing principles, whether assisted by normative guidelines or not, to the choice of a list of sentencing options. The determination of a specific sentence may be influenced by a number of further rules that can drastically alter the outcome for the offender concerned. This chapter groups together the rules dealing with such variations.

**PRIORITY OF NON-CUSTODIAL SENTENCES**

3.6.2 A particularly important rule of choice that operates in addition to the general provisions on principles and guidelines is that where there is penal equivalence between a custodial and a non-custodial sentence, the choice should fall on the latter. Of course, some offences will be so serious that there will be no penal equivalents and a prison sentence will inevitably have to be imposed. There will also be instances where the offender poses such a risk that society has to be protected by the imposition of a custodial sentence.

**RECOMMENDATION**

3.6.3 The Commission proposes the following section to set out this specific rule of subsidiarity:

**29. Priority of non-custodial sentences**

Where a non-custodial sentence is a sentencing option allowed by a sentencing guideline or a guideline judgment applicable to a particular offence or, if in terms of the sentencing principles it would be an option as a sentence for such an offence, an appropriate non-custodial sentence should be imposed, unless a custodial sentence is required in order to protect society against the offender.

**PRIORITY OF RESTITUTION OR COMPENSATION**

3.6.4 The emphasis that the proposed Bill places on helping victims of crime is the basis for a new provision that requires the making of restitution or the payment of compensation to take priority over a possible sentence of the payment of a fine to the State.

## **RECOMMENDATION**

3.6.5 In this regard the Commission recommends the following provision:

### **30. Priority of restitution or compensation**

Where the court finds it appropriate to impose a sentence of community corrections which includes an order of restitution or compensation, or to postpone or suspend sentence on condition of restitution or compensation, or to make an award in terms of section 28, and the court is considering the imposition of a fine in addition to such an award, but it appears to the court that the person convicted would not have the means to make restitution or pay compensation and to pay the fine, the court must first make the order or set the condition of restitution or compensation and then consider the appropriate sentence to be imposed in addition to the award.

## **CUMULATIVE OR CONCURRENT SENTENCES**

3.6.6 Courts have a choice to allow sentences imposed at the same time to run together or one after another. The provision that the Commission recommends sets out the legal basis for doing so. It should be read with section 39 of the Correctional Services Act 111 of 1998, which has further rules relating to the same topic, including the provision that determinate sentences always run concurrently with a life sentence.

## **RECOMMENDATION**

3.6.7 The Commission recommends the inclusion of the following provision:

### **31. Cumulative or concurrent sentences**

- (1) When a person -
- (a) has been convicted of two or more offences; or
  - (b) is serving a sentence or is still subject to conditions of a sentence or has been convicted but has not yet been sentenced, and is convicted again of another offence;

the court may impose individual sentences for such offences or a sentence for such other offence.

- (2) When the sentences imposed in terms of subsection (1) consist of imprisonment, they commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.
- (3) When the sentences imposed in terms of subsection (1) consist of community corrections they commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that they must run concurrently.
- (4) If the aggregate of sentences of community corrections referred to in subsection (3) exceeds three years, the person concerned shall serve a period of not more than three years from the date on which the first of the sentences commenced, unless the court, when imposing sentence, directs otherwise.

## **POSTPONED SENTENCES**

3.6.8 The possibility of postponing the passing of sentence presents a court with a device for holding a threat of punishment over an offender without actually having to implement it. If the postponement is unconditional there is no immediate sanction at all. If it is conditional the offender may be subject to conditions that amount in effect to some aspects of a sentence of community corrections, while facing the possibility of an unspecified further punishment.

## **RECOMMENDATION**

3.6.9 The Commission proposes that this somewhat unusual sanction should be retained. It should, however, not be possible for a court to postpone sentence where a sentencing guideline has been set, unless the guideline specifically provides for the possibility of such postponement of sentence. The Commission recommends the inclusion of the following provisions:

### **32. Conditional postponement of passing of sentence**

- (1) Where a court convicts a person of any offence the court may, unless a relevant sentencing guideline has been set or guideline judgment has been given and that guideline or guideline judgment does not provide for the postponement of sentence, postpone the passing of sentence for a period not exceeding three years and release the person concerned on condition that he or she complies with any order or combination of orders referred to in section 26(3) or (4) and order such person to appear before the court at the expiration of the relevant period.

- (2) Where a court has postponed the passing of sentence in terms of subsection (1) and the court, whether differently constituted or not, is satisfied at the expiration of the relevant period that the person concerned has observed the conditions imposed under that subsection, the court must discharge such person without passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

### **33. Unconditional postponement of passing of sentence**

- (1) Where a court convicts a person of any offence the court may, unless a sentencing guideline has been set or a guideline judgment has been given and that guideline or guideline judgment does not provide for the unconditional postponement of sentence, postpone the passing of sentence for a period not exceeding three years and release the person concerned unconditionally, and order such person to appear before the court, if called upon before the expiration of the relevant period.
- (2) Where a court has unconditionally postponed the passing of sentence in terms of subsection (1), and the person concerned has not at the expiration of the relevant period been called upon to appear before the court, such person shall be deemed to have been discharged with a caution.

## **SUSPENDED SENTENCES**

3.6.10 The suspension of sentences has long been a prominent feature of South African sentencing practice. Historically, positive conditions of suspension have been used to introduce indirectly many of the orders that make up the sentence of community corrections that is now being put forward as an independent sentence. Such sentences, it is argued, have both a rehabilitative and a deterrent effect. The suspension of the whole or part of a sentence has been used as a way of reducing the harshness of sentence and ensuring that fewer people go to prison.

3.6.11 The Commission considered whether suspended sentences still have a role to play in a new system where community corrections may be imposed directly and where the primary principle of sentence is that the punishment must fit the crime. It is also concerned that suspension could increase the inequalities between sentences, as a suspended sentence does not have nearly the same penal impact on the offender as an unsuspended sentence of the same degree of severity. In the end it was persuaded that suspended sentences do have a part to play, particularly in keeping first offenders out of prison and in giving them an opportunity to attempt to reform. However, suspension of sentences on a large scale should not be allowed to distort the mechanisms that are being set in place to ensure equal punishments. For this reason there is a provision in section 4(6) that where a sentencing guideline is set, suspension

is only allowed to the extent that a guideline specifically makes provision for it.

## **RECOMMENDATION**

3.6.12 The Commission recommends the inclusion of the following provisions:

### **34. Suspension of sentence**

- (1) Where a court convicts a person of any offence the court may, unless a relevant sentencing guideline has been set or a guideline judgment has been given and that guideline or guideline judgment provides for the conditional suspension of sentence, pass sentence but order the operation of the whole or any part of it to be suspended for a period not exceeding three years on condition that he or she complies with any order or combination of orders referred to in section 26(3) or (4),
  - (2) (a) A court which sentences a person to a term of imprisonment as an alternative to a fine, may, where the fine is not paid, at any stage before the expiration of the period of imprisonment, suspend the operation of the sentence and order the release of the person concerned on such conditions relating to the payment of the fine or such portion of it as may still be due, as the court may regard as expedient, including a condition that the person concerned take up a specified employment and that the fine be paid in instalments by the person concerned or the employer of such person.
  - (b) A court which has suspended a sentence in terms of paragraph (a), whether differently constituted or not, or any court of equal or superior jurisdiction, which has suspended a sentence in terms of paragraph (a), may at any time-
    - (i) further suspend the operation of the sentence on any existing or additional conditions which the court may regard as expedient; or
    - (ii) cancel the order of suspension and recommit the person concerned to serve the balance of the sentence.

### **35. Amending a postponed or suspended sentence**

- (1) A court which has-
  - (a) postponed the passing of sentence in terms of section 32;
  - (b) suspended the operation of a sentence in terms of section 34; or
  - (c) suspended the payment of a fine in terms of section 34(2),
 whether differently constituted or not, or any court of equal or superior jurisdiction

may, if satisfied that the person concerned has through circumstances beyond his or her control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence or the payment of a fine, subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.

- (2) A court which has-
- (a) postponed the passing of sentence in terms of section 32(1); or
  - (b) suspended the operation of a sentence in terms of section 34;

on any condition of any order mentioned in section 26 (3) or (4) may, whether or not the court is constituted differently than it was at the time of such postponement or suspension, at any time during the period of postponement or suspension on good cause shown amend any such condition or substitute any other competent condition for such condition, or cancel the order of postponement or suspension and impose a competent sentence or put the suspended sentence into operation.

### **36. Procedure to execute conditions of suspension or postponement of sentence**

- (a) A court which in terms of section 32(1) or 34 has imposed a condition of an order referred to in section 26 (3) must have served upon the person concerned a notice in writing directing him or her to report on a date and time specified in the notice or, if prevented from doing so by circumstances beyond his or her control, as soon as practicable thereafter, to the person specified in that notice, in order to meet the conditions that have been imposed.
- (b) A copy of such notice is authority for the person mentioned in it to have the conditions of postponement or suspension implemented as imposed.

### **37. Failure to comply with conditions of postponed or suspended sentence**

- (a) If any condition imposed in terms of sections 32(1), 34(1) or (2) is not complied with, the person concerned may upon the order of any court, be arrested or detained and, where the condition in question-
  - (i) was imposed in terms of section 32(1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or
  - (ii) was imposed in terms of section 34(1), (2) or (3), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction,

and such court, whether or not it is constituted differently than it was at the time

of such postponement or suspension, may then, in the case of paragraph (i), impose any competent sentence, or, in the case of paragraph (ii), put into operation the sentence which was suspended.

- (b) A person who has been called upon in terms of section 33(1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.

### **38. Change of conditions to a sentence of community corrections**

The court which ordered the imposition of community corrections may, on application by the Commissioner or the person serving the sentence, vary any condition which constitutes the sentence of community corrections.

### **39. Failure to comply with conditions of sentence of community corrections**

- (1) If it appears from an affidavit that a person subject to community corrections has failed to comply with any aspect of the conditions imposed on him or her, or any duty placed upon him or her in terms of the sentence, the court which imposed the sentence or any court with equal jurisdiction may issue a warrant for the arrest of the person.
  - (2) (a) A warrant issued in terms of subsection (1) may be executed by any peace officer as defined in section 1 of the Criminal Procedure Act.
  - (b) A person detained in terms of paragraph (a) must be brought before a court within 48 hours after arrest, which court must make an order as to the further detention and referral of the person to the authority responsible to deal with the matter.
- (3) If the court is satisfied that the person has failed to meet the conditions imposed on him or her but that such failure is due to a change in circumstances beyond the control of the person concerned, the court, whether or not constituted differently than it was at the time of the imposition of the sentence, may impose upon such person any competent sentence afresh or vary any existing condition to the sentence of community corrections.

## **ANTEDATING OF SENTENCES**

3.6.13 Current South African law does not allow for the backdating of sentences of imprisonment to the time that someone was first taken into custody. Only if a new sentence of imprisonment is imposed on appeal to replace an earlier sentence of imprisonment may the new sentence be

backdated.<sup>94</sup> On the other hand, current South African case law does allow time served while awaiting trial to be taken into account when determining sentence.<sup>95</sup> The current position is fraught with uncertainty. As Terblanche explains:

“It is not certain to what extent this should be taken into account. The courts have stopped short of saying that the term of confinement whilst awaiting trial should be subtracted from the term of imprisonment which the court considers appropriate, but in practice this is probably the basic intention.”<sup>96</sup>

3.6.14 The Commission recognises that the importance of taking into account pre-sentence detention has grown as the average periods that accused persons spend in custody whilst awaiting trial has increased significantly. In the case of a person who is sentenced to a term of imprisonment after having been detained the simplest and fairest solution is to impose a sentence fully commensurate with the seriousness of the offence but to antedate the commencement of the sentence by the number of days that person has already been in custody. This has the advantage of openness and takes away any uncertainty that would arise if this period of pre-trial detention were to be ignored at sentence but considered when a prisoner is assessed for early release.

3.6.15 It has been suggested that the sentence-based solution would pose practical difficulties. For example, it may be hard for the Department of Correctional Services to provide accurate information at the sentencing stage about the amount of time that a prisoner had spent in custody awaiting trial on a particular charge. This may be so, but a serious attempt should be made to overcome these difficulties. The alternative of allowing the Department to recalculate sentences seems to have the disadvantage of hiding the true period that the offender will spend in custody overall behind a bureaucratic procedure. If a parole board were to be given a discretionary power to take time served while awaiting trial into account, then one would be back with the current situation where the rule is not clear. In fact the position would be worse, because the discretion would be exercised by a quasi-judicial board rather than in open court. The potential practical difficulties with the solution preferred by the Commission at this stage may, nevertheless, require further discussion. Thought will also have to be given to the implications

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<sup>94</sup> Section 282 of the Criminal Procedure Act 51 of 1977.

<sup>95</sup> *S v Hawthorne* 1980 (1) SA 531 (A).

<sup>96</sup> SS Terblanche *The Guide to Sentencing in South Africa* (1999) 236-7.

of antedating of sentences for the calculation the time at which conditional release must be considered. If an alternative has to be found, it should be some provision for the prison authorities to deduct automatically from the prison term the time spent awaiting trial.

3.6.16 A complex problem of equity is raised when someone is detained awaiting trial and the court wishes to impose a non-custodial sentence. In such an instance there is no simple equivalent for calculating by how much the sentence should be reduced to take into account time served while awaiting trial. In this case the court must be given a discretion to take the period in detention into account and reduce the sentence by a reasonable amount. It is envisaged that, as the new system develops, the equivalent penal weight of various sentencing options will become clearer as sentencing guidelines that provide for alternative sentencing options become more common, but a measure of discretion may still be required.

## RECOMMENDATION

3.6.17 The Commission proposes the following provision in respect of the antedating of sentences:

### **40. Antedating of sentence**

- (1) After the decision has been taken to impose a sentence of imprisonment, whether by applying the sentencing principles directly or by following a sentencing guideline or guideline judgment, and the envisaged term of imprisonment has been determined and announced in open court, the coming into effect of the term of imprisonment must be antedated by the number of days that the person concerned has spent in prison prior to the sentence being pronounced on the charge for which he or she is being sentenced.
- (2) In determining an appropriate sentence other than imprisonment the court must take into account the time that the person concerned has spent in prison prior to sentence and reduce the severity of the sentence accordingly.

## CHAPTER 7

### SENTENCING PROCEDURES

#### INTRODUCTION

3.7.1 In this chapter the Commission briefly discusses the provisions relevant to sentencing procedures that should be included in the Sentencing Framework Bill.

#### PROCEDURE AFTER CONVICTION

3.7.2 The procedures that are to be followed after conviction, and the order in which the various submissions are to be made, have largely evolved over time and are prescribed in part by the 1977 Criminal Procedure Act. Immediately after conviction the prosecution may prove previous convictions, if any. Thereafter the defence and the prosecution get the opportunity to address the court on sentence (often by way of *ex parte* statements from the bar) about issues and facts that are relevant to sentencing. In practice the defence is given the opportunity to address the court first and the prosecution follows. In general, the courts allow the parties considerable leeway in the presentation of evidence and address on sentencing and are not too strict in this regard.

#### PREVIOUS CONVICTIONS

3.7.4 The Criminal Procedure Act contains a number of provisions dealing with previous convictions. The Commission is of the view that similar provisions should be included in the Sentencing Framework Bill and recommends that provision be made for proof of previous convictions, the lapsing of previous convictions, a fingerprint-based register as proof of previous convictions and evidence on further particulars in respect of previous convictions. Of these, the only provision that is potentially controversial is that dealing with the lapsing of previous convictions.

3.7.5 As the focus of this discussion paper is on sentencing the Commission concentrated only on whether, and if so at what stage, previous convictions should lapse for the purpose of determining sentence. It did not address the larger issue of whether citizens have, or should have, a right to have all records of their previous convictions expunged. For the purpose of

sentence there is no doubt that a previous conviction should have less impact if considerable time has elapsed since the punishment was served for the last crime committed. The point at which it should cease to be regarded as having any impact at all is inevitably somewhat arbitrary. The Commission proposes that this period should be set at ten years, that is, ten years must elapse without any further offence being committed after the last sentence has been served. If there have not been ten “clean” years of this kind the full record of an ex-offender may continue to be taken into account.

3.7.6 Should the rule that previous convictions must be discounted after ten years (as defined) apply to all offences? The Commission was of the view that a partial exception should be made for sexual offences as conduct of this nature has unique characteristics.

## **RECOMMENDATION**

3.7.7 The Commission recommends that the following provisions relating to previous convictions be included in the Bill:

### **41. Previous convictions**

- (1) After a person has been convicted and before sentence has been imposed the prosecution may produce to the court a record of previous convictions alleged against such person.
- (2) The court must ask the person concerned whether any previous conviction referred to in subsection (1) is admitted.
- (3) If the person concerned denies such previous conviction, the prosecution may tender evidence that such person was so previously convicted.
- (4) If the person concerned admits such previous conviction or such previous conviction is proved, the court must, subject to the provisions of section 15, take such conviction into account if it is relevant to the offence for which the accused must be sentenced.
- (5) If the prosecution tenders no evidence of a previous conviction the court may, at the request of the victim or otherwise, nevertheless receive evidence to prove such conviction.

### **42. Evidence relating to proof of previous convictions**

- (1) When the prosecution seeks to prove previous convictions in terms of this Act a record, photograph or document which relates to a fingerprint and -

- (a) which purports to emanate from the officer commanding the South African Criminal Bureau; or
- (b) in the case of any other country, from any officer having charge of the criminal records of that country,

is admissible in evidence at criminal proceedings upon production by a police official having custody of it, and it constitutes prima facie proof of the facts it contains.

- (2) The admissibility of such record, photograph or document is not affected by whether it was obtained under any law or against the wish or will of the person concerned.

#### **43. Evidence on further particulars relating to previous conviction**

Whenever any court in criminal proceedings requires any particulars or clarification of any previous conviction admitted by or proved against a person, any document purporting to be certified as correct by the officer commanding the South African Criminal Bureau or by any registrar or clerk of any court within the Republic or by any officer in charge of any prison within the Republic and furnishing such particulars or such clarification, shall be admissible as prima facie proof of the facts contained in it.

#### **44. Convictions fall away as previous convictions after 10 years**

- (1) Where a period of 10 years has passed from the date of completion of the last sentence and the date of commission of any subsequent offence for which a person is to be sentenced, the last conviction and all convictions prior to that shall be deemed not to have taken place.
- (2) If any previous conviction relates to an offence that includes an element of sexual misconduct a court may, notwithstanding the provisions of subsection (1), take such previous conviction into account, if the court believes that it reveals a tendency or proclivity to commit similar offences.

### **EVIDENCE ON SENTENCING**

3.7.8 The sentencing phase is somewhat different from the rest of the trial. How different it is and to what extent the rules and principles applicable to the trial are still relevant are to a large extent unresolved. Although some principles applicable to the trial still apply at the sentencing stage, for example, the right of the accused to be represented and the rule that evidence should be given under oath, the sentencing phase is different in that this stage is not characterised by the same clinical exercise that is part of determining the guilt of the accused. There are no fixed issues and formal evidential burdens. Facts are less important while impressions assume more

significance. Considerations such as motive, which are irrelevant at the trial stage, are now much more important and relevant. Because of the nature of sentencing the sentencing phase requires a much more flexible approach and it should not be hampered by rigid evidentiary rules. In addition, the sentencing phase requires a much more active role by the presiding officer, which is more consistent with an inquisitorial approach than an adversarial one.

3.7.9 Section 274 of the Criminal Procedure Act provides that a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The accused may address the court on any evidence received under this section as well as on the matter of the sentence. Thereafter the prosecution may likewise address the court. This provision places the court at the centre of the sentencing stage and it distinguishes between receiving evidence on the one hand and the address by the parties on the other. The sentencing discretion can only be properly exercised on the basis of all the facts relevant to the matter. The court has to decide which evidence has the potential to provide the necessary information and the court has the discretion to allow such evidence. Only then will the court be in a position to form correct impressions and make the complex value judgement which is required for the imposition of an appropriate sentence. If the necessary information is not forthcoming from the parties, the court is required to obtain that information in order to be able to pass an appropriate sentence.<sup>97</sup>

3.7.10 Prior to the amendment of section 277 of the Criminal Procedure Act,<sup>98</sup> there was no onus on either party at the sentencing phase, with the exception of the onus on the accused to prove extenuating circumstances following a murder conviction.<sup>99</sup> Following the amendment of section 277 in 1990 the Appellate Division held in *S v Nkwanyana*<sup>100</sup> that when the sentence of

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97 This matter has also been considered in the Commission's discussion Paper 90, *The Application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing*, January 2000 ISBN 0-621-29936-7 and some of the arguments contained therein are reproduced in this discussion. See *S v Mazibuko* 1997 (1) SACR 255 (W); *S v Martin* 1996 (2) SACR 378 (W) and *S v Masisi* 1996 (1) SACR 147 (O).

<sup>98</sup> See section 4 of the Criminal Law Amendment Act 107 of 1990, subsequently repealed by section 35 of Act 105 of 1997.

<sup>99</sup> Du Toit *et al Commentary on the Criminal Procedure Act* 28-4. See also *S v Siebert* 1998 (1) SACR 554 (A).

<sup>100</sup> 1990 (4) SA 735 (A). See also *S v Khumalo* 1991 (4) 310 (A).

death was a competent verdict, section 277(2) required the state to prove aggravating factors and negate the existence of mitigating factors beyond a reasonable doubt. Section 277 has subsequently been repealed as the death penalty has been found to be unconstitutional.<sup>101</sup> Du Toit *et al.* argue that there is no reason why the standard of proof stipulated in *Nkwanyana* should not be applied at the sentencing phase in respect of other offences.<sup>102</sup>

3.7.11 There are two possible constitutional grounds that can be used in support of the argument of Du Toit and his colleagues, viz. the right to be presumed innocent and the right to freedom and security of person. Chief Justice Lamer noted in the Canadian case of *R v Pearson*<sup>103</sup> that the presumption of innocence as a rule requiring proof of guilt beyond a reasonable doubt did not apply at the sentencing phase; however, it did apply as a component of fundamental justice. Logically the presumption of innocence cannot be applied as a rule requiring proof of guilt beyond reasonable doubt at the sentencing phase as guilt has already been proved. It is equally difficult to see how the presumption of innocence can be applied as a principle of fundamental justice as there is no justification for continuing to assume innocence.

3.7.12 As Schwartz<sup>104</sup> observes, there is a distinction between procedures applied in proving criminal liability and the less formal procedures in determining sentence. This, he says, is because “conviction is the basic determination that the defendant has forfeited his freedom and subjected himself to dispositions society makes for its own protection. Sentencing is an altogether different matter”.<sup>105</sup>

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<sup>101</sup> *S v Makwanyane* 1995 (2) SACR 1 (CC).

<sup>102</sup> Du Toit *et al op cit* 28-4A; see also *S v Shepard* 1967 (4) 170 (W).

<sup>103</sup> (1992) 3 SCR 665 (SCC) at [36]-[37].

<sup>104</sup> Schwartz :”Innocence - a Dialogue with Professor Sundby” (1989) 41 *Hastings Law Journal* 153 at 159 quoted in SA Law Commission Discussion Paper 90.

<sup>105</sup> At 159. Cf Sundby *op. cit.* who argues that the presumption of innocence does apply at the sentencing stage. However, his argument is based on those exceptions in American criminal law that permit the onus to be placed on the accused in respect of certain defences or exceptions. In contrast, D Dripps “The Constitutional Status of the Reasonable Doubt Rule” (1987) 75 *California Law Review* 1665 at 1703 notes that the decisions of the United States Supreme Court, whilst inconsistent, reflect a less rigorous application of due process safeguards at the sentencing phase (see, for example, *Williams v New York* 337 US 241 (1949)) and argues that consistency would

3.7.13 However, whilst the presumption of innocence may not apply at the sentencing phase, this does not mean that other societal interests do not require the prosecution to prove disputed facts beyond a reasonable doubt. In the South African case of *S v Shepard*,<sup>106</sup> Colman J referring to the application of the reasonable doubt rule at the sentencing phase, stated:

To an accused person the sentence is at least as important as the conviction, and it might seem, in a sense, anomalous to give him the benefit of all reasonable doubts before finding him guilty, and then, when dealing with a question which may make a vast difference to his sentence, to place an onus on him so that the Court, if it finds the probabilities equally balanced in relation to some mitigating factor, will punish him as if that fact did not exist.<sup>107</sup>

3.7.14 The Canadian Supreme Court in *R v Gardiner*,<sup>108</sup> in holding that disputed facts relevant to sentencing should be proved beyond a reasonable doubt by the prosecution, quoted the following passage with approval: “[B]ecause the sentencing process poses the ultimate jeopardy to an individual ... in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process.”<sup>109</sup> Consequently, it is possible to argue that the right to freedom and security of person requires that an onus be placed on the State at the sentencing phase at least in respect of establishing the presence of

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be best achieved by requiring all issues of fact at the sentencing stage to be proved beyond a reasonable doubt.

106 Supra.

107 At 180G. However, the following comments of Colman J in *S v Shepard supra* at 180H also deserve noting: “But on the other hand, it could hardly be sound policy, or conducive to the proper administration of justice, to place an onus on the state to negative, beyond all reasonable doubt, all mitigating circumstances. A prosecutor is not always able to foresee all the mitigating factors which might be urged in favour of an accused person; and when such a factor is put forward, either in argument or in evidence given by or on behalf of the accused, he is not always equipped to test its factual validity, or to counter the assertion if it is false. And that may be true of matters closely related to the gravity of the offence, as well as matters personal to the accused. See also S Sundby “The Virtues of a Procedural View of Innocence - a Response to Professor Schwartz” (1989) 41 *Hastings Law Journal* 171.

108 [1982] 2 SCR 368 (SCC) at 415.

109 From JA Olah “Sentencing: The Last Frontier of the Criminal Law” (1980) 16 CR (3d) 97 at 121.

aggravating factors and the absence of mitigating factors. Another approach may be to consider the sentencing stage as a stage of the trial where the ordinary rules of evidence and argument do not necessarily apply. The function of the judicial officer would then be to conduct an investigation into the matter in which case it will no longer be party driven. It should be pointed out that the Court in *Gardiner* also stated that the strict rules that govern evidence at trial do not apply at a sentencing hearing, and, more particularly, that the hearsay rule does not govern the sentencing hearing: "Hearsay evidence may be accepted where found to be credible and trustworthy."<sup>110</sup> Thus, it appears that, although the Crown must prove disputed circumstances beyond a reasonable doubt, such proof may be met by the use of hearsay evidence,<sup>111</sup> although there is some dispute on the issue at least as regards the voluntariness rule in respect of a statement made to a person in authority.<sup>112</sup>

3.7.15 The decision to grant or refuse bail to an accused is in many ways similar to that of imposing a sentence. Decisions on the onus of proof during bail proceedings are therefore relevant to the issue of onus at the sentencing stage. According to *S v Mbele*,<sup>113</sup> when section 25(2) of the Interim Constitution came into operation, it was widely accepted that the State had the onus of proof in bail applications. This, according to Leveson J, was wrong and, according to Stegmann J, a revolutionary step. Both judges felt that section 25(2)(d) of the Interim Constitution was never intended to influence a long-standing procedure that the accused had the onus of proof. According to Edeling J in *Prokureur-Generaal, Vrystaat v Ramokhosi*<sup>114</sup> it was obvious that anybody who wants to claim that the arrested person should be held without bail will not succeed if the court does not or cannot find that the interests of justice require such further incarceration. In this sense there was an onus on the State. This onus was not, however, an onus in the strict sense of the word. In *Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden*<sup>115</sup> Eloff JP found that there was no onus in

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<sup>110</sup> *Ibid.*, per Dickson J. (as he then was) at 414 (S.C.R.).

<sup>111</sup> See, e.g., *R. v. Wilcox* (1988), 53 C.C.C. (3d) (N.W.T.S.Ct.) (hearsay evidence of damage estimates allowed); *R. v. Boyd* (1983), 8 C.C.C. (3d) 153 (B.C.C.A) (at a dangerous offender proceeding, there was no need to prove that the accused's statements to psychiatrists were voluntarily made).

<sup>112</sup> See the decision of Anderson J A, dissenting in part, in *Boyd*, *ibid.*, pp. 158-159.

<sup>113</sup> 1996 SACR (1) 212 (W) AT 215.

<sup>114</sup> 1997 (1) SACR 127 (O) at 147.

<sup>115</sup> 1994 (2) SACR 469 (W) at 478-480.

bail proceedings. This was supported by the majority in *Ellish v Prokureur-Generaal, WPA*,<sup>116</sup> who found that the issue whether the interests of justice in the context would be promoted or not could not be proved, but involved a value judgement. To speak of an onus of proof ignores this fact. The conclusion therefore is that onus should not be a factor in determining how bail decisions are best made. The same conclusion may be reached in respect of a decision on sentencing.

## **RECOMMENDATION**

3.7.16 It is clear that a quasi-inquisitorial approach prevails during the sentencing stage. In the view of the Commission it is therefore inappropriate to refer to a burden of proof in the strict sense during the sentencing stage (which means that the party who alleges bears the onus of proof, either beyond a reasonable doubt or upon a preponderance of probabilities). It should, however, be noted that at the sentencing stage the court has to rely on findings and to make a value judgement based on those findings. In order to be able to do that the court must make factual findings. If the court is not satisfied that a particular fact exists, that fact cannot be used against the accused in the sentence imposed. In practice this would mean that the State has to prove the existence of an aggravating fact if the State wants the court to rely on it. For the same reason, if the court is not satisfied that a mitigating fact exists, that fact cannot be used in favour of the accused and again it would mean that in practice the defence should prove the fact on which it wants the court to rely. However, since it is the court's duty to determine the proper sentence and the evidence that is fit for this purpose, one cannot state categorically that the State or the defence bears the onus of proof with regard to a particular fact. In practice the problem is resolved by the party who alleges carrying the burden of proof, but one cannot, because of this, conclude that either the State or the defence carries the burden of proof at the sentencing stage. What is certain is that the court must make factual findings at the sentencing stage and, in order to do just that, it must use some standard of proof. It is submitted that the standard of proof at the sentencing stage should be "if the court is satisfied".

3.7.17 The Commission recommends that the following provision be included in the Sentencing Framework Bill:

### **45. Evidence on sentencing**

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<sup>116</sup> 1994 (2) SACR 579 (W) at 586-593.

- (1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
- (2) The court must allow the accused and the prosecution to call witnesses or to adduce evidence relevant to sentencing and may itself call witnesses or adduce evidence
- (3) If witnesses are called the provisions of sections 162, 163, 164, 165, and 166 of the Criminal Procedure Act apply.
- (4) The court may examine the accused and any person who has been subpoenaed to attend the sentencing proceedings or who is in attendance at such proceedings, and may recall and re-examine any person already examined at the proceedings if their evidence appears to the court essential for the determination of an appropriate sentence.
- (5) Before passing sentence the court must allow the accused and the prosecution to address the court on the issue of sentencing and on any evidence received under this section.
- (6) Any fact relevant to the determination of an appropriate sentence must be proved to the satisfaction of the court.

## **EVIDENCE RELATING TO THE INTERESTS OF VICTIMS - VICTIM IMPACT STATEMENTS**

3.7.18 In addition to the general rules on evidence at the sentencing stage the focus on the rights of victims of crime requires that special attention be paid to evidence from victims. A first step in this regard is to consider the role of the prosecution in sentencing as often the prosecutors must represent the concerns of victims. Clearly a legislative duty may be placed on prosecutors to take this aspect of their role seriously.

3.7. 19. Of equal importance is that victims should be given a direct voice at the sentencing stage of proceedings. They may testify directly but this may not be practical and desirable in all cases. An important question is whether they should be allowed to do so indirectly by means of so-called victim impact statements. The need to legislate for victim impact statements was considered in some detail in the Issue Paper on Restorative Justice.<sup>117</sup> For purposes of this

discussion it will not be repeated. The question here is whether legislation should provide for the admissibility of such statements and, if so, to what extent it should be regulated.

3.7.20 A victim impact statement is a statement made by the victim and addressed to the presiding officer for consideration in the taking of sentencing decisions. A victim impact statement consists of a description of the harm, in terms of the physical, psychological, social and economic effect that the crime had, and will have in future, on the victim.<sup>118</sup> Sometimes this statement may include the victim's statement of opinion on his or her feelings about the crime, the offender and the sentence that the victim feels is appropriate.

3.7.21 A victim impact statement usually takes the form of a written statement that is presented to the court as part of the pre-sentence report. It can, however, also take the form of an oral statement by the victim during sentencing.

3.7.22 The form, content and means of implementation vary greatly. In the United States of America, for example, some jurisdictions require a written victim impact statement attached either to the pre-sentence report or as an affidavit that becomes part of the court file. Responsibility for the preparation of a victim impact statement can rest with criminal justice personnel, like the prosecutor, police or probation officer, or with an independent outside organisation like victim service specialists. Victims may also, or in some cases only, provide oral information in court prior to sentencing.<sup>119</sup> A victim impact statement may include objective information or both objective as well as subjective evaluations of injury, including psychological harm suffered by the victim.<sup>120</sup>

3.7.23 Having regard to the legal position in comparative jurisdictions, the neglected position of

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<sup>118</sup> Hinton, M "Valuing the victim. The use of victim impact statements in sentencing." Unpublished paper read at the 8th International Symposium on Victimology 22 - 26 August 1994 Adelaide Australia.

<sup>119</sup> M McLeod "Victim participation in sentencing" (1986) 22 *Criminal Law Bulletin* 501 and 517 at 503.

<sup>120</sup> R Douglas and K Klaster "Systematising police summaries in the motion court: victim impact statements through the back-door". Unpublished paper read at the 8th International Symposium on Victimology 22 - 26 August 1994 Adelaide Australia.

victims of crime in South Africa and the comments received on the Issue Paper the Commission concludes that there is sufficient justification for the inclusion of a provision in the Sentencing Framework Bill which will formally recognize the use of victim impact statements at the sentencing stage of a trial. Some safeguards against an offender being prejudiced by a victim impact statement that is inaccurate are required, however. For this reason the Commission believes that where a victim impact statement is challenged it should not be admitted as evidence and that the victim should be required to testify.

## **RECOMMENDATION**

3.7.24 The Commission recommends the inclusion of the following provision:

### **46. Evidence relating to the interests of victims**

- (1) The prosecution must, when adducing evidence or addressing the court on sentence, consider the interests of the victim and the impact of the crime on the victim and, where practicable, furnish the court with particulars of -
  - (a) injury, loss or damage resulting from the offence;
  - (b) injury, loss or damage resulting from -
    - (i) any other offence which is to be taken into account specifically in the determination of sentence; or
    - (ii) a course of conduct consisting of a series of criminal acts of the same or similar character of which the offence for which sentence is to be imposed forms part.
- (2) A victim impact statement may be made by a person against whom the offence was committed and who suffered harm as a result of the offence or by a person nominated by such victim.
- (3) The prosecutor must seek to tender evidence of a victim impact statement where the victim is not called to give evidence and such a statement is available.
- (4) If the contents of a victim impact statement is not disputed a victim impact statement is admissible evidence on production thereof.
- (5) If the contents of a victim impact statement is disputed, the victim must be called as a witness.
- (6) If a victim who is required to give evidence requests that certain information should not be disclosed, the court must give due consideration to the interests of the victim and the reasons for the request and balance them against the

interests of justice.

## **POST-TRIAL RIGHTS OF VICTIMS**

3.7.25 The Commission is also of the view that provision should be made for the victim to be informed that in particular circumstances he or she has the right to give an input at the parole hearing concerning the eventual release of an offender from prison.

## **RECOMMENDATION**

3.7.26 The Commission therefore also recommends the inclusion of the following provision in the draft Bill:

### **47. Victims and release of offenders from prison.**

- (1) Where a person has been convicted of an offence involving violence against another person and is sentenced to a term of imprisonment of two years or more that is not suspended, the judgment at sentence must explain to any victims of the crime, including the next of kin of a deceased victim, that they may inform the Commissioner that they wish to be notified of any hearing of a Parole and Correctional Supervision Board where the conditional release of such offender is being considered, so that they can attend such hearing and make representations to it as specified in section 75(4) of the Correctional Services Act.
- (2) Where the victim is incapable of informing the Commissioner as contemplated in subsection (1) the information may be conveyed by a relative or other representative of the victim.
- (3) If the victims or their next of kin or representatives referred to in subsection (2) intend to make such representations or to attend such a meeting of the Correctional Supervision and Parole Board, they have to inform the Commissioner of their intention and keep the Commissioner informed of any change of address.

## **PROCEDURE ON RESTITUTION AND COMPENSATION**

3.7.27 The Commission is also of the view that provision needs to be made for a number of procedural issues relating to the enforcement of restitution and compensation orders. These provisions complement the provisions for sentences that include restitution and compensation as well as the specialised orders contained in chapter 5 of the proposed Bill.

## RECOMMENDATION

3.7.28 The Commission recommends the inclusion of the following provisions in the draft Bill:

### 48. Consideration of restitution and compensation

- (1) Where a person has been convicted in any court of any offence causing damage or loss, the court must, whether or not such an order has been requested by the prosecutor or any party that suffered damage or loss, consider making a restitution or compensation order in terms of section 28, unless the sentence that is imposed already requires the person who is sentenced to make restitution or pay compensation, whether as an element of community corrections or as a condition of suspension or postponement.
- (2) Where the party suffering damage or loss is not present at the proceedings at the time when such order is considered, the court may direct that notice be given for the attendance of the proceedings of the party who may be the beneficiary of the order or such other party having an interest in the order as the court deems fit.

### 49. Determining the amount of restitution or compensation

- (1) For the purpose of determining the amount to be paid if restitution or compensation is ordered in terms of any sentence or in terms of section 28, the time for payment and the method of payment, the court may refer to the evidence that was led prior to conviction or to evidence on sentence, or the court may hear further evidence.
- (2) When determining restitution or compensation payments the court must, unless the person against whom a restitution or compensation order is to be made acknowledges the ability to pay, conduct an inquiry concerning the present and future ability of such person to pay the amount and must consider -
  - (a) the employment, earning ability and financial resources of the person concerned at present or in the future, including any circumstance which may affect his or her ability to pay compensation or make restitution;
  - (b) any benefit, financial or otherwise, derived directly or indirectly, as a result of the commission of the offence; and
  - (c) any harm done to, or loss suffered by, any person to whom restitution or compensation may be ordered.
- (3)
  - (a) The court may require the person convicted to disclose to the court orally or in writing particulars of his or her financial circumstances in the manner and form the court deems fit.
  - (b) Such information may not be used for any other purposes.
- (4) The court may require that a written report be prepared and filed with the court containing information concerning the financial status of the person convicted,

in particular his or her ability to make restitution or pay compensation, and the amount to be paid.

#### 50. Execution of an order for restitution or compensation

- (1) (a) An award made under section 28 -
  - (i) by a magistrate's court, shall have the effect of a civil judgment of that court;
  - (ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.
- (b) Where a High Court makes an award under this section, the registrar of the court must forward a certified copy of the award to the clerk of the magistrate's court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon such award has the effect of a civil judgment of that magistrate's court.
- (2) Where money of the person convicted is taken from him or her upon his arrest, the court may order that payment be made forthwith from such money in satisfaction of the award made by the court.

### SENTENCING JUDGMENT

3.7.29 The emphasis on truth in sentencing, which is a hallmark of the new partnership on sentencing, is reflected in specific requirements about what every sentencing judgment must contain. The proposal includes two noteworthy features:

The court must explain not only the sentence but also the basic rules according to which it will be implemented. In the case of a sentence of imprisonment this means that both the offender and the public will know when the offender will be **considered** for conditional release - and also that the offender may serve much longer than the minimum. In the case of a sentence of community corrections both the offender and the public will know what the offender will be doing by way of community service or restitution, for example, and what restrictions such as house arrest, for example, will apply.

Secondly there are checks to ensure that two victim-friendly requirements are in fact met. These are that the possibility of awarding compensation or restitution is considered in every case and that victims are told about post-sentence procedures in

which they may play a part.

## **RECOMMENDATION**

3.7.30 To achieve these and related objectives the Commission proposes the following provision:

### **51. Sentencing Judgment**

Every judgment on sentence must include:

- (a) the sentence imposed;
- (b) the reasons for sentence;
- (c) a brief explanation of the law relating to the implementation of the sentence encompassing -
  - (i) In the case of a sentence of imprisonment, the law relating to conditional release; and
  - (ii) in the case of a sentence of community corrections, the law governing the specific order that is made;
- (d) information to the victim on post-sentence procedure if required by section 47; and
- (e) a note that restitution or compensation for the victim has been considered as required by section 28.

## **WARRANT FOR THE EXECUTION OF SENTENCE**

3.7.31 The Commission recommends that the provision that relates to warrants for the execution of sentences in the current Criminal Procedure Act be retained.

### **52. Warrant for the execution of sentence**

- (1) A warrant for the execution of any sentence of imprisonment or community corrections must be issued by the court that passed the sentence or by any other judicial officer of the court in question.
- (2) The warrant for the execution of a sentence of imprisonment contemplated in subsection (1) commits the person concerned to the prison for the magisterial district in which such person is sentenced.

## **SENTENCE BY JUDICIAL OFFICER OTHER THAN JUDICIAL OFFICER WHO CONVICTED ACCUSED**

3.7.32 The Commission recommends that the provision dealing with sentence by a judicial officer other than the one who convicted the accused in the current Criminal Procedure Act be retained.

### **53. Sentence by judicial officer other than judicial officer who convicted accused**

- (1) If sentence is not passed upon an accused forthwith upon conviction in a lower court, or if, by reason of any decision or order of a high court on appeal, review or otherwise, it is necessary to vary any sentence passed in a lower court or to pass sentence afresh, any judicial officer of that court may, in the absence of the judicial officer who convicted the person concerned or passed the sentence and after consideration of the evidence recorded and in the presence of the person concerned, pass sentence or take such other steps as the judicial officer who is absent, could lawfully have taken.
- (2) Whenever-
  - (a) a judge is required to sentence a person convicted by him or her of any offence; or
  - (b) any matter is remitted on appeal or otherwise to the judge who presided at the trial of the person concerned,

and that judge is for any reason not available, any other judge of the division of the High Court concerned may, after consideration of the evidence recorded and in the presence of the person concerned, sentence the person or take such other steps as the former judge could lawfully have taken.

**CHAPTER 8****GENERAL PROVISIONS**

3.8.1 There are a number of further provisions that are required to complete the draft Bill. They are of a technical nature. The Commission proposes as follows in this regard.

**54. Sentence may be corrected**

- (1) When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence.
- (2) Where the calculation of a term of imprisonment in terms of section 40 underestimates the number of days that a person has spent in prison prior to the sentence being pronounced on the charge for which he or she is being sentenced, the court or any other court of equivalent jurisdiction may amend the sentence at any time.

**55. Liability for patrimonial loss arising from the performance of community service**

- (1) If patrimonial loss may be recovered from a person on the ground of a delict committed by such person while performing community service as part of a sentence of community corrections or as a condition of postponement or suspension of sentence, that loss may, subject to subsection (3), be recovered from the State.
- (2) Subsection (1) may not be construed as precluding the State from obtaining indemnification against its liability in terms of subsection (1) by means of insurance or otherwise.
- (3) The patrimonial loss which may be recovered from the State in terms of subsection (1) must be reduced by the amount from any other source to which the injured person is entitled by reason of the patrimonial loss.
- (4) In so far as the State has made a payment by virtue of a right of recovery in terms of subsection (1), all the relevant rights and legal remedies of the injured person against the offender pass to the State.
- (5) If any person as a result of performing community service has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-General may, with the concurrence of the Department of State Expenditure, as an act of grace pay such amount as he or she deems reasonable to that person.

## 56. Agreement on operation of suspended sentences

(1) The President may, on such conditions as he or she deems necessary, enter into an international agreement with any state, so as to provide, on a reciprocal basis, for the putting into operation of suspended sentences in respect of persons convicted, within the jurisdiction of the Republic or of such state, of an offence mentioned in the agreement.

(2) The President may, if the parties agree, amend such an agreement to the extent which he or she deems necessary.

(3) If an application is made for a suspended sentence imposed by a court of a state referred to in subsection (1) to be put into operation, the court at which the application is made must, subject to the terms of the agreement, proceed with that application as if the suspended sentence was imposed by a court in the Republic.

(4) (a) An agreement referred to in subsection (1), or any amendment of it, comes into force only after it has been published by the President by proclamation in the *Gazette*.

(b) The President may at any time and in like manner withdraw any such agreement.

## 57. Repeal

The Acts set out in the Schedule are hereby repealed or amended to the extent set out in the third column of the Schedule.

## 58. Short title and commencement

(1) This Act is the Sentencing Framework Act, 2000, and takes effect on a date fixed by the President by notice in the *Gazette*.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

(3) Different dates may be set by the President by proclamation in the *Gazette* for the repeal and the amendment of sections of the Acts set out in the Schedule.

**Note:** the Schedule must include, *inter alia*, amendments to the Correctional Services Act by the insertion of the following sections:

### 117A Offences relating to periodical imprisonment

(1) Any person who-

(a) without lawful excuse, the proof of which shall be on such person, fails to comply with a notice issued under section (2) of the Sentencing Framework Act, of 2000; or

(b) when surrendering him or herself for the purpose of undergoing periodical imprisonment, is under the influence of intoxicating liquor or drugs or the like; or

(c) impersonates or falsely represents him or herself to be a person who has been directed to surrender him or herself for the purpose of undergoing periodical imprisonment,

is guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

**117B Offences relating to community service**

(1) Any person who-

(a) when he or she reports to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like; or

(b) impersonates or falsely represents him or herself to be the person who has been directed to perform the community service in question, to undergo the instruction or treatment in question or to attend or reside at the specified centre for the specified purpose,

is guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

To establish a comprehensive legislative framework for sentencing that specifies general principles of sentencing, to define the purpose of sentencing, to provide for sentencing guidelines to be established and revised, to establish a Sentencing Council, to provide for the functions of the Council and procedures it should follow, to provide for sentencing guideline judgments by the Supreme Court of Appeal, to specify the sentencing options and their limitations including options that entrench the notion of restorative justice and specific provision for dangerous and persistent offenders, to provide for restitution and compensation orders, to provide for variations of sentences and for procedures necessary for implementation of sentencing options, to provide for cumulative and concurrent sentences, to provide for postponement and suspension of sentences, to provide for procedures at sentencing including the proof of previous convictions, the lapsing of previous convictions, evidence on sentencing and evidence relating to the interests of victims of crime, to describe requirements for judgments on sentencing, to empower victims by providing for input of victims at the release of offenders from prison, to provide for a judicial officer other than the one who convicted the accused to impose sentence, to provide for the antedating and correction of sentences, to provide for warrants for the execution of sentences, to provide for liability for patrimonial loss in respect of certain sentences, to provide for agreements on the operation of suspended sentences, and to provide for incidental matters.

### **Preamble**

With the object of deterring criminal conduct and making society safer by providing for the punishment of offenders with sentences that are just and proportionate and of restoring the rights of victims of crime.

BE IT THEREFORE ENACTED BY THE Parliament of the Republic of South Africa as follows: -

## **TABLE OF CONTENTS**

### **Preamble**

### **CHAPTER 1**

## **General Principles**

Definitions  
Purpose of sentencing  
Sentencing principles  
Sentencing guidelines

## **CHAPTER 2**

### **Sentencing Council**

Structure of Sentencing Council  
Office of the Sentencing Council  
Functions of the Sentencing Council  
Establishment of Sentencing guidelines  
Revision of sentencing guidelines  
Action of the Sentencing Council on request  
Procedures of the Sentencing Council

## **CHAPTER 3**

### **Guideline judgements**

Guideline judgments of the Supreme Court of Appeal

## **CHAPTER 4**

### **Sentencing options**

Nature of punishments  
Imprisonment for life  
imprisonment  
Declaration as dangerous criminal  
Enquiry into and report on potential dangerous criminal  
Imprisonment for an indefinite period in respect of dangerous criminals  
Declaration as habitual criminals  
Periodical imprisonment  
Committal to a treatment centre  
Fines  
Court may enforce payment of fine  
Recovery of fine  
Alternative to a fine

Community corrections

27 Requirements for imposing community corrections

## **CHAPTER 5**

### **Restitution and Compensation orders**

Restitution and compensation orders

## **CHAPTER 6**

### **Variations of sentence**

29. A Priority of non-custodial sentences

30. Priority of restitution or compensation

31. Cumulative and concurrent sentences

Conditional postponement of passing of sentence

Unconditional postponement of passing of sentence

Suspension of sentence

Amending a postponed or suspended sentence

Procedure to execute conditions of suspension or postponement of sentence

Failure to comply with conditions of postponed or suspended sentence

Change of conditions to a sentence of community corrections

Failure to comply with conditions of sentence of community corrections

Antedating of sentences

## **CHAPTER 7**

### **Sentencing Procedures**

Previous convictions

Evidence relating to proof of previous convictions

Evidence on further particulars relating to previous convictions

Convictions fall away as previous convictions after 10 years

Evidence on sentencing

Evidence relating to the interests of victims

Victims and release of offenders from prison

Consideration of restitution and compensation

Determining the amount of restitution or compensation

Execution of an order for restitution or compensation

Sentencing judgment

Warrant for the execution of sentence

Sentence by judicial officer or judge other than judicial officer or judge who convicted accused

## **CHAPTER 8**

### **General provisions**

Sentence may be corrected

Liability for patrimonial loss arising from the performance of community service

Agreement on operation of suspended sentences

Repeal

Amendment of Correctional Services Act

## **CHAPTER I**

### **General Principles**

#### **1. Definitions**

“Category of offence” means a class of conduct which falls within the definition of a common law or statutory offence.

“Commissioner” means the Commissioner of Correctional Services.

“Correctional official” means an employee of the Department of Correctional Services appointed under section 3(4) of the Correctional Services Act, 111 of 1998.

“Correctional Services Act “ means the Correctional Services Act, 111 of 1998.

“Criminal Procedure Act” means the Criminal Procedure Act, 51 of 1977.

“Department” means the Department for Justice and Constitutional Development.

“Director-General” means the Director-General for Justice and Constitutional Development.

“Family group conferencing” means a gathering of people convened by a probation officer as part of a sentence of community corrections which is devised to obtain a restorative justice response to the offender in appropriate cases.

“Minister” means the Minister for Justice and Constitutional Development.

“Probation officer” means a person appointed under the Probation Services Act, 1991 (Act 116 of 1991).

“Psychiatrist” means a psychiatrist means a person registered as a psychiatrist under the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974).

“Sub-category” means a class of conduct which falls within the definition of a common law or statutory offence and which is distinguished by specified features.

“Victim impact statement” means a written statement by the victim or someone authorised by this Act to make a statement on behalf of the victim which reflects the impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim.

## **2. The purpose of sentencing**

The purpose of sentencing is to punish convicted offenders for the offences they have committed by limiting their rights and imposing obligations on them in ways that are not contrary to the Constitution of the Republic of South Africa, Act 108 of 1996.

## **3. Sentencing principles**

- (1) Subject to the provisions of this Act the following general principles must be applied exclusively to the determination of all sentences:
  - (a) Sentences must be proportionate to the offence committed.
  - (b) In determining the proportionate sentences regard must be had to the seriousness of the offence committed and the social harm caused by it, relative to other categories or subcategories of offences.
  - (c) Subject to the principle of proportionality expressed in subsection (a) sentences must seek to offer the optimal combination of-
    - (i) restoring the rights of victims of the offence;
    - (ii) protecting society against the offender; and
    - (iii) giving the offender the opportunity to lead a crime free life in the future.
  - (d) The presence or absence of relevant previous convictions may be used to modify the sentence to a reasonable extent.
- (2) In order to ensure consistency in sentencing departures from these principles are allowed only if there are substantial and compelling circumstances that increase or decrease significantly the moral blameworthiness of the offender with

reference to the offence committed.

#### 4. Sentencing guidelines

- (1) A sentencing guideline specifies normative sentencing options for a particular offence or sub-category of offence.
- (2) A sentencing guideline is determined by applying the sentencing principles in section 3(1) by
  - (a) giving a proportionate numerical rating to a category or sub-category of offence on a scale of one to a hundred, in which a hundred is given to the most serious category or sub-category of offence committed by a person with two or more relevant previous convictions and other categories or sub-category of offences are given proportionately lesser ratings in relation to the seriousness of the offence and the relevant previous convictions of the offender; and
  - (b) matching the numerical rating to one or more sentencing options, the severity of which is set in the light of the capacity of the correctional system to implement them.
- (3) Except that a normative sentencing guideline may not exceed the maximum sentence laid down for a particular category or sub-category of offence, a guideline may be determined regardless of any restriction contained in any legislation other than in this Act.
- (4) Subject to the principle of proportionality between the sentence and the offence, the sentencing options provided should create, as far as possible, the possibility of meeting the objectives set in section 3(1)(c).
- (5) In determining the severity of community corrections different levels of severity may be recognised that depend on the orders that are made as part of a sentence of community corrections.
- (6) A guideline may provide -
  - (a) for an increase or decrease of up to 15 percent in the severity of a normative sentencing option;
  - (b) for any alternative sentence to a sentence of life imprisonment;
  - (c) that a part or the whole of any normative sentencing option, other than a sentence of imprisonment of more than five years, be suspended in terms of section 34; and
  - (d) that the passing of sentence be postponed conditionally in terms of section 32 or unconditionally in terms of section 33.
- (7) When an offender is convicted of an offence that falls within a category or sub-category of offence for which a sentencing guideline has been determined, a court must, subject to subsection 8, impose one of the normative sentencing

options that comprise the guideline within the range of any increase or decrease that the guideline may allow.

- (8) In order to ensure consistency in sentencing, departures from sentencing guidelines that have been published by the Sentencing Council in terms of section 8(3) are allowed only in substantial and compelling circumstances that increase or decrease significantly the moral blameworthiness of the offender with reference to the offence committed.

## **CHAPTER 2**

### **Sentencing Council**

#### **5. Structure of the Sentencing Council**

- (1) The Minister must appoint the Sentencing Council for a period of five years at a time.
- (2) The Sentencing Council consists of -
- (a) a judge of the Supreme Court of Appeal or the High Court appointed after consultation with the Chief Justice;
  - (b) a magistrate of a regional division appointed after consultation with the chairperson of the Magistrates Commission;
  - (c) the National Director of Public Prosecutions, a Deputy National Director of Public Prosecutions or a Director of Public Prosecutions appointed after consultation with the National Director of Public Prosecutions;
  - (d) a member of the South African Police Service, of or above the rank of director, appointed after consultation with the National Commissioner of the South African Police Service;
  - (e) a member of the Department of Correctional Services, of or above the rank of director, appointed after consultation with the National Commissioner of Correctional Services;
  - (f) the head of the office of the Sentencing Council;
  - (g) two persons not in the full-time employ of the State with special knowledge of sentencing; and
  - (h) two representatives of the public with knowledge of the position of victims of crime.
- (3) The Sentencing Council elects its own chairperson at its first meeting by a majority from amongst its own members other than the head of the office of the

### Sentencing Council.

- (4) (a) If there are valid grounds for doing so the Minister may terminate the appointment of a member and appoint another member, who qualifies for membership of the Council on the same basis as the member whose appointment has been terminated, for the remainder of the term of that member.
- (b) A member who has served a term of five years may be reappointed for one further period of five years.
- (5) A member of the Sentencing Council who is not in the service of the State may receive such allowances as may be determined by the Director-General in consultation with the Minister of State Expenditure.

## **6. Office of the Sentencing Council**

- (1) An independent office under the control of the chairperson of the Sentencing Council must support the work of the Council.
- (2) The office is managed by a head, who must be an official of the Department.
- (3) The staff complement of the office of the Sentencing Council and the salaries of such staff members must be determined by the chairperson in consultation with the Director-General.
- (4) Such staff members, if not officials of the Department, are deemed for administrative purposes to be such officials but are under the control and authority of the chairperson of the Sentencing Council.
- (5) The Director-General must provide adequate financial and logistical support for the work of the office and of the Sentencing Council.
- (6) All government departments must provide statistical and other information required by the Sentencing Council.

## **7. Functions of the Sentencing Council**

- (1) The primary function of the Sentencing Council is to take the initiative in establishing and revising sentencing guidelines in terms of the general principles of, and in the manner prescribed in this Act.
- (2) The Sentencing Council must respond to a request from the Supreme Court of Appeal for assistance in terms of section 12(2).
- (3) The Sentencing Council must act upon a request made in terms of section 10 by the Minister or Parliament.
- (4) (a) The Sentencing Council may advise, and must advise when requested by the Minister, on the development of community corrections or other sentencing options.

In performing its advisory function it must liaise with the National Council for Correctional Services established in terms of section 83 of the Correctional Services Act.

- (5) The Sentencing Council must provide annually a report to Parliament that includes -

a statistical overview of all sentences that have been imposed and that are still in force, and of the costs associated with implementing such sentences;

projections of the estimated cost of continuing to implement such sentences in the future;

as far as is practicable, information on the efficacy of sentences in reducing crime;

a statistical overview of the development of the use of community corrections as a sentencing option and its effectiveness; and

a consolidated list of all the guidelines that it has developed and those that have been set by guideline judgments of the Supreme Court of Appeal.

The Sentencing Council must publish annually, electronically or otherwise, information on sentencing, including a consolidated list of sentencing guidelines and guideline judgments of the Supreme Court of Appeal, that will assist the courts in imposing sentences in terms of this Act.

## **8. Establishment of Sentencing Guidelines**

- (1) The Sentencing Council may establish a sentencing guideline for any category or sub-category of offence, provided that within five years of commencing work the Sentencing Council must establish sentencing guidelines for all offences for which sentenced offenders make up more than five percent of the sentenced prison population or for which more than 20 percent of offenders in any calendar year are sentenced to terms of imprisonment without an option of a fine.
- (2) When establishing sentencing guidelines the Sentencing Council must determine what are to be regarded as relevant previous convictions for the purpose of calculating a proportionate numerical rating for an offence or sub-category of offence.
- (3) The Sentencing Council must publish sentencing guidelines that have been established in the *Gazette*.

## **9. Revision of Sentencing Guidelines**

- (1) The Sentencing Council may revise any sentencing guideline for any category or sub-category of offence after the guideline has been in operation for at least one year by giving a new numerical rating to a category or sub-category of offence and matching the new rating to the sentencing options.
- (2) When a new numerical rating is given to a category or a sub-category of an offence, the relevant previous convictions may be determined afresh.
- (3) The Sentencing Council may also issue new guidelines annually by reviewing the

matching of the numerical ratings and the sentencing options.

#### **10. Action of the Sentencing Council on request**

- (1) The Minister, the Minister of Correctional Services or Parliament may request the Sentencing Council to establish a sentencing guideline or to review an existing guideline.
- (2) If the Sentencing Council receives a request made in terms of subsection (1) it must act upon such request, following the same procedures as if it were itself taking the initiative.

#### **11. Procedures of the Sentencing Council**

The Sentencing Council may take decisions about establishing or revising sentencing guidelines only after -

- (a) consultation; and
  - (b) considering sentences imposed by the courts for comparable offences.
- (2) Consultation in terms of subsection (1) must include publication of draft guidelines for comment as well as the time frame set for such comments.
  - (3) The majority of members of the Sentencing Council, which must include the chairperson, constitutes a quorum for a meeting of the Council.
  - (4) A decision of the majority of members of the Sentencing Council present relating to the setting or revising of sentencing guidelines and any other decisions that the Sentencing Council may take in terms of this Act shall be a decision of the Council.
  - (5) A member of the Sentencing Council who is not in the service of the State may receive such allowances as may be determined by the Director-General in consultation with the Minister of State Expenditure.

### **CHAPTER 3 Guideline judgments**

#### **12. Guideline judgments of the Supreme Court of Appeal**

- (1) The Supreme Court of Appeal when considering an appeal against sentence may give a guideline judgment on sentence and it must do so when a party to an appeal against sentence requests it to do so.

When the Supreme Court of Appeal anticipates giving a guideline judgment it must notify the Sentencing Council of its intention and ask the Council to provide it with the information it requires for a guideline judgment.

When the Sentencing Council is notified in terms of subsection (2), it may in addition make representations to the Supreme Court of Appeal on any aspect of the guideline judgment that the Court proposes to give.

A guideline judgment must determine, by applying the principles set out in section 3(1), in the same manner as in the determination of a sentencing guideline, the sentencing option or options and their severity that are proportionate to the category or sub-category of offence within which the offence committed falls.

A guideline judgment may revise an existing sentencing guideline which is the subject of an appeal, including a sentencing guideline applied by a court against whose sentence an appeal is considered.

- (6) A guideline judgment may also contain an indication of substantial and compelling circumstances of specific relevance to the category or sub-category of offence that may be taken into account in departing from a sentence laid down in subsection (4).
- (a) A guideline judgment is binding on all other courts in respect of all offences of the same category or sub-category of offence.
  - (b) In order to ensure consistency in sentencing, departures from guideline judgements are allowed only in substantial and compelling circumstances that increase or decrease significantly the moral blameworthiness of the offender with reference to the offence committed.

## CHAPTER 4 Sentencing options

### 13. Sentencing Options

Subject to the provisions of this Act and any other law that restricts the punishment jurisdiction of a court or sets a maximum limit on sentences that may be imposed, the following sentences may be passed upon a person convicted of an offence if justified by the sentencing principles referred to in section 3 or allowed by a sentencing guideline or guideline judgment applicable to the offence:

- (a) imprisonment for life;
- (b) imprisonment;

imprisonment for an indefinite period following an order declaring an offender a dangerous person;

imprisonment for an extended period following an order declaring an offender an habitual criminal;

- (e) periodical imprisonment;
- (f) committal to an institution;

- (g) a fine;
- (h) community corrections; and
- (i) a caution and discharge.

#### **14. Imprisonment for life**

Imprisonment for life is the most severe sentence and may be imposed only where the offence is extremely serious.

#### **15. Imprisonment**

A reference in any law to imprisonment with or without any form of labour as a punishment must be construed as a reference to imprisonment only and a reference to any maximum period of imprisonment of less than three months must be construed as a reference to a period of imprisonment of three months.

- (2) No person may be sentenced by any court to imprisonment for a period of less than seven days unless the sentence is that the person concerned be detained until the rising of the court.

#### **16. Declaration as a dangerous criminal**

A High Court or a regional court that convicts a person of any offence of which serious violence is an element, may, subject to the provisions of section 17, decide not to apply the sentencing principles referred to in section 3 or to follow a sentencing guideline or guideline judgment applicable to the offence and declare him or her a dangerous criminal, if the court is satisfied that such person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him or her.

#### **17. Inquiry into a potentially dangerous criminal**

If, after conviction of an offence of which serious violence is an element but before sentence, it appears to a court having jurisdiction that the person concerned may be a dangerous criminal, the court may direct that the matter be enquired into and be reported on in accordance with the provisions of this section.

Before a person is subjected to an inquiry in terms of subsection (1) the court must inform him or her of its intention and explain the relevant provisions of this Act as well as the gravity of those provisions.

- (3) (a) Where a court orders an inquiry under subsection (1), the inquiry must be conducted and reported on by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court and by a psychiatrist appointed by the person concerned.

A psychiatrist appointed under paragraph (a), other than a psychiatrist appointed by the person

concerned, must be appointed from the list of psychiatrists referred to in section 79 (9) of the Criminal Procedure Act: except that where such list does not include a sufficient number of psychiatrists who may conveniently be appointed for an inquiry under this Act, a psychiatrist may be appointed although his or her name does not appear on such list.

A psychiatrist designated or appointed under paragraph (a) and who is not in the full-time service of the State, must be compensated for his or her services in connection with the inquiry, including giving evidence, according to a tariff determined by the Minister in consultation with the Minister of State Expenditure.

The person concerned may, for the purposes of the inquiry, be committed to a psychiatric hospital or other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may determine, and if in custody while so committed, the person is deemed to be in the lawful custody of the person or the authority in whose custody he or she was at the time of committal.

When the period of committal in terms of subsection (4) is extended for the first time such extension may be granted in the absence of the person concerned unless he or she requests otherwise.

The report on the inquiry must be in writing and submitted to the registrar or the clerk of the court, who must make a copy thereof available to the prosecutor and the person concerned.

The report must include a description of the inquiry and a finding as to the question whether the person concerned represents a danger to the physical or mental well-being of other persons.

If the persons conducting the inquiry are not unanimous in their finding, that must be stated in the report and the individual conclusions recorded.

(9) The contents of the report is admissible in evidence at criminal proceedings: provided that a statement made by the person concerned at the inquiry is not admissible in evidence against him or her at the criminal proceedings, except when it is relevant to the determination of the question whether the person concerned is a dangerous criminal or not.

(10) (a) If the finding in the report is the unanimous finding of the persons who conducted the inquiry, and the finding is not disputed by the prosecutor or the person concerned, the court may determine the matter on such report without hearing further evidence.

If the finding is not unanimous or, if unanimous, is disputed by the prosecutor or the person concerned, the court must determine the matter after hearing evidence. For this purpose the prosecutor and the person concerned may present evidence to the court, including the evidence of any person who conducted the inquiry. Where the finding is disputed, the party disputing it may subpoena and cross-examine any person who conducted the inquiry.

## **18. Imprisonment of dangerous criminals for an indefinite period**

A court that declares a person a dangerous criminal must sentence such person to imprisonment for an indefinite period.

- (2) (a) The court must also decide on the sentence that it would have imposed had it not declared the person concerned a dangerous criminal and in this regard it must take into account any sentencing guideline or guideline judgment that deals with the relevant category or sub-category of offence.
- (b) Such sentence must be within the sentencing jurisdiction of the court.

In the light of the decision referred to in subsection (2) the court must order that the person whom it declared a dangerous criminal must appear before it at a stage when such person would normally appear before a Correctional Supervision and Parole Board or a court to be considered for conditional release in terms of section 73 of the Correctional Services Act.

- (4) A person sentenced in terms of subsection (1), must be brought before the court that imposed the sentence within seven days after the expiration of the period contemplated in subsection (3) in order to enable such court to reconsider the sentence: provided that -

in the absence of the judicial officer who imposed the sentence, any other judicial officer of that court may reconsider the sentence; or

when practical or other considerations make it desirable that a court other than the court which imposed sentence should reconsider the sentence, the Commissioner may, with the concurrence of the National Director of Public Prosecutions, apply to the registrar or the clerk of the court of the other court, which court must have jurisdiction equal to that of the court which sentenced the person, to have such person appear before the other court, for that purpose.

- (5) (a) On receipt of an application referred to in subsection (4)(b), the registrar or the clerk of the court must, after consultation with the prosecutor, set the matter down for a date not later than seven days after the expiration of the period determined by the court in terms of subsection (3).

The registrar or the clerk of the court must submit the case record to the judicial officer who is to reconsider the sentence within a reasonable time before the date contemplated in paragraph (a) and inform the Commissioner in writing of the date for which the matter has been set down.

- (6) (a) Whenever a court reconsiders a sentence in terms of this section it must obtain a report from the Correctional Services and Parole Board contemplated in section 75(1)(b) of the Correctional Services Act.

In the light of this and other information before the court the court must consider whether the person is still a dangerous criminal.

After a court has reconsidered a sentence in terms of section (6), it may-

confirm the sentence of imprisonment for an indefinite period, in which case the court must direct that such person be brought before the court on the expiration of a further period determined by it, which may not exceed five years; or

release the person unconditionally or on such conditions as it deems fit.

The jurisdiction of the regional court is not exceeded by any further detention that may be ordered in terms of subsection (7)(a)

At the expiration of the further period contemplated in subsection (7)(a) the provisions of subsections (2) up to and including (8) apply with the necessary changes.

#### **19. Declaration as a habitual criminal**

A High Court or a regional court which convicts a person of one or more offences, may, subject to the provisions of subsection (2), decide not to apply the sentencing principles referred to in section 3 directly or to follow a sentencing guideline or guideline judgment applicable to the offence and declare such person a habitual criminal, instead of any other punishment for the offence or offences of which he or she is convicted, if the court is satisfied that the said person habitually commits offences and that the community should be protected against him or her.

No person under the age of 18 years may be declared an habitual criminal, nor may such order be made where the offence, in the opinion of the court, warrants the imposition of punishment which by itself or together with any punishment for any other offence of which the person has been convicted at the same time, would entail imprisonment for more than 15 years.

#### **20. Periodical imprisonment**

A court convicting a person of any offence, may, instead of any other sentence but subject to the sentencing principles referred to in section 3 or a sentencing guideline or guideline judgment that may be applicable to the offence, sentence such person to periodical imprisonment for a period of not less than 100 hours and not more than 2,000 hours.

The court which imposes a sentence of periodical imprisonment upon a person must have served upon him or her, a notice in writing directing such person to surrender him or herself on a date and at a time specified in the notice or, if prevented from doing so by circumstances beyond his or her control, as soon as possible thereafter, to the person in charge of a specified prison, for the purpose of undergoing such imprisonment.

A copy of the notice referred to in subsection (2) serves as a warrant for the reception into custody of the convicted person.

The court which tries any person on a charge of contravening section 117 A (a) of the Correctional Services Act, must, subject to subsection (5), cause a notice referred to in subsection (2) to be served on that person.

- (5) The unexpired portion of the sentence of periodical imprisonment must be set aside if a person serving such sentence is detained or sentenced to imprisonment on another charge, and a fresh sentence must be imposed in place of the unexpired portion of the sentence of periodical imprisonment.

#### **21. Committal to a treatment centre**

A court convicting any person of any offence may decide not to apply the sentencing principles referred to in section 3 or to follow a sentencing guideline or guideline judgment applicable to the offence and order that the person be detained at a treatment

centre established under the Prevention and Treatment of Drug Dependency Act 20 of 1992.

- (2) An order may be made in terms of subsection (1) if the court is satisfied from the information placed before it, which must include a report of a probation officer, that such person is a person as described in section 21 (1) of the Prevention and Treatment of Drug Dependency Act 20 of 1992, and for the purposes of the said Act such order is deemed to have been made under section 22.
- (3) (a) Where a court has referred a person to a treatment centre under subsection (1) and such person is later found not to be fit for treatment in such treatment centre, such person may be referred back to the court for re-sentencing.
- (b) Whenever a court reconsiders a sentence in terms of paragraph (a) it has the same powers as it would have had if it were considering sentence after conviction.

## **22. Fines**

If justified in terms of the sentencing principles, a fine may be imposed for any offence by any court having jurisdiction to impose such sentence unless otherwise provided for by any other law or if a sentencing guideline or guideline judgment does not make provision for a fine as a sentencing option for a category or sub-category of offence.

## **23. Enforcement and payment of fines**

Where a person is sentenced to pay a fine, whether with or without an alternative period of imprisonment, the court may in its discretion enforce payment of the fine, whether in whole or in part -

by the seizure of money upon the person concerned;

if money is due or is to become due as salary or wages from any employer of the person concerned-

by from time to time ordering such employer to deduct a specified amount from the salary or wages so due and to pay over such amount to the clerk of the court or registrar in question; or

- (ii) by ordering such employer to deduct a specified amount from the salary or wages so due on specified times and to pay over such amount to the clerk of the court or registrar in question; and
- (c) by allowing the accused to pay the fine on the conditions and in instalments at the intervals it deems fit.

## **24. Recovery of fines**

Whenever a person is sentenced to pay a fine, the court passing the sentence may issue a warrant addressed to the sheriff or messenger of the court authorizing him or her to levy the amount of the fine by attachment and sale of any movable property belonging to such person even if the sentence directs that, in default of payment of the fine, such

person must be imprisoned.

The amount which may be levied in terms of subsection (1) must be sufficient to cover, in addition to the fine, the costs and expenses of the warrant and of the attachment and sale in terms of it.

If the proceeds of the sale of the movable property are insufficient to satisfy the amount of the fine and the costs and expenses, a High Court may issue a warrant, or, in the case of a sentence by any lower court, authorize such lower court to issue a warrant for the levy against the immovable property of such person of the amount unpaid.

- (4) When a person is sentenced only to a fine or, in default of payment of the fine, to a term of imprisonment and the court issues a warrant under this section, it may suspend the execution of the sentence of imprisonment and may release the person upon his or her executing a bond with or without sureties as the court thinks fit, on condition that he or she appears before such court or some other court on the day appointed for the return of such warrant, such day being not more than 15 days from the time of executing the bond. In the event of the amount of the fine not being recovered, the sentence of imprisonment may be executed at once or may be suspended as before for a further period or periods of not more than 15 days.
- (5) In any case in which an order for the payment of money is made on non-recovery of which imprisonment may be ordered, and the money is not paid at once, the court may require the person ordered to make such payment to enter into a bond as prescribed in subsection (4), and if the person does not do so, may at once pass a sentence of imprisonment as if the money had not been recovered.

## **25. Alternative to a fine**

Whenever a court convicts a person of any offence punishable by a fine, whether with or without any other direct or alternative punishment, it may, in imposing a fine, impose any other sentence as an alternative: provided that the alternative is not more severe than the punishment which may be imposed for that offence.

Whenever a court has imposed upon any person a fine without an alternative sentence and the fine is not paid in full or is not recovered in full, the court which passed sentence may issue a warrant directing that the person concerned be arrested and brought before the court, whereupon the court may impose such other sentence as could have been imposed if the court were considering sentence after conviction.

## **26. Community Corrections**

- (1) The primary purposes of the sentence of community corrections are to restore the rights of victims and allow persons subject to the sentence to lead a socially responsible and crime-free life during the period of their sentence and in future.

The particular orders that make up a sentence of community corrections must be tailored to the purposes set out in subsection (1), while still applying the sentencing principles referred to in section 3 and any sentencing guidelines or guideline judgments that may be applicable to the offence for which the sentence is being imposed.

A sentence of community corrections must be imposed for a fixed period not exceeding three years and must include one or more of the following orders. The orders are that, subject to the supervision of a probation officer or a correctional official, the person concerned-

- (a) is placed under house detention;
- (b) does community service;
- (c) seeks employment;
- (d) takes up and remains in employment;
- (e) makes restitution or pays compensation to a victim;
- (f) takes part in treatment, development and support programmes;

participates in mediation between victim and offender or in family group conferencing; and

if a child, attends educational programmes whether or not he or she is otherwise subject to compulsory education.

The court may, in addition to any of the orders in subsection (3), order, specifying details as indicated, that a person –

contributes financially towards the cost of the community corrections to which he or she has been subjected;

- (b) is restricted to one or more specified magisterial districts;
- (c) lives at a specified ascertainable address;
- (d) refrains from using or abusing alcohol or drugs;
- refrains from committing a specified criminal offence or class of criminal offences;
- (f) refrains from visiting a specified place;
- (g) refrains from making contact with a specified person or persons;
- refrains from threatening a specified person or persons by word or action; and
- (i) is subjected to a specified form of monitoring.

A sentence of community corrections may not include any order other than those listed in subsections (3) and (4) but the court may, subject to the provisions of the Correctional Services Act, elaborate on the conditions to be attached to the order.

- (6) The conditions attached to the orders must include at least the following information:

Where house detention is ordered in terms of subsection (3)(a) the court must stipulate the number of days for which the detention is to operate and the hours to which the person is restricted daily to his or her dwelling.

Where community service is ordered in terms of subsection (3)(b) the court must stipulate the number of hours which the person is required to serve, which may not be less than 16 hours per month.

- (c) Where payment of compensation or damages is ordered in terms of subsections (3)(e) the court must stipulate the amount to be paid.

A sentence of community corrections is served in accordance with the provisions of the Correctional Services Act, and the conditions attached to the orders that comprise the sentence may be further elaborated as provided in that Act.

## **27 Requirements for imposing community corrections**

A sentence of community corrections may only be imposed after a report of a probation officer or a correctional official has been placed before the court.

A report referred to in subsection (1) must contain -

recommendations on the conditions on which the sentence should be imposed;

recommendations on how the conditions can be utilised to achieve the objectives of the sentence;

the reasons why the accused is a person suitable to undergo a sentence of community corrections;

a proposed programme for the offender;

the reasons why the offender would benefit from the sentence;

information on the family and social background of the offender; and

a report on any matter which the court may request the probation officer or correctional official to consider.

**CHAPTER 5**  
**Restitution and Compensation orders**

**28. Restitution and compensation orders**

- (1) The court may, in addition to any sentence except a sentence that requires restitution or compensation as part of community corrections or as a condition of postponement or suspension, order the person convicted to make restitution or pay compensation or -
  - (a) in the case of damage to, or the loss or destruction of property, including money, belonging to another as a result of the commission of the offence by returning the property concerned or by paying to the party concerned an amount equal to the value of the loss or damage or an amount not exceeding the replacement value of the property as of the date of the order less the value of any part of the property that has been returned to

such person, where the amount is reasonably easy to ascertain; or

- (b) in the case of bodily injury to or death of any person as a result of the commission of the offence by paying to the person concerned or, in the case of death, to the dependants of the deceased, an amount not exceeding all pecuniary damages, including loss of income or support, incurred as a result of the injury or death, where the amount is reasonably easy to ascertain.
- (2) (a) The awards made by a regional court or a magistrate's court in terms of subsection (1) may not exceed the amount determined by the Minister from time to time by notice in the *Gazette* in respect of the respective courts.
  - (b) Where the award that a regional court or magistrate's court wishes to make exceeds the amount of an award that may be made in terms of subsection (a) the matter should be referred to the High Court for consideration of an appropriate award.
- (3) In cases where the amount of the actual damage or loss exceeds the amount of an award made in terms of subsection (1) such additional amount can be claimed in a civil action.
  - (4) Where a court determines the amount of restitution or compensation in terms of this section, it must also determine the time for payment and the method of payment.

## **CHAPTER 6**

### **Variations of sentencing**

#### **29. Priority of non-custodial sentences**

Where a non-custodial sentence is a sentencing option allowed by a sentencing guideline or a guideline judgment applicable to a particular offence or, if in terms of the sentencing principles it would be an option as a sentence for such an offence, an appropriate non-custodial sentence should be imposed, unless a custodial sentence is required in order to protect society against the offender.

#### **30. Priority of restitution or compensation**

Where the court finds it appropriate to impose a sentence of community corrections which includes an order of restitution or compensation, or to postpone or suspend sentence on condition of restitution or compensation, or to make an award in terms of section 28, and the court is considering the imposition of a fine in addition to such an award, but it appears to the court that the person convicted would not have the means to make restitution or pay compensation and to pay the fine, the court must first make the order or set the condition of restitution or compensation and then consider the appropriate sentence to be imposed in addition to the award.

#### **31. Cumulative or concurrent sentences**

- (1) When a person -
- (a) has been convicted of two or more offences; or
  - (b) is serving a sentence or is still subject to conditions of a sentence or has been convicted but has not yet been sentenced, and is convicted again of another offence;

the court may impose individual sentences for such offences or a sentence for such other offence.

- (2) When the sentences imposed in terms of subsection (1) consist of imprisonment, they commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.
- (3) When the sentences imposed in terms of subsection (1) consist of community corrections they commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that they must run concurrently.
- (4) If the aggregate of sentences of community corrections referred to in subsection (3) exceeds three years, the person concerned shall serve a period of not more than three years from the date on which the first of the sentences commenced, unless the court, when imposing sentence, directs otherwise.

### **32. Conditional postponement of passing of sentence**

- (1) Where a court convicts a person of any offence the court may, unless a relevant sentencing guideline has been set or guideline judgment has been given and that guideline or guideline judgment does not provide for the postponement of sentence, postpone the passing of sentence for a period not exceeding three years and release the person concerned on condition that he or she complies with any order or combination of orders referred to in section 26(3) or (4) and order such person to appear before the court at the expiration of the relevant period.
- (2) Where a court has postponed the passing of sentence in terms of subsection (1) and the court, whether differently constituted or not, is satisfied at the expiration of the relevant period that the person concerned has observed the conditions imposed under that subsection, the court must discharge such person without passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

### **33. Unconditional postponement of passing of sentence**

- (1) Where a court convicts a person of any offence the court may, unless a sentencing guideline has been set or a guideline judgment has been given and that guideline or guideline judgment does not provide for the unconditional postponement of sentence, postpone the passing of sentence for a period not exceeding three years and release the person concerned unconditionally, and order such person to appear before the court, if called upon before the expiration of the relevant period.
- (2) Where a court has unconditionally postponed the passing of sentence in terms of subsection (1), and the person concerned has not at the expiration of the relevant period been called upon to appear before the court, such person shall be deemed to have been discharged with a caution.

#### **34. Suspension of sentence**

- (1) Where a court convicts a person of any offence the court may, unless a relevant sentencing guideline has been set or a guideline judgment has been given and that guideline or guideline judgment provides for the conditional suspension of sentence, pass sentence but order the operation of the whole or any part of it to be suspended for a period not exceeding three years on condition that he or she complies with any order or combination of orders referred to in section 26(3) or (4),
  - (2) (a) A court which sentences a person to a term of imprisonment as an alternative to a fine, may, where the fine is not paid, at any stage before the expiration of the period of imprisonment, suspend the operation of the sentence and order the release of the person concerned on such conditions relating to the payment of the fine or such portion of it as may still be due, as the court may regard as expedient, including a condition that the person concerned take up a specified employment and that the fine be paid in instalments by the person concerned or the employer of such person.
  - (b) A court which has suspended a sentence in terms of paragraph (a), whether differently constituted or not, or any court of equal or superior jurisdiction, which has suspended a sentence in terms of paragraph (a), may at any time-
    - (i) further suspend the operation of the sentence on any existing or additional conditions which the court may regard as expedient; or
    - (ii) cancel the order of suspension and recommit the person concerned to serve the balance of the sentence.

#### **35. Amending a postponed or suspended sentence**

- (1) A court which has-

- (a) postponed the passing of sentence in terms of section 32;
- (b) suspended the operation of a sentence in terms of section 34; or
- (c) suspended the payment of a fine in terms of section 34(2),

whether differently constituted or not, or any court of equal or superior jurisdiction may, if satisfied that the person concerned has through circumstances beyond his or her control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence or the payment of a fine, subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.

(2) A court which has-

- (a) postponed the passing of sentence in terms of section 32(1); or
- (b) suspended the operation of a sentence in terms of section 34;

on any condition of any order mentioned in section 26 (3) or (4) may, whether or not the court is constituted differently than it was at the time of such postponement or suspension, at any time during the period of postponement or suspension on good cause shown amend any such condition or substitute any other competent condition for such condition, or cancel the order of postponement or suspension and impose a competent sentence or put the suspended sentence into operation.

### **36. Procedure to execute conditions of suspension or postponement of sentence**

- (a) A court which in terms of section 32(1) or 34 has imposed a condition of an order referred to in section 26 (3) must have served upon the person concerned a notice in writing directing him or her to report on a date and time specified in the notice or, if prevented from doing so by circumstances beyond his or her control, as soon as practicable thereafter, to the person specified in that notice, in order to meet the conditions that have been imposed.
- (b) A copy of such notice is authority for the person mentioned in it to have the conditions of postponement or suspension implemented as imposed.

### **37. Failure to comply with conditions of postponed or suspended sentence**

If any condition imposed in terms of sections 32(1), 34(1) or (2) is not complied with, the person concerned may upon the order of any court, be arrested or detained and, where the condition in question-

- (i) was imposed in terms of section 32(1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or
- (ii) was imposed in terms of section 34(1), (2) or (3), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction,

and such court, whether or not it is constituted differently than it was at the time of such postponement or suspension, may then, in the case of paragraph (i), impose any competent sentence, or, in the case of paragraph (ii), put into operation the sentence which was suspended.

- (b) A person who has been called upon in terms of section 33(1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.

### **38. Change of conditions to a sentence of community corrections**

The court which ordered the imposition of community corrections may, on application by the Commissioner or the person serving the sentence, vary any condition which constitutes up the sentence of community corrections.

### **39. Failure to comply with conditions of sentence of community corrections**

- (1) If it appears from an affidavit that a person subject to community corrections has failed to comply with any aspect of the conditions imposed on him or her, or any duty placed upon him or her in terms of the sentence, the court which imposed the sentence or any court with equal jurisdiction may issue a warrant for the arrest of the person.
- (2)
  - (a) A warrant issued in terms of subsection (1) may be executed by any peace officer as defined in section 1 of the Criminal Procedure Act.
  - (b) A person detained in terms of paragraph (a) must be brought before a court within 48 hours after arrest, which court must make an order as to the further detention and referral of the person to the authority responsible to deal with the matter.
- (3) If the court is satisfied that the person has failed to meet the conditions imposed on him or her but that such failure is due to a change in circumstances beyond the control of the person concerned, the court, whether or not constituted differently than it was at the time of the imposition of the sentence, may impose

upon such person any competent sentence afresh or vary any existing condition to the sentence of community corrections.

**40. Antedating of sentences**

1. After the decision has been taken to impose a sentence of imprisonment, whether by applying the sentencing principles directly or by following a sentencing guideline or guideline judgment, and the envisaged term of imprisonment has been determined and announced in open court, the coming into effect of the term of imprisonment must be antedated by the number of days that the person concerned has spent in prison prior to the sentence being pronounced on the charge for which he or she is being sentenced.
- (2) In determining an appropriate sentence other than imprisonment the court must take into account the time that the person concerned has spent in prison prior to sentence and reduce the severity of the sentence accordingly.

**CHAPTER 7**

**Sentencing procedures**

**41. Previous convictions**

- (1) After a person has been convicted and before sentence has been imposed the

prosecution may produce to the court a record of previous convictions alleged against such person.

- (2) The court must ask the person concerned whether any previous conviction referred to in subsection (1) is admitted.
- (3) If the person concerned denies such previous conviction, the prosecution may tender evidence that such person was so previously convicted.
- (4) If the person concerned admits such previous conviction or such previous conviction is proved, the court must, subject to the provisions of section 15, take such conviction into account if it is relevant to the offence for which the accused must be sentenced.
- (5) If the prosecution tenders no evidence of a previous conviction the court may, at the request of the victim or otherwise, nevertheless receive evidence to prove such conviction.

#### **42. Evidence relating to proof of previous convictions**

- (1) When the prosecution seeks to prove previous convictions in terms of this Act a record, photograph or document which relates to a fingerprint and -
  - (a) which purports to emanate from the officer commanding the South African Criminal Bureau; or
  - (b) in the case of any other country, from any officer having charge of the criminal records of that country,

is admissible in evidence at criminal proceedings upon production by a police official having custody of it, and it constitutes prima facie proof of the facts it contains.

- (2) The admissibility of such record, photograph or document is not affected by whether it was obtained under any law or against the wish or will of the person concerned.

#### **43. Evidence on further particulars relating to previous conviction**

Whenever any court in criminal proceedings requires any particulars or clarification of any previous conviction admitted by or proved against a person, any document purporting to be certified as correct by the officer commanding the South African Criminal Bureau or by any registrar or clerk of any court within the Republic or by any officer in charge of any prison within the Republic and furnishing such particulars or such

clarification, shall be admissible as prima facie proof of the facts contained in it.

#### **44. Convictions fall away as previous convictions after 10 years**

- (1) Where a period of 10 years has passed from the date of completion of the last sentence and the date of commission of any subsequent offence for which a person is to be sentenced, the last conviction and all convictions prior to that shall be deemed not to have taken place.
- (2) If any previous conviction relates to an offence that includes an element of sexual misconduct a court may, notwithstanding the provisions of subsection (1), take such previous conviction into account, if the court believes that it reveals a tendency or proclivity to commit similar offences.

#### **45. Evidence on sentencing**

- (1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
- (2) The court must allow the accused and the prosecution to call witnesses or to adduce evidence relevant to sentencing and may itself call witnesses or adduce evidence
- (3) If witnesses are called the provisions of sections 162, 163, 164, 165, and 166 of the Criminal Procedure Act apply.
- (4) The court may examine the accused and any person who has been subpoenaed to attend the sentencing proceedings or who is in attendance at such proceedings, and may recall and re-examine any person already examined at the proceedings if their evidence appears to the court essential for the determination of an appropriate sentence.
- (5) Before passing sentence the court must allow the accused and the prosecution to address the court on the issue of sentencing and on any evidence received under this section.
- (6) Any fact relevant to the determination of an appropriate sentence must be proved to the satisfaction of the court.

#### **46. Evidence relating to the interests of victims**

- (1) The prosecution must, when adducing evidence or addressing the court on sentence, consider the interests of the victim and the impact of the crime on the

victim and, where practicable, furnish the court with particulars of -

- (a) injury, loss or damage resulting from the offence;
  - (b) injury, loss or damage resulting from -
    - (i) any other offence which is to be taken into account specifically in the determination of sentence; or
    - (ii) a course of conduct consisting of a series of criminal acts of the same or similar character of which the offence for which sentence is to be imposed forms part.
- (2) A victim impact statement may be made by a person against whom the offence was committed and who suffered harm as a result of the offence or by a person nominated by such victim.
  - (3) The prosecutor must seek to tender evidence of a victim impact statement where the victim is not called to give evidence and such a statement is available.
  - (4) If the contents of a victim impact statement is not disputed a victim impact statement is admissible evidence on production thereof.
  - (5) If the contents of a victim impact statement is disputed, the victim must be called as a witness.
  - (6) If a victim who is required to give evidence requests that certain information should not be disclosed, the court must give due consideration to the interests of the victim and the reasons for the request and balance them against the interests of justice.

#### **47. Victims and release of offenders from prison.**

- (1) Where a person has been convicted of an offence involving violence against another person and is sentenced to a term of imprisonment of two years or more that is not suspended, the judgment at sentence must explain to any victims of the crime, including the next of kin of a deceased victim, that they may inform the Commissioner that they wish to be notified of any hearing of a Parole and Correctional Supervision Board where the conditional release of such offender is being considered, so that they can attend such hearing and make representations to it as specified in section 75(4) of the Correctional Services Act.

- (2) Where the victim is incapable of informing the Commissioner as contemplated in subsection (1) the information may be conveyed by a relative or other representative of the victim.
- (3) If the victims or their next of kin or representatives referred to in subsection (2) intend to make such representations or to attend such a meeting of the Correctional Supervision and Parole Board, they have to inform the Commissioner of their intention and keep the Commissioner informed of any change of address.

#### **48. Consideration of restitution and compensation**

- (1) Where a person has been convicted in any court of any offence causing damage or loss, the court must, whether or not such an order has been requested by the prosecutor or any party that suffered damage or loss, consider making a restitution or compensation order in terms of section 28, unless the sentence that is imposed already requires the person who is sentenced to make restitution or pay compensation, whether as an element of community corrections or as a condition of suspension or postponement.
- (2) Where the party suffering damage or loss is not present at the proceedings at the time when such order is considered, the court may direct that notice be given for the attendance of the proceedings of the party who may be the beneficiary of the order or such other party having an interest in the order as the court deems fit.

#### **49. Determining the amount of restitution or compensation**

- (1) For the purpose of determining the amount to be paid if restitution or compensation is ordered in terms of any sentence or in terms of section 28, the time for payment and the method of payment, the court may refer to the evidence that was led prior to conviction or to evidence on sentence, or the court may hear further evidence.
- (2) When determining restitution or compensation payments the court must, unless the person against whom a restitution or compensation order is to be made acknowledges the ability to pay, conduct an inquiry concerning the present and future ability of such person to pay the amount and must consider -
  - (a) the employment, earning ability and financial resources of the person concerned at present or in the future, including any circumstance which may affect his or her ability make restitution or to pay compensation;
  - (b) any benefit, financial or otherwise, derived directly or indirectly, as a result of the commission of the offence; and

- (c) any harm done to, or loss suffered by, any person to whom restitution compensation may be ordered.
- (3) (a) The court may require the person convicted to disclose to the court orally or in writing particulars of his or her financial circumstances in the manner and form the court deems fit.
  - (b) Such information may not be used for any other purposes.
- (4) The court may require that a written report be prepared and filed with the court containing information concerning the financial status of the person convicted, in particular his or her ability to make restitution or pay compensation, and the amount to be paid.

#### **50. Execution of an order for restitution or compensation**

- (1) (a) An award made under section 28 -
  - (i) by a magistrate's court, shall have the effect of a civil judgment of that court;
  - (ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.
- (b) Where a High Court makes an award under this section, the registrar of the court must forward a certified copy of the award to the clerk of the magistrate's court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon such award has the effect of a civil judgment of that magistrate's court.
- (2) Where money of the person convicted is taken from him or her upon his arrest, the court may order that payment be made forthwith from such money in satisfaction of the award made by the court.

#### **51. Sentencing Judgment**

Every judgment on sentence must include:

- (a) the sentence imposed;

- (b) the reasons for sentence;
- (c) a brief explanation of the law relating to the implementation of the sentence encompassing -
  - (i) In the case of a sentence of imprisonment, the law relating to conditional release; and
  - (ii) in the case of a sentence of community corrections, the law governing the specific order that is made;
- (d) information to the victim on post-sentence procedure if required by section 47; and
- (e) a note that restitution or compensation for the victim has been considered as required by section 28.

## **52. Warrant for the execution of sentence**

- (1) A warrant for the execution of any sentence of imprisonment or community corrections must be issued by the court that passed the sentence or by any other judicial officer of the court in question.
- (2) The warrant for the execution of a sentence of imprisonment contemplated in subsection (1) commits the person concerned to the prison for the magisterial district in which such person is sentenced.

## **53. Sentence by judicial officer other than judicial officer who convicted accused**

- (1) If sentence is not passed upon an accused forthwith upon conviction in a lower court, or if, by reason of any decision or order of a high court on appeal, review or otherwise, it is necessary to vary any sentence passed in a lower court or to pass sentence afresh, any judicial officer of that court may, in the absence of the judicial officer who convicted the person concerned or passed the sentence and after consideration of the evidence recorded and in the presence of the person concerned, pass sentence or take such other steps as the judicial officer who is absent, could lawfully have taken.
- (2) Whenever-
  - (a) a judge is required to sentence a person convicted by him or her of any offence; or
  - (b) any matter is remitted on appeal or otherwise to the judge who presided at the trial of the person concerned,

and that judge is for any reason not available, any other judge of the division of the High Court concerned may, after consideration of the evidence recorded and in the presence of the person concerned, sentence the person or take such other steps as the former judge could lawfully have taken.

## CHAPTER 8

### General provisions

#### 54. Sentence may be corrected

- (1) When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence.
- (2) Where the calculation of a term of imprisonment in terms of section 40 underestimates the number of days that a person has spent in prison prior to the sentence being pronounced on the charge for which he or she is being sentenced, the court or any other court of equivalent jurisdiction may amend the sentence at any time.

#### 55. Liability for patrimonial loss arising from the performance of community service

- (1) If patrimonial loss may be recovered from a person on the ground of a delict committed by such person while performing community service as part of a sentence of community corrections or as a condition of postponement or suspension of sentence, that loss may, subject to subsection (3), be recovered from the State.
- (2) Subsection (1) may not be construed as precluding the State from obtaining indemnification against its liability in terms of subsection (1) by means of insurance or otherwise.
- (3) The patrimonial loss which may be recovered from the State in terms of subsection (1) must be reduced by the amount from any other source to which the injured person is entitled by reason of the patrimonial loss.
- (4) In so far as the State has made a payment by virtue of a right of recovery in terms of subsection (1), all the relevant rights and legal remedies of the injured person against the offender pass to the State.
- (5) If any person as a result of performing community service has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-General may, with the concurrence of the

Department of State Expenditure, as an act of grace pay such amount as he or she deems reasonable to that person.

## 56. Agreement on operation of suspended sentences

- (1) The President may, on such conditions as he or she deems necessary, enter into an international agreement with any state, so as to provide, on a reciprocal basis, for the putting into operation of suspended sentences in respect of persons convicted, within the jurisdiction of the Republic or of such state, of an offence mentioned in the agreement.
- (2) The President may, if the parties agree, amend such an agreement to the extent which he or she deems necessary.
- (3) If an application is made for a suspended sentence imposed by a court of a state referred to in subsection (1) to be put into operation, the court at which the application is made must, subject to the terms of the agreement, proceed with that application as if the suspended sentence was imposed by a court in the Republic.
- (4)
  - (a) An agreement referred to in subsection (1), or any amendment of it, comes into force only after it has been published by the President by proclamation in the *Gazette*.
  - (b) The President may at any time and in like manner withdraw any such agreement.

## 57. Repeal<sup>1</sup>

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1 **Note:** the schedule must include, *inter alia*, amendments to the Correctional Services Act by the insertion of the following sections:

The Correctional Services Act, 111 of 1998, is hereby amended by the insertion of the following sections:

### 117A Offences relating to periodical imprisonment

- (1) Any person who-
  - (a) without lawful excuse, the proof whereof shall be on such person, fails to comply with a notice issued under section (2) of the Sentencing Act, of 2000; or

The Acts set out in the Schedule are hereby repealed or amended to the extent set out in the third column of the Schedule.

**58. Short title and commencement**

- (1) This Act is the Sentencing Framework Act, 2000, and takes effect on a date fixed by the President by notice in the *Gazette*.
- (2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

- (b) when surrendering him or herself for the purpose of undergoing periodical imprisonment, is under the influence of intoxicating liquor or drugs or the like; or
- (c) impersonates or falsely represents him or herself to be a person who has been directed to surrender him or herself for the purpose of undergoing periodical imprisonment,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

**117B Offences relating to community service**

- (1) Any person who-
  - (a) when he or she reports to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like; or
  - (b) impersonates or falsely represents him or herself to be the person who has been directed to perform the community service in question, to undergo the instruction or treatment in question or to attend or reside at the specified centre for the specified purpose,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months.

**APPENDIX A**  
**PART 1**

**EXTRACTS FROM ISSUE PAPER ON  
MANDATORY MINIMUM SENTENCES**

*The Issue Paper reflected information collected up to April 1997 and since then some of the information may have changed.*

## CHAPTER 2

### IDENTIFYING THE ISSUES

#### Introduction

2.1 Ashworth<sup>2</sup> points out that sentencing is the stage after the determination of criminal liability and may be characterised as a **public, judicial assessment of the degree to which the offender may rightly be ordered to suffer legal punishment**. It is therefore important not to lose sight of the fact that the values that society wishes to uphold should inform any reform of the sentencing system.

2.2 The approach of our courts to sentencing and the need for reform is illustrated by the facts in *S v Young*<sup>3</sup> and the comment on the case by RG Nairn.<sup>4</sup> Young, a man aged 57 with a clean record, was convicted by a regional court magistrate on nine counts of contravening the Prevention of Corruption Act, 6 of 1958. His crime was soliciting and accepting bribes in relation to the award of contracts by the petrol company for whom he worked. He was sentenced to a total of 90 months imprisonment, of which half was suspended on conditions. The sentence was confirmed on appeal to the then Transvaal Provincial Division, but on further appeal to the then Appellate Division an entirely new sentence, (the sentence on certain accounts having been reduced), of 64 months imprisonment of which half was suspended, was imposed. Commenting on these facts<sup>5</sup> Nairn criticises current practices as follows:

... two learned judges gave careful consideration to the same issues, arising out of a set of agreed facts, but arrived at diametrically opposed conclusions. It seems that the nature of our sentencing procedure makes this type of outcome virtually inevitable, because whereas the course of the trial is determined by clearly defined rules of law, the approach to sentence is left largely to chance. What this means - as the present case demonstrates - is that the point of view of the individual sentencer will largely

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2 AJ Ashworth "Criminal justice and deserved sentences" *Criminal Law Review* (1989) Vol 36 340-55.

3 1977 (1) SA 602 (A).

4 "Sentencing *S v Young* 1977 (1) SA 602 (A)" (1977) *SACC* Vol 36 189-191.

5 Nairn (1977) *SACC* Vol 36 189 et seq.

determine his approach to a given set of facts, and there will therefore be as many different approaches as there are different sentencers... This state of affairs is quite understandable, because judges are human beings: each one is a unique product of a unique combination of social, physical, psychological and economic influences, so each will inevitably go his own way in the absence of clearly articulated guidelines; as a consequence, uniformity in sentencing remains unattainable. The problem of uniformity has not yet been approached seriously and scientifically in our law, and until it is it will remain a murky and uncertain, albeit vital, problem,...

and:<sup>6</sup>

This judgment, despite the canvassing of relevant factors, is with respect, almost as bare of reasons as was that of the court *a quo* and a number of questions are left unanswered:

- (i) How exactly does one draw the line between a crime warranting a fine and one warranting imprisonment? No principle was laid down and no general test was suggested, and yet this was the most important issue in the appeal. The question of seriousness was dealt with, but not sufficiently exhaustively to provide one with a general guide - one is still left wondering how serious a case has to be before the scales tip from fine to imprisonment.
- (ii) Was this intended to be a deterrent punishment, or what object was it designed to achieve? It is suggested at 609E that deterrence is an important consideration, but nowhere is it suggested that this type of offence is sufficiently prevalent to warrant passing a sentence which is so severely deterrent that it approaches the category of an exemplary sentence. (It is submitted, with respect, that a sentence of imprisonment passed on a man of 57 with a clean record, for an offence of this nature, can only be classified as exemplary).
- (iii) Did the court consider the effect that this sentence would have on the appellant, and weigh this against the general needs of society? One cannot help wondering whether the need to protect society warranted such a drastic and destructive punishment ...

It seems, as has been pointed out elsewhere ... that a serious and systematic approach to punishment is long overdue. With the greatest respect, cases like Young demonstrate that our courts have not yet begun to take this problem seriously. **It is no longer enough to list aggravating and mitigating factors and then move straight on to a generalised conclusion. The lower courts are now in desperate need of a comprehensive set of principles which can be used as basic guides. Ideally these principles should be formulated by the Appellate Division so as to ensure their uniform**

**application throughout the country. Upon these principles could be built a comprehensive body of sentencing law - our only road out of the quagmire.** (Emphasis added).

### **Main characteristics of punishment in South Africa**

2.3 It should be pointed out that the issue of mandatory sentences cannot be discussed without reviewing sentencing practices in South Africa as a whole, because when one is considering reform in this regard, the adopted approach will be influenced by one's approach to sentencing as a whole.

#### \* **Justification for punishment**

2.4 Punishment is the sanction of the criminal law and there is general consensus on the two salient characteristics of punishment, namely the intentional infliction of suffering upon an offender and the expression of the community's condemnation and disapproval of the offender and his conduct<sup>7</sup>. Criminal punishment is, however, more than the infliction of suffering. It is the infliction of suffering on account of the commission of a crime. According to Van der Merwe<sup>8</sup> criminal law is inherently moral and punishment is essentially justified as the moral reproach of the community.

#### \* **Aims of punishment**

2.5 The aims of punishment describe the result that is expected to be achieved by means of punishment. There are a number of aims, also called theories, of punishment recognised by the courts in South Africa. In *S v Khumalo*<sup>9</sup> these aims are stated as follows:

In the assessment of an appropriate sentence, regard must be had inter alia to the main purposes of punishment mentioned by Davis AJA in *R v Swanepoel* 1945 AD 444 at 455, namely, **deterrent, preventative, reformative and retributive** (see *S v Whitehead* 1970 4 SA 424 (A) at 436 E-F; *S v Rabie* 1975 4 SA 855 (A) at 862). (Emphasis added).

2.6 For the purpose of this paper a detailed discussion is not deemed necessary and a brief reference to what is understood by these aims or theories would suffice. A popular view is that the ultimate aim of punishment is to protect the community against crime. The main differences of opinion arise as to the best method to achieve this. One method of doing this is by directly

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7 MA Rabie SA Strauss *Punishment: An introduction to principles* (4th edition) Lex Patria (1985) 6.

8 DP van der Merwe *Sentencing* Juta Johannesburg 1-7.

9 1984 (3) SA 327 (A) at 330 D-E.

incapacitating the offender, for example by imposing the death penalty. This method of coercing the offender directly can be described as **direct prevention**. A second method is so-called **indirect prevention** where the aim is to persuade the offender to cease his activities voluntarily.

2.7 In principle the aims or theories of punishment belong to one of three groups, namely the **absolute theory of retribution or the relative theories of prevention or a combination of these theories**.

**(i) The absolute theory - retribution**

2.8 In terms of the absolute theory of retribution, punishment is justified because a crime was committed. It is also known as the “justice” theory, because the injustice that has been brought about by the commission of a crime is said to be wiped out by the imposition of an equivalent evil upon the offender. **Punishment is imposed because it has been deserved**. It has also been described as the desire to make the offender suffer, not because it is good for him, not because suffering might deter him from further crime, **but simply because it is felt that he deserves to suffer**.

**(ii) Relative theories - prevention**

2.9 In terms of the relative theories, punishment is justified by the value of its consequences, namely the prevention of crime and crime must be prevented in order to protect society. The basic idea is that offenders **should become**, and citizens generally, **should remain**, law-abiding. Two types of prevention can be distinguished from this, namely individual prevention and general prevention.

**(a) Individual prevention**

2.10 Individual prevention is aimed at offenders who have already been convicted of crimes. The idea is that the offender should be prevented from repeating his criminal behaviour, be it through incapacitation or intimidation by the threat of punishment or through his rehabilitation. Thus the simplest way in which an offender can be prevented from repeating his crime is to render him permanently or temporarily incapable thereto (for example, by imposing the death penalty or imprisonment).

2.11 A further aim is individual deterrence. The underlying idea is that a person who has already been subjected to the pain that punishment brings about will be conditioned in the future to refrain from criminal behaviour.

2.12 A third aim under this heading that has become increasingly popular, is that the personality of the offender is to be influenced so that he or she can become a law abiding citizen (rehabilitation theory). Forms of punishment aimed at achieving this are periodical imprisonment or committal to a rehabilitation centre. Under this aim it has become customary to replace the unpleasant word “punishment” with “treatment” for the latter option.

## (b) General prevention

2.13 General prevention as an aim of punishment is regarded as justified in that it is calculated to discourage people in general from committing crimes. People are thus restrained from committing crimes by the threat of punishment rather than by the imposition of punishment.

2.14 General deterrence is the classical aim underlying the theory of general prevention. The underlying idea is that people refrain from criminal activities because they know that the unpleasant consequences of punishment follow the commission of crime.

2.15 One of the most important facets of general prevention is that the threat and imposition of punishment fulfills an educative, socialising or moralising function; - punishment is in the first instance a concrete expression of society's disapproval of the act and this helps to form and strengthen the public's moral code. Secondly, criminal laws are probably complied with by most law-abiding citizens because compliance with the law ensues automatically for them. Thirdly, the general preventive effect of the criminal sanction can also be seen in the role of the criminal law as an informer of the limits of legitimate and acceptable behaviour. Citizens also require orientation as to what conduct would expose them to punishment. Rules of conduct are unlikely to be followed unless they are reinforced by a sanction. Thus the threat of punishment is added to criminal provisions to provide a persuasion for persons to comply with these provisions.

## (iii) Integrative theories

2.16 Considerable criticism has been levelled against the retributive theory and the theories of prevention, pursued to their logical conclusion, also led to unacceptable results. Accordingly attempts have been made to integrate these different theories into a single theory. Retribution is thus taken as the basis in order to ensure that justice is done and the principle of proportionality between punishment and the gravity of the offence is applied in order to ensure that the application of the prevention theories, do not violate principles of justice as regards the offender.

### \* The legislative framework of sentencing in South Africa

2.17 The Criminal Procedure Act, 51 of 1977 makes provision for different types of punishment.<sup>10</sup> This section is the general enabling statutory provision as far as the various forms of punishment in criminal trials are concerned. Provision is, *inter alia*, made for the following forms of punishment-

- \* the death sentence;<sup>11</sup>

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10 Section 276.

11 Ruled to be unconstitutional by the Constitutional Court in *S v Makwanyane and another* 1995 (2) SACR 1 (CC).

- \* imprisonment, including imprisonment for life or imprisonment for an indefinite period;
- \* periodical imprisonment;
- \* declaration as a habitual criminal;
- \* a fine;
- \* a whipping;<sup>12</sup>
- \* correctional supervision; and
- \* imprisonment from which a person may be placed under correctional supervision in the discretion of the Commissioner.

2.18 That section is, however, subject to the provisions contained in the Criminal Procedure Act itself, as well as those contained in other laws or the common law. Courts of law may therefore impose the punishments they are entitled to impose under other legal provisions, or under the common law and section 276 is merely complementary to other penal provisions in the statute and common law. It is, however, not a general provision enabling courts to impose forms of punishment that do not fall within their jurisdiction. A court of law is still limited to its own prescribed sentencing jurisdiction.

2.19 The Criminal Procedure Act also contains certain specific provisions regarding the crimes for which, or the circumstances under which, certain forms of punishment may be imposed, for example periodical imprisonment, correctional supervision, declaration as a habitual criminal and declaration as a dangerous criminal.

2.20 Periodical imprisonment may, for example, be imposed for any offence, but a minimum of 100 hours and a maximum of 2,000 hours is stipulated in the Act and no other punishment may accompany it. Correctional supervision may be imposed for any offence, but it may only be imposed for a fixed period of three years. Declaration as an habitual criminal means that the offender will spend an unspecified period in prison of at least 7 years, it may only be imposed by a regional or high court, it is incompetent where the accused is under the age of 18 years and where the punishment which may be imposed, by itself or together with other sentences, would entail imprisonment for a period exceeding 15 years.

2.21 Declaration as a dangerous person may be imposed by a regional court and a high court if the offender represents a danger to the physical or mental well-being of other persons and if the community must be protected against the offender. The offender is sentenced to an indefinite period of imprisonment and the court is obliged to direct that the offender shall be brought before the Court on the expiration of a period determined by it and that does not exceed the jurisdiction of the court. A life sentence may also be imposed. Imprisonment for life may literally mean incarceration for the natural life of the offender. Current practice is that a prisoner is not considered for release until he has served at least 20 years (previously such consideration took

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12 Ruled to be unconstitutional by the Constitutional Court in *S v Williams and Others* 1995 (2) SACR 251 (CC).

place sooner). Such a person is considered for release after the Minister of Correctional Services has requested the advice of the National Advisory Council on Correctional Services. The approval of this Council is required before the prisoner may be released.

2.22 In respect of common law crimes such as assault, theft, rape, and so forth there is no statutory provision specifying the type of punishment. In such cases the courts may impose sentences up to the maximum provided for in the Act governing their criminal jurisdiction. The punishment jurisdiction of magistrates' and regional courts is determined by section 92 of the Magistrates Courts Act, 32 of 1944.

2.23 The range of punishment that may be imposed on a person convicted of a statutory crime is usually stipulated in the statute that creates the offence; that is, stipulated either in the definition itself or in a separate penalty clause. The regular punishment for statutory crimes is normally a fine or a period of imprisonment, which may not exceed a fixed maximum, or both.

2.24 Apart from the regular punishments provided for an offence, some statutes make allowance for an increased or further punishment in addition to the normal punishment prescribed, while other statutes provide for certain penalties and orders other than the regular or increased punishment, for example:

- \* In respect of certain crimes provision is made for increased punishment (fine and/or imprisonment) in the case of a second or subsequent conviction.<sup>13</sup>
- \* In respect of certain crimes the court is empowered, or even obliged, upon conviction, to enquire into and assess the monetary equivalent of any advantage that the convicted person may have gained in consequence of the commission of the crime, and in addition to any punishment that may be imposed, to impose a fine equal to the amount so assessed, or, in default of payment, imprisonment for a certain maximum period.<sup>14</sup>

\* **The court's discretion in sentencing**

2.25 The legislature's primary task is to define what conduct will be criminal and to provide a threat of punishment. It will ordinarily also prescribe the nature of the punishment that may be imposed and the maximum that may not be exceeded. The court's function is to impose punishment on offenders found guilty of the commission of crime. It is generally accepted that the South African Courts have a discretion to determine the **nature** and **extent** of the punishment

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13 See for example section 170 (1) and (2) of the Water Act, 54 of 1956; section 46 of the Atmospheric Pollution Prevention Act, 45 of 1965.

14 See for example section 11 (2) of the Physical Planning Act, 88 of 1967.

to be imposed within this framework.

2.26 Sentencers are also restricted by the framework of punishment created by the legislator. While judges have more freedom (except for maxima set by statutory penalty clauses, no other statutory limits apply to the criminal jurisdiction of the High Court), magistrates are more restricted. Within the legislative framework presiding officers are allowed much freedom, but the principles in terms of which they have to act have often been criticised as imprecise and vague. Certain statutory rules apply, for example, to the suspension and conditions of sentences. While it is frequently alleged that sentencers have a wide discretion, one should not lose sight of the limitations that do exist and that sentencers do not have an unlimited discretion as is sometimes alleged. In the sentencing process the sentencer is required to make a number of decisions and the freedom to do so differs, depending on the circumstances of the case, the particular legislative framework and the principles developed by the courts.

2.27 There are therefore two institutions which control the exercise of the sentencing discretion, namely relevant legislation and control exercised by the courts of appeal or review. It should, however, be noted that control by the courts has also been subjected to criticism. For example, in *S v Pieters*<sup>15</sup> it was stated that a court of appeal will only reverse a decision of the trial court if it appears that trial **court has exercised its discretion in an improper or unreasonable manner**. With regard to the latter, the courts have developed a number of tests for determining when it is appropriate to interfere with the trial courts' decision: for example, if the sentence imposed "induces a sense of shock" or if the sentence is "startlingly inappropriate" or if it reveals a "striking disparity" compared to the sentence that the court of appeal would have imposed as court of first instance.<sup>16</sup> These tests have been described as vague and unprecise.

2.28 In addition to the modes of control by appellate courts that has been described in the previous paragraph, these courts also exercise control by highlighting certain principles which have to be taken into account when deciding on the appropriate sentence. In the case of imprisonment, for example, the following principles have been developed by the courts:

- \* the sentence must be authorised through statute or common law;<sup>17</sup>
- \* it must be unaffected by misdirection;

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15 1987 (3) SA 717 (A).

16 See *S v M* 1976 (3) SA 644 (A); *S v N* 1988 3 SA 450 (A) at 465 I-J; *S v Petkar* 1988 (3) SA 571 (A).

17 *S v Pillay* 1977 (4) SA 531 (A).

- \* it must not be so severe that no reasonable court would have imposed it;<sup>18</sup>
- \* it is not to be imposed lightly or without serious reflection, this is especially true where all the requirements of punishment, as well as the aims thereof, can be satisfied by another form of punishment;
- \* for the first offender, imprisonment is usually not desirable and alternatives should be considered;<sup>19</sup>
- \* youth is a factor against imprisonment;
- \* first offendership or youth does not as a rule mean that imprisonment should not be imposed;<sup>20</sup> and
- \* high age is usually a factor against imprisonment.

2.29 Both the courts and the legislature have been criticised for the manner in which they control the sentencing discretion. The appellate courts have been criticised for their reluctance to interfere with the sentencing discretion exercised by the courts of first instance. Van Rooyen<sup>21</sup> states that in the absence of legislative guidelines, the Supreme Court finds itself in the position where it has to play an important role and fulfil a leadership function in developing a sound penal policy through the shaping of guidelines in respect of the sentencing discretion. However, rules are binding but principles are merely guidelines pointing in a general direction, compelling a court to give attention and consideration to certain matters, **but not compelling it necessarily to follow that direction**. By way of illustration, the principle that first offenders should not be sent to prison does not mean that first offenders may never be sent to prison. Other principles may well outweigh this particular principle.

2.30 Guidance by our appellate courts has also been described as vague and unsatisfactory. In *S v Scheepers*<sup>22</sup> Viljoen JA, for example expressed the view that imprisonment is justified to remove the offender from society only when it is necessary for the protection of the community and where the aims of punishment cannot be achieved through the imposition of an alternative

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18 *S v De Jager and Another* 1965 (2) SA 616 (A).

19 *Persadh v R* 1944 NPD 357, *S v M* 1990 (2) SACR 509 (E); *S v George* 1992 (1) SACR 250 (W).

20 *S v Victor* 1970 (1) SA 427 (A).

21 J H van Rooyen "The decision to imprison - the courts' need for guidance" 1980 SACC 228.

22 1977 (2) SA 155 (A).

sentence. This view was, however, rejected in *S v Holder*<sup>23</sup> where the court held that no court can prescribe to another court when to impose imprisonment.

2.31 The guidance provided by the courts is furthermore complicated by the different approaches in the case law to the so-called theories or aims of punishment, which are discussed below. In *S v Khumalo*<sup>24</sup> the court held that:

In the assessment of an appropriate sentence, regard must be had *inter alia* to the main purposes of punishment ... namely deterrent, preventive, reformatory and retributive ... **Deterrence has been described as the 'essential', 'all important', 'paramount' and 'universally admitted' object of punishment.** (Emphasis added).

2.32 In *S v Baptie*<sup>25</sup> the court observed that offenders who have a background of disordered mental conditions can usually be cured by **psychiatric treatment**. Therefore, in dealing with first offenders of that type, it seems proper that the court should suppress its dismay and disgust at the nature of the offences and should, in the interest of justice, endeavour to investigate matters such as the accused's social background, his domestic state, the sort of work that he does and his intellectual ability. It should also ascertain whether, if a suspended sentence is imposed, the accused is prepared to undergo psychiatric treatment to aid in addressing his or her particular condition.

2.33 In *S v B*<sup>26</sup> the court of appeal confirmed a sentence of five years imprisonment for attempted rape. The court subscribed to the view that, although in former times the emphasis was on retribution, **in modern times the retributive aspect has tended to yield to aspects of prevention and correction**. However, having regard to the circumstances of the case, the complainant, a girl of 16 years, was seriously manhandled by the appellant who showed no remorse afterwards, the court took the view that the magistrate did not overemphasise the retributive aspect and correctly applied the deterrent aims of the sentence both as far as the appellant himself, as well as others were concerned. The court confirmed the sentence of imprisonment.

2.34 In *R v S*<sup>27</sup> the accused was convicted of committing unnatural sexual acts with a number of boys. With regard to a proper sentence the court observed that, whilst appreciating the great

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23 1979 (2) SA 70 (A).

24 1984 (3) SA 3 SA 327 (A) at 330 D-E.

25 1963 (1) PH 96 (N).

26 1985 (2) SA 120 (A).

27 1956 (1) SA 649 (T).

importance of reformative measures in this type of cases, persons who have been guilty of depraved practices should not escape gaol sentences. The court should not encourage the belief that depraved conduct can be embarked upon with no consequence other than that of psychiatric treatment. **The court stated that the public would feel alarmed if no real punitive sanction is attached to such conduct.**

2.35 In *S v S*<sup>28</sup> the court of appeal accepted that the appellant was a sick man and that he required psychiatric treatment. However, the court observed that having regard to the serious nature of the offences committed, a period of imprisonment should nevertheless be imposed. The court also emphasised that **prevention is one of the main objects of punishment**, but emphasised that **imprisonment should serve as a warning to others not to indulge in similar conduct.**

2.36 In *S v B*<sup>29</sup> the court accepted that the accused had psychosexual problems and that he needed treatment. Having regard to the special circumstances of the case the court imposed a term of imprisonment suspended on condition that he underwent treatment. In *S v D*<sup>30</sup> the court of appeal held that the magistrate erred in emphasising the imprisonment of the accused as a means of removing him from contact with children. The court found that on the evidence it appeared that paedophilia was at least partially curable and incarceration was therefore not the only option. The court stated that the paedophile's illness, by definition leads to the commission of crimes against an extremely vulnerable segment of society. Thus, if there were no known form of treatment for paedophilia, then incarceration would be the only option to safeguard children from a paedophile's predations.

2.37 *S v D*<sup>31</sup> involved sexual abuse of children within a family context. The court observed that this conduct is often a manifestation of family pathology and it requires that attention should be given to the family, its composition and dynamics. Furthermore, in a criminal justice system a sentence should also address the future. Of importance is the court's observation that the sexual molestation of children represents a special form of criminal conduct. The person imposing sentence should ask himself whether, both as regards the particular individual he is dealing with as well as in regard to the interests of the community, it is possible to act in a reconstructive manner. The court set aside the sentence of imprisonment imposed by the magistrate and referred the matter back to the magistrate's court for reconsideration of sentence. The court of appeal also indicated that in the circumstances of the case it was far more likely that some or other form of compulsory treatment of the accused and the family under the sanction of a totally suspended sentence of imprisonment would be preferable.

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28 1977 (3) SA 830 (A).

29 1980 (3) SA 851 (A).

30 1989 4 SA 209 (C).

31 1989 (4) SA 709 (T).

2.38 In *S v E*<sup>32</sup> the trial court approached punishment for the indecent acts committed by the accused from the view that he needed urgent extra-custodial treatment, but because some term of imprisonment was unavoidable, it should be a short term so as not unduly to delay the commencement of treatment. On appeal the Appellate Division stated that the violation of the innocence of young children arouses the community's indignation and prompts it to call for measures to protect its youth. The penalties provided, therefore, understandably reflect the seriousness with which the legislature viewed these contraventions. However, the obvious need to deter would-be offenders, and society's desire for retribution, must be balanced against the primary need in this type of case to achieve in the long-term interest of society, the offenders' rehabilitation.

2.39 Finally, considering sentence in *S v R*<sup>33</sup> the Appellate Division highlighted the introduction of correctional supervision as a sentencing option and considered its appropriateness as a proper sentence for sexual offences. The court concluded that correctional supervision was a particularly appropriate sentence having regard to the circumstances of the case. The court held that as the accused had strong family ties and a stable job, his criminality had its origin in his personality defects, which would respond favourably to therapy, while imprisonment would have a negative impact on the accused. Although the offences were regarded as serious and the accused had a relevant previous conviction, **the court was of the opinion that the sentence should emphasise remedial treatment rather than retribution.**

\* **Mandatory sentences**

2.40 It is clear from the above that, for some kinds of offences at least, the treatment model has a great deal of support in South Africa. The legislative framework for each sentencing option has been criticised as leaving too wide a discretion to the courts and, as a result, in the history of our penal system, a number of attempts have been made to limit the sentencing discretion by providing for mandatory minimum sentences. By way of illustration, in 1952 the imposition of corporal punishment was mandatory under certain circumstances. In 1959 imprisonment for the prevention of crime and imprisonment for corrective training were introduced, the imposition of which were compulsory if certain requirements were met. The Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, 41 of 1971, for example also contained a number of mandatory sentences.

2.41 In the past the provisions containing mandatory sentences were subject to strong criticism. In *S v Toms*; *S v Bruce*<sup>34</sup> Chief Justice Corbett observed that:

**... the imposition of a mandatory minimum prison sentence has always been**

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32 1992 (2) SACR 625 (A).

33 1993 (1) SACR 209 (A).

34 1990 (2) SA 802 (A) at 817 C-D.

**regarded as an undesirable intrusion by the Legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted of statutory offences and as a kind of enactment that is calculated in certain instances to produce grave injustice.** (Emphasis added).

and Botha JA<sup>35</sup> expressed the following view:

It is not for me to comment on the policy of the legislature when once I have found an unavoidably clear expression of it in the Act. **But I am qualified, entitled and obliged to speak my mind on the effect of that policy on the administration of justice in the courts of the country, which is the sphere in which I function and on that level I find a legislative provision like s 126 A (1) (a), which reduces a sentencing court to a mere rubber stamp, to be wholly repugnant.** (Emphasis added).

\* **The methodology in sentencing adopted by our courts**

2.42 South African courts have often been criticised for adopting an intuitive approach to sentencing. There is a perception that most officials in the magistrates' courts pass sentence on an unscientific basis. Most magistrates have done what their more experienced colleagues did- impose sentences on the basis of a "feeling". In *S v Makhele*<sup>36</sup> this view was confirmed. The court ruled that it is unsatisfactory that responses to queries from reviewing judges regarding sentence amount to a mere repetition of the trite principles of sentencing together with the well known cases without the facts of the case and the personal circumstances of the accused having been determined.

2.43 At present the well-known *dictum* in *S v Zinn*<sup>37</sup> is regarded to be the point of departure in the sentencing process:

**What has to be considered is the triad consisting of the crime, the offender and the interests of society.** (Emphasis added).

2.44 The triad has been criticised as elementary, vague and unsophisticated. One of these criticisms is that the role of victims of crime is not emphasised. In subsequent decisions the triad has been referred to in somewhat different terms.<sup>38</sup>

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35 At 822 C-D.

36 1994 (1) SACR 7 (0).

37 1969 (2) SA 537 (A) at 540G.

38 *S v Khumalo* 1973 (3) SA 697 (A) at 698A.

Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.

and:<sup>39</sup>

In addition to the matter of punishment, the deterrent aspect calls for a measure of emphasis, lest others think the game is worth the candle. Nevertheless, the appellants must not be visited with punishments to the point of being broken. Punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy.

2.45 However, failure by the legislature to provide a clear and unambiguous legislative framework for the exercise of the sentencing discretion, failure by the courts to develop firm **rules** for the exercise of the sentencing discretion and failure by the courts and the legislature to give firm guidance as to which sentencing theories or aims carry the most weight, brought much uncertainty and inconsistency into the sentencing process in South Africa.

## **PROBLEMS IN RESPECT OF THE SENTENCING PROCESS IN SOUTH AFRICA**

2.46 A detailed discussion of criticism of the penal system in South Africa is not appropriate for the purpose of this issue paper. Some points of criticism are summarised below without claiming the list to be complete:

- \* **The existence of a sentencing discretion is the source of inconsistency and disparity in sentencing practices in South Africa .**
- \* **The legislative framework for control of the sentencing discretion is too broad and it enhances inconsistency and disparity in sentencing practices.**
- \* **The principles developed by the courts to limit or control the sentencing discretion are ineffective.**
- \* **The principles upon which a superior court will interfere with a sentence imposed by the court of first instance are vague and the lower courts are in desperate need of a comprehensive set of principles which can be used as basic guidelines in sentencing.**
- \* **There is great uncertainty as to which sentencing aim or theory should be pursued. In some cases it is suggested that deterrence is the most important consideration while others emphasise retribution or rehabilitation.**
- \* **There is a clear absence of a systematic approach to sentencing.**
- \* **Attempts by the legislature to control the sentencing discretion by the introduction of mandatory minimum sentences elicited strong criticism. In**

the Viljoen Commission's report<sup>40</sup> the Commission expressed its opposition to interference with the judicial discretion in the form of prescribing minimum sentences and sentences for corrective training (two to four years), prevention of crime (five to eight years) and the indeterminate sentence (nine to 15 years). It recommended that minimum sentences be abolished (and sentences for corrective training and prevention of crime were subsequently removed from the statute book).

- \* There is a clear absence of a structured sentencing policy and sentencing guidelines.
- \* Most sentencers appear to approach the question of sentencing in an intuitive and unscientific manner.
- \* Sentencing practices fail to protect the community from criminals committing serious offences.
- \* Release of convicted prisoners by the Parole Board before expiration of their sentences is severely criticised. It is regarded as interference by the Executive in the functions of the courts.
- \* Academics have highlighted a number of factors which, in the past, were regarded as justification for discrimination in sentencing, for example race, gender, class, economic position and political background.
- \* Many sentencers imposed sentences with a specific political background as a point of departure.

## CHAPTER 3

### OPTIONS FOR SENTENCING REFORM - AN INTERNATIONAL PERSPECTIVE

#### Background

3.1 Until two decades ago sentencers in most countries enjoyed a wide discretion to impose whatever sentence they deemed appropriate, subject only to prescribed maximum penalties. Furthermore, in many states sentences for serious offences comprised indeterminate or partially indeterminate periods of custody the duration of which was determined by parole authorities. In some countries, for example in England, a “tariff” was developed by the judiciary that broadly indicated a range of sentences for normal cases; defendants had a right of appeal where an excessive penalty beyond the tariff was imposed. In Australia the idea of a “tariff” was objectionable to judges in some states and sentencing was alleged to involve an intuitive synthesis.<sup>41</sup>

3.2 Internationally the existence of a sentencing discretion has led to criticism similar to that levelled against the approach followed in South Africa. Different sentences were imposed for different reasons without having to explain the sentence imposed by the court. Some sentences were imposed for deterrent reasons, others to rehabilitate offenders. Even the same judges were not consistent in sentencing. There was no agreement as to what criteria ought to be taken into account in the sentencing decision and what weight ought to be given to factors such as prior record, age, dangerousness, and so forth. The criticism of a lack of consistency was met with the response that sentences were individualized, that they were tailored to meet the needs of the accused and therefore that consistency in sentencing was not to be expected. The result was predictable, widespread sentencing disparity with similar cases being treated differently.

3.3 Another feature of the sentencing practices was the development of the so-called exemplary sentences. This resulted in offenders receiving sentences in excess of those imposed on others committing similar crimes. There was also a absence of “truth in sentencing” because offenders sent to prison were entitled to remission of sentence by parole boards. These disparities and inconsistencies were regarded unjust and unacceptable.

3.4 Furthermore, research evidence failed to demonstrate that individualized sentencing worked in terms of subsequent law abiding behaviour. Faith in the rehabilitative ideal was also undermined from the 1970s onwards and increasing knowledge of the extent of crime and the marginal inroads that policing and justice interventions made to detecting and punishing criminals, called into question the doctrine of deterrence.

3.5 In many jurisdictions concerns about the rising prison population fed a reformulation of opinion. In some states it was believed that the exclusive use of imprisonment, can serve to control and reduce crime. In Australia, in both New South Wales and in Victoria, an

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41 C Clarkson, R Morgan *The Politics of Sentencing Reform* Clarendon Press: Oxford (1995) at 4.

administration came to power which perceived a rise in the prison population to be the inevitable consequence of the tough law and order policies that they have adopted. However, at the same time these politicians encouraged more generous use of executive release. As a result, there are disparities between the sentences imposed and the sentences actually served. This development gave a renewed impetus towards “truth in sentencing”.

3.6 A combination of the factors outlined above provided fertile soil for the growth of the “justice” or “just deserts” movement. This meant that sentencing disparity had to be eliminated. This involved eliminating disproportionately long sentences, emphasising the need for truth in sentencing and that equal sentences had in practice to mean the same thing for different offenders. It was suggested that what was needed was a mechanism for ensuring that judicial discretion was controlled by **forcing judges to sentence in accordance with agreed and objective standards of desert.**

3.7 **Thus, on the international scene, a number of factors - rising crime rates, prison crowding, fiscal crises, loss of faith in the treatment paradigm, concern that just deserts be delivered, the need for public protection against dangerous offenders - have in recent years sharpened the debate about sentencing policy.**

3.8 **With the incidence of violent crime continuing to rise and public demands for harsher and more certain punishment increasing, many countries are examining sentencing of offenders with the view to instituting reforms. These reforms are primarily a response to criticism of rehabilitation attempts, but they also seek to accomplish differing goals, including reducing disparity that results from discretionary sentencing, increasing sentencing fairness, establishing truth in sentencing and balancing sentencing policy with limited correctional resources.**

## **SENTENCING REFORM IN THE UNITED STATES OF AMERICA.**

### **\* Background**

3.9 Prior to 1972 the practice of sentencing convicted criminals in federal courts was rarely criticized. Although legislatures prescribed either maximum lengths or specific ranges for sentences, the practice of sentencing was largely left to the discretion of federal judges. In fact there was a trend towards expanding judicial discretion in sentencing.

3.10 In 1972, District Court Judge MF Frankel sounded the alarm on the long established system of sentencing in the United States. He stated that **the almost wholly unchecked and sweeping powers** given to judges in the fashioning of sentences were terrifying and intolerable for a society that professes devotion to the rule of law. According to Frankel the source of the problem was the practice of indeterminate sentencing in which judges sentenced convicted criminals to vaguely specified ranges of time (for example five to ten years) and the fact that an

unaccountable Parole Commission determined when the sentence should expire.<sup>42</sup> He argued that the form of the sentence which judges imposed provided no check on arbitrary decision-making. As a result there was a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of justice. Frankel demanded that the **legislature** determine the value - laden issue of the basic purposes that punishment and sentencing should accomplish. He argued that, whatever individual preferences might be, **it was for the legislature to decide and prescribe the legitimate bases for criminal sanctions.** Therefore, once these issues of societal values were settled by the legislature, it would constrain the judiciary's role to that of implementing the democratically determined policy.

3.11 Senator Edward Kennedy responded to Frankel's call and three years after the initial call, Kennedy introduced his first sentencing reform Bill. Doubting the legitimacy of rehabilitation as a proper systematic rationale for sentencing, Kennedy propagated that the legislature should guide the judiciary in choosing a new rationale. A second notion underlying the sentencing reform was the problem of disparity in sentences and the underlying problem of persistence of discrimination in sentencing, most notably racial and class discrimination. These reform efforts resulted in the enactment of legislation which allowed the promulgation of the Federal Sentencing Guidelines in 1987.

3.12 Sentencing guidelines developed by an independent sentencing commission, have since the late 1970's, represented the dominant approach to sentencing reform in the United States. Many States have replaced the indeterminate sentencing with **structured sentencing schemes** such as determinate sentencing, mandatory minimum penalties, and sentencing guidelines.

3.13 The goals of **structured sentencing** are -

- \* to increase sentencing fairness;
- \* to reduce unwanted disparity, either in the decision to imprison or in the length of the sentence;
- \* to establish truth in sentencing; and
- \* to establish a balance of sentencing policy with limited correctional services.

3.14 It was furthermore claimed that **structured sentencing reforms** could be used to **deter potential offenders and incapacitate dangerous offenders** and it could also be used to reduce the likelihood and length of imprisonment for the so-called non-dangerous offenders.

3.15 For the purpose of understanding these reforms it is necessary to have a clear understanding of certain definitions. The following terms are therefore explained:

**Determinate sentencing:** Sentences of incarceration in which an offender is given a

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42 M A Adams "The Federal Sentencing Guidelines as Legal Process Jurisprudence" *American Criminal Law Review* Vol 31 259 at 262.

fixed term that may be reduced by good time or earned time.

**Indeterminate sentencing:** Sentences in which an administrative agency, generally a parole board, has the authority to release an offender and determine whether an offender's parole will be revoked for violations of conditions of release.

**Mandatory minimum sentences:** A minimum sentence that is specified by the State and that may be applied for all convictions of a particular crime with special circumstances, for example robbery with a fire-arm or selling drugs to a teenager within 1000 feet of a school.

**Presumptive sentencing guidelines:** Sentencing that meets the following conditions: (1) the appropriate sentence must be authorized by sentencing guidelines developed by a legislatively created body, usually a sentencing commission; (2) sentencing judges are expected to sentence within the range or provide written justification for departure from the range; (3) the guidelines must provide a mechanism for review of the departure. Presumptive guidelines may employ determinate or indeterminate sentencing structures.

**Voluntary advisory sentencing guidelines:** Recommended sentencing policies that are not required by law. They are usually based on past sentencing practices and serve as guide to judges. Legislation has not mandated their use. They may also employ determinate or indeterminate sentencing structures.

\* **Current sentencing practices in the USA**

3.16 An unprecedented number of structured sentencing reforms have taken place over the past two decades in the United States of America. To date, 16 States and the Federal Government have implemented or are about to implement **presumptive or advisory sentencing guidelines**. Five states adopted determinate sentencing systems.

3.17 All states employ some version of **mandatory minimum sentencing laws** which target **habitual offenders and the crimes of possessing a deadly weapon, driving under the influence of alcohol and possessing and distributing drugs**.

3.18 In all the States where sentencing guidelines were adopted a sentencing commission was appointed with the mandate to develop sentencing guidelines. In the enabling legislation these commissions are required to meet the multiple goals of punishment, i.e just deserts, deterrence, incapacitation and rehabilitation. Of concern is the ability to individualize sentencing and to consider a wide range of sentencing purposes. Most States have attempted to control the individualization of judicial practices while maintaining that sentences should consider the full range of traditional sentencing purposes. In Pennsylvania, for example, judges are required to consider the offenders' rehabilitative potential and community protection as well as the guidelines. In Washington the enabling legislation mandates that sentencing guidelines incorporate the goals of retribution, incapacitation, rehabilitation and frugal use of correctional resources.

3.19 **It is claimed that under the system of sentencing guidelines repeat offenders and offenders convicted of violent crimes are much more likely to be imprisoned and thereby and serve longer prison terms. Conversely, first-time offenders charged with property crimes are less likely to be imprisoned.**

3.20 It should be noted that the development of sentencing guidelines is a long and expensive process. Before guidelines can be developed, detailed data on current sentencing practices are obtained and analyzed and a simulation model is established for estimating the impact of the proposed guidelines on prison, parole, probation and jail populations,

3.21 In the USA the sentencing guidelines in Minnesota have been in effect the longest and have generated the most extensive body of sentencing data, case-law, amendments and evaluative literature and is therefore regarded to be the best model for reference.

\* **The Minnesota sentencing guidelines**<sup>43</sup>

3.22 In 1978 the Minnesota Sentencing Guideline Commission was created to develop sentencing guidelines. The new guidelines were to govern sentencing in all felony cases (crimes punishable by more than one year of imprisonment). The Commission had two specific directions, namely (1) to develop guidelines which were to specify presumptively correct prison-commitment and prison duration rules for each combination of appropriate offence and offender characteristics and (2) the Commission was to take previous sentencing practices and existing correctional resources into consideration. Furthermore, the enabling statute abolished parole and provided that the entire term of imprisonment must be served, subject only to limited reductions for good behaviour.

3.23 The Commission subsequently developed a set of guidelines centred around a sentencing grid (for an illustration see the table below). **The two major determinants of the presumptive sentence are the severity of the most serious conviction offence and the defendant's criminal - history score** (based on prior felony convictions). These two factors place each defendant in one of the cells of the grid. The numbers in the cells represent the duration of the recommended prison sentence in months. The black line across the grid is the disposition line, in cells below this line, the guidelines recommend that the prison sentence be executed immediately. The single number at the top is the recommended best sentence, but a range is also provided within which the sentence could fall without being deemed a departure.

3.24 Above the disposition line, the guidelines generally recommend a stayed (suspended) prison sentence equal to the number of months shown in the cell. Such stayed sentence is normally accompanied by several conditions such as incarceration in a local jail for up to a year.

3.25 The prescribed sentence is presumed to be correct, but the court may depart from the recommendation if it finds that substantial and compelling circumstances call for a different sentence. In that case the judge must state reasons for departure from the sentence. If the accused goes to prison the term imposed will be reduced by a third for good behaviour. Thus a 36 - month guidelines sentence becomes a 24-month sentence.

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43 R S Frase "Sentencing Guidelines in Minnesota and other American States: A Progress Report" in *The Politics of Sentencing Reform* 1995 169 et seq.

### The Minnesota Sentencing Grid - presumptive sentencing lengths in months

Severity levels of conviction offence	0	1	2	3	4	5	6 or more
Sale of a simulated I controlled substance	12 <sup>a</sup>	12 <sup>a</sup>	12 <sup>a</sup>	13	15	17	19 18-20
Theft-related crimes II (\$2,500 or less) Cheque forgery	12 <sup>a</sup>	12 <sup>a</sup>	13	15	17	19	21 20-22
Theft crimes III (\$2,500 or less)	12 <sup>a</sup>	13	15	17	19 18-20	22 21-23	25 24-26
Non-residential IV burglary Theft crimes (over \$2,500)	12 <sup>a</sup>	15	18	21	25 24-26	32 30-34	41 37-45
Residential burglary V simple burglary	18	23	27	30 29-31	38 36-40	46 43-49	54 50-58
Criminal sexual VI conduct, 2nd degree (a) and (b)	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
Aggravated VII robbery	48 44- 52	58 54-62	68 64-72	78 74-82	88 84-92	98 94- 102	108 104-112
Criminal sexual VIII conduct, 1st degree Assault, 1st degree	86 81- 91	98 93- 103	110 105- 115	122 117- 127	134 129- 139	146 141- 151	158 153-163
Murder, 3rd degree IX Murder, 2nd degree (felony murder)	150 144- 156	165 159- 171	180 174- 186	195 189- 201	210 204- 216	225 219- 231	240 234-246
Murder, 2nd degree X (with intent)	306 299- 313	326 319- 333	346 339- 353	366 359- 373	386 379- 393	406 399- 413	426 419-433

3.26 It is important to note that the **presumptive sentences are almost entirely based on prior record and current offence severity** (which research showed to be the two most important factors in previous judicial and parole decisions). The Commission stated that it adopted a sentencing theory of 'Modified just deserts'. **Thus retributive values were the**

**primary determinant of the presumptive sentence and criminal history plays an important role.**

3.27 A further important development was the fact that maximum penalties for violent crimes were raised in 1989 and again in 1992 after a round of public hysteria prompted by two highly publicized rape-murders. Drug penalties were also increased steadily and the legislature periodically displayed impatience with presumptive sentencing rules by creating or expanding statutes requiring a mandatory minimum prison term (eg for use of a dangerous weapon and for certain recidivists). Some of these statutes are truly mandatory - the court has no power to impose any lesser sentence, others have been interpreted merely to prescribe the minimum sentence if the court choose prison. An important development was that the guidelines enabling statute was amended in 1989 to specify that the Commission's **primary goal in setting guidelines should be public safety while correctional resources remain a factor but no longer a substantial consideration.**

\* **Sentencing in the US federal jurisdiction**

3.28 In 1984 Congress enacted sweeping and dramatic reforms of the federal sentencing practices through the passing of the Sentencing Reform Act. The Act was part of a comprehensive Crime Control Act the purpose of which was to address the problem of crime in society. **The goals of the Sentencing Reform Act were to reduce disparity in sentencing, increase certainty and uniformity and to correct past patterns of undue leniency in sentencing.**

3.29 To this end the United States Sentencing Commission was created with an overriding mandate to determine the appropriate type and length of sentences for each of the federal offences. At the same time parole was eliminated so that sentences announced would be sentences served. Discretion previously vested in the federal judiciary to set sentences were to be vastly curtailed by mandatory guidelines promulgated by the Commission. The first set of guidelines was implemented in January 1989.

3.30 The Sentencing Reform Act had clear goals and for the purpose of this paper it is deemed necessary to refer to the provisions dealing with the imposition of a sentence:

**Section 3553 Imposition of a Sentence:**

- (a) **Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed shall consider-
  - (1) The nature and circumstances of the offence and the history and characteristics of the defendant;
  - (2) The need for the sentence imposed -
    - (A) to reflect the seriousness of the offence, to promote respect for the law,

- and to provide just punishment for the offence;
- (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentence available;
  - (4) the kinds of sentence and sentencing range established ... (by the United States Sentencing Commission guideline)
  - (5) any pertinent policy statement issued by the Sentencing Commission ...
  - (6) the need to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct; and
  - (7) the need to provide restitution to any victim of the offence.
- (b) The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing Guidelines, policy statements, and official commentary of the Sentencing Commission...
  - (e) Upon motion of the government, the court shall have the authority to impose a sentence below a level established by the statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offence. Such a sentence shall be imposed in accordance with the Guidelines and policy statement issued by the Sentencing Commission...

**3582 (a) The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation ...**

3.31 The sentencing guidelines drafted by the US Sentencing Commission seek to address the key aspects of the sentencing decision where unwarranted disparities were allowed in the past. To this end similar offences are grouped together and assigned the same offence level. Offence characteristics are considered to help determine the seriousness of the offence. Certain adjustments are allowed to gauge the offence seriousness and to allow for individualisation of punishment, for example the defendant's role in the commission of the crime and his degree of culpability. The guidelines also credit a defendant who is truly remorseful. On the other hand the sentence is increased where the defendant has a significant record of prior criminal activity. The guidelines provide for a range of appropriate sentences within which the sentencer may consider

factors such as family ties, community involvement and degree of sophistication. If the sentencing judge finds an unusual mitigating or aggravating circumstance not reflected in the guidelines he may depart from the prescribed sentencing range for valid reasons stated in open court and such decision is subject to review or appeal.

\* **Mandatory minimum sentencing in the USA**

3.32 In the US Federal Code over 60 criminal statutes contain mandatory minimum sentences. However, only those related to drug offences and weapon offences account for the most convictions. In mandating minimum sentences one of the goals was to eliminate sentencing disparity for certain offences. Certain categories of offences were identified and Congress designated appropriate penalties below which defendants were not to be sentenced.

3.33 A number of reasons are advanced as justification for the enactment of mandatory minimum sentencing. These motivations include:

**Retribution/Just deserts** - In simple terms it is argued that the punishment should fit the severity of the crime.

**Incapacitation** - It is vital to make use of incapacitation of serious offenders to protect the community.

**Disparity** - Mandatory minimum sentences reduce unwarranted disparity in sentencing.

**Inducement of cooperation** - Mandatory minimums may help induce defendants to cooperate with authorities.

3.34 In the USA Congress persistently targeted drug related and violent crimes to receive mandatory minimum sentences. It was stated that there is **a need for the continuation of the policy of punishment of a severe character as a deterrent to narcotic law violations. In order to define the gravity of that class of crimes, mandatory sentences were regarded as an essential element of the desired deterrents.**

3.35 However, during 1991 the US Sentencing Commission was requested to examine the continued use of mandatory sentences.<sup>44</sup> After empirical research, the US Sentencing Commission concluded in its report that despite the expectation that mandatory minimum sentences would be applied to all cases that meet the statutory requirements, the available data suggested that it was not case. In a vast number of cases defendants were sentenced below the applicable statutory minimum, resulting in sentencing disparities. Mandatory minimum sentences were wholly dependent upon defendants being charged with and convicted of the specified offence under the mandatory minimum statute. To the extent that prosecutorial discretion was exercised with preference to some offences, and to the extent that some defendants were convicted of conduct carrying a mandatory minimum penalty while others who engage in similar conduct were not so convicted, the use of mandatory minimum penalties again introduced

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44 United States Sentencing Commission *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (1991).

sentencing disparity.

3.36 In contrast the guidelines promulgated by the Sentencing Commission were regarded a self correcting and ever-improving system which reflected amendments to the guideline system in an iterative fashion. Therefore, amendments reflected changes in statutory maximums, directives received from Congress, empirical research on the effect of the guidelines, emergent case law, the changing nature of crime, changing priorities in prosecution and developments in knowledge about effective crime control. Mandatory penalties on the other hand were single-shot efforts at crime control intended to produce dramatic results but they lacked a built-in mechanism for evaluating their effectiveness and adjustment.

3.37 **The Sentencing Commission concluded that the guideline system, because of its ability to accommodate the vast array of relevant offence-offender characteristics and because of its self-correcting potential, was regarded to be superior to the mandatory approach. The most efficient and effective way for Congress to exercise its powers to direct sentencing policy was therefore through the established process of sentencing guidelines.**

3.38 **Not only the Sentencing Commission but also the courts criticised mandatory sentences.** In **United States v Madkour**<sup>45</sup> the court commented as follows on the sentencing practice of mandatory penalties:

This type of statute ... does not render justice. This type of statute denies the judges of this court and of all courts, the right to bring their conscience, experience, discretion and sense of what is right into sentencing procedure, and it, in effect, makes a judge a computer, automatically imposing sentences without regard to what is right and just. **It violates the rights of the judiciary and of the defendants, and jeopardizes the judicial system.**

\* **Three strikes legislation in the USA**

3.39 In a referendum in 1993 voters in the state of Washington approved a proposition calling for the introduction of a **“three strikes and you’re out”** law, that is, a law imposing mandatory life sentences on offenders with two previous felony convictions who are subsequently convicted of a third felony. The law was duly passed and subsequently several other states considered and in some instances adopted similar laws. The **Federal Violent Crime Control and Law Enforcement Act of 1994** also contains a three strikes provision. Over the past few years such legislation gained widespread acceptance in the United States as a means of combatting serious crime.

3.40 In 1994 the California legislature responded to public pressure to enact legislation that would mandate longer sentences for recidivists by approving the “Jones-Costa Three Strikes

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45 930 F. zd 234 (2d Cir. 1991).

Bill".<sup>46</sup> This Bill has been an influential example of "Three Strikes" legislation. For first time felony offenders the statute leaves in tact the sentencing guidelines, for second time offenders the new law doubles the minimum required sentence. The centrepiece of the legislation is, however, its "Three Strikes" provision which mandates that state courts sentence to an "indeterminate term of life imprisonment" those individuals previously convicted for two or more serious and/or violent felonies. Section 667 (e)(2)(A) of the California Penal Code reads as follows:<sup>47</sup>

If a defendant has two or more prior felony convictions ... that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: (i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions. (ii) Imprisonment in the state prison for 25 years. (iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under [Section 1170], or any period prescribed by Section 190 or 3046.

3.41 Three Strikes legislation has been criticised on a number of grounds. The California legislation has been criticised for being over-inclusive as it extends its reach to non-violent offences by treating property crimes in the same way as violent crimes. It is also criticised as an imprecise method of incapacitating truly dangerous criminals because a two-time cheque forger caught committing a non-violent residential burglary must, under the Act, receive a life term in prison. It is argued that it does not promote long term crime prevention since it fails to address the socio-economic roots of the crime problem and it places a huge financial burden on the taxpayers because it increases the number of years that convicts will have to spend in prison.

3.42 Judges are frustrated because the mandatory nature of the law means that they have to impose a sentence which they may not regard as just in the particular circumstances. For prosecutors the law removes the ability to offer a shorter sentence as an incentive for a plea of guilty to a lesser offence and thus impedes the efficient disposal of cases through plea bargaining. From the defendants' point of view the fact that they cannot expect a lesser sentence in exchange for a plea of guilty encourages such offenders to take their chances in court in an attempt to avoid life imprisonment. In Washington the legislation has increased the incidence of resistance to arrest as offenders seek to avoid the inevitable life imprisonment. The result is an increase in the human and financial costs of law enforcement. Because of their inflexibility, such laws sometimes result in the imposition of sentences in individual cases which everyone involved believes to be unjustly severe. Furthermore, they encourage hypocrisy on the part of prosecutors and judges, since officials engage in adaptive responses and circumventions to avoid injustices, for example, in plea bargaining armed robbery is reduced to robbery or aggravated assault to assault. When judges and prosecutors engage in circumventions to sidestep mandatory sentences, important values are being sacrificed. In a sense such practices are dishonest and they undermine the integrity of the judicial system.

## SENTENCING IN SWEDEN

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46 See "Recent Legislation" *Harvard Law Review* Vol 107:2123.

47 See *Harvard Law Review* 2124.

\* **Background**

3.43 In Sweden new provisions covering the determination of sanctions i.e choice of sanction and determination of punishment were introduced into the Penal Code's provisions on January 1 1989 with the aim of increasing the predictability and consistency of penal decision-making.<sup>48</sup> In terms of these provisions **the punishment is determined by the penal value attributed to the offence which requires special consideration to be given to the harm, wrong or danger occasioned by the criminal act, what the offender realised or ought to have realised about it, as well as his intentions or motives. A number of aggravating circumstances are provided, for example whether the offender exploited another persons' vulnerability. Special consideration must also be given to a number of mitigating circumstances in assessing the penal value. Guidance is also given on the impact of previous criminality and factors over and above the penal value of the crime to which the court may give consideration. Imprisonment is used where the penal value is high and when the offender's previous record is such that it precludes consideration of any other sentence.**

3.44 For the purpose of this paper the relevant provisions are quoted in some detail:<sup>49</sup>

**Section 1**

**The punishment shall be imposed within the statutory limits according to the penal value of the crime or crimes, and the interest of uniformity in sentencing shall be taken into consideration.**

**The penal value is determined with special regard to the harm, offence, or risk which the conduct involved, what the accused realized or should have realized about it, and the intentions and motives of the accused.**

**Section 2**

Apart from circumstances specific to particular types of crime, the following circumstances, especially, shall be deemed to enhance the penal value:

1. whether the accused intended that the criminal conduct should have considerably worse consequences than it in fact had;

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48 See R Henham "The European Context of Sentencing Violent Offenders 1993 Vol 21" *International Journal of Sociology of Law* 265 -280; Nils Jareborg "The Swedish Sentencing Reform" in *The Politics of Sentencing Reform* edited by C Clarkson and R Morgan Clarendon Press: Oxford 1995.

49 Nils Jareborg "The Swedish Sentencing Reform" 101 and further (Emphasis added).

2. whether the accused has shown a special degree of indifference to the adverse consequences of the offence;
3. whether the accused made use of the victim's vulnerable position, or his other special difficulties in protecting himself;
4. whether the accused grossly abused his rank or position or grossly abused a special trust;
5. whether the accused induced another person to participate in the deed through force, deceit, or abuse of the latter's youthfulness, lack of understanding, or dependent position; or
6. whether the criminal conduct was part of criminal activity that was especially carefully planned, or that was executed on an especially large scale and in which the accused played an important role.

### Section 3

Apart from what is elsewhere specifically prescribed, the following circumstances, especially, shall be deemed to **diminish the penal value**:

1. whether the crime was provoked by another's grossly offensive behaviour;
2. whether the accused, because of mental abnormality or strong emotional inducement or other cause, had a reduced capacity to control his behaviour;
3. whether the accused's conduct was connected with his manifest lack of development, experience, or capacity for judgment; or
4. whether strong human compassion led to the crime.

The court may sentence below the statutory minimum when the penal value obviously calls for it.

### Section 4

Apart from the penal value, the court shall in measuring the punishment, to a reasonable extent take the accused's **previous** criminality into account, but only if this has not been appropriately done in the choice of sanction or revocation of parole. In such cases, the extent of previous criminality and the time that has passed between the crimes shall be especially considered, as well as whether the previous and the new criminality is similar, or whether the criminality in both cases is especially serious.

### Section 5

In determining the punishment, the court shall to a reasonable extent, apart from the penal value, consider:

1. whether the accused as a consequence of the crime has suffered serious bodily

- harm;
2. whether the accused, according to his ability, has tried to prevent, or repair, or mitigate the harmful consequences of the crime;
  3. whether the accused voluntarily gave himself up;
  4. whether the accused is, to his detriment, expelled from the country in consequence of the crime;
  5. whether the accused as a consequence of the crime has experienced or is likely to experience discharge from employment or other disability or extraordinary difficulty in the performance of his work or trade;
  6. whether a punishment imposed according to the crime's penal value would affect the accused unreasonably severely, due to advanced age or bad health;
  7. whether, considering the nature of the crime, an unusually long time has elapsed since the commission of the crime; or
  8. whether there are other circumstances that call for a lesser punishment than the penal value indicates.

If, in such cases, special reasons so indicate, the punishment may be reduced below the statutory minimum.

#### **Section 6**

The sanction is to be remitted entirely when, with regard to circumstances of the kind mentioned in section 5, imposing of a sanction is manifestly unreasonable.

#### **Section 7**

If someone has committed a crime before the **age of 21, his youth shall be** considered separately in the determination of the punishment, and the statutory minimum may be disregarded. Life imprisonment is never to be imposed in such cases.

### **SENTENCING IN GREECE<sup>50</sup>**

3.45 The Greek Penal Code (Chapter 16) details a considerable number of offences classed as Bodily Injury, viz. Article 308, **Simple Bodily Injury**; Article 309, **Grievous Bodily Injury**; Article 310, **Severe Bodily Injury**; Article 311, **Deadly Injury (i.e. bodily injury causing death)**; Article 312, **Bodily Injury of Minors**; Article 313, **Brawling**; Article 314, **Negligent Bodily Injury**. Guidance is given as to the meaning of severe illness of the mind or body of the victim that constitutes the offence of Severe Bodily Injury under Article 310 i.e. **it exists if, as a result of the offence, the victim is in danger of his life or contracts a severe and lengthy illness or is**

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50 R Henham "The European Context of Sentencing Violent offenders" 1993 Vol 21 *International Journal of the Sociology of Law* 265 at 274 - 276.

**seriously mutilated or in any way prevented from using his mind or body for a long period of time and to a serious extent.**

3.46 The Penal Code also details **several articles dealing with how the court should fix a sentence within the parameters identified** by the Code. Article 79 of the Penal Code (Judicial Computation of Punishment) **provides that the court, when fixing sentence, must in determining the nature of the offence consider:**

- (a) the injury resulting or the danger presented;**
- (b) the quality, type and purpose of the offence as well as circumstances attending its preparation or commission; and**
- (c) the extent of intent or degree of negligence of the offender.**

3.47 The court must also give reasons justifying the imposed punishment. These are particularly important and their absence may theoretically result in a successful appeal to the Supreme Court. In practice the Supreme Court has held that general reference to the appropriate legal terminology is sufficient without any specific reference to particular circumstances. Greek provisions do not attempt to detail specific guidance on degrees of seriousness within offence categories that can be directly related to sentencing provisions. Calculation of punishment is confined to issues that are dealt with in England in the context of the Court of Appeal's sentencing principles. **One important goal of Greek criminal policy during recent years has a direct bearing on sentencing violent offenders. This is to expand the alternatives to imprisonment in common with most western European countries. Non-custodial penalties are not expressly provided by the Greek Penal Code although a number of unrelated alternatives are mentioned. Hence, for less serious offences (petty violations) resulting in custody, Article 82 provides that all custodial sentences not exceeding six months will as a rule be converted into pecuniary penalties. The court must give specific reasons for its decision and must take into account the financial circumstances of the offender when setting the specific pecuniary penalty. However, non-custodial sanctions are not available for felonies and most misdemeanours, but, if the imposed sentence for any offence, that is the sentence fixed following mitigation, does not exceed 18 months imprisonment conversion is possible.**

## **SENTENCING IN GERMANY<sup>51</sup>**

3.48 The German Penal Code (GFR, Section 17) **distinguishes a number of offences according to their relative seriousness** (viz. paragraph 223) for example **bodily harm** (paragraph 223a), **dangerous bodily harm** (paragraph 224), **aggravated bodily harm** (paragraph 225), **intentional aggravated bodily harm** (paragraph 230) and **negligent bodily harm**. **Dangerous bodily harm involves the use of a weapon, or sneak attack, or action**

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51 Op cit 276.

**by several persons acting in concert, or by life endangering act.** The possible use of a weapon is also contemplated by the English offence of malicious wounding and inflicting grievous bodily harm under section 20 of the Offences against the Persons Act (1861), although no guidance is provided as to what constitutes grievous bodily harm. Paragraph 225 of the Penal Code states that **aggravated assault is committed if the victim suffers loss of an important part of his body, sight in one or both eyes, hearing, speech or his or her procreative capacity, or the assault results in a serious permanent deformity or deteriorates into invalidity, paralysis or mental illness.**

3.49 **Judicial sentencing** is circumscribed by legislative scaling of penalties which provides for cases which differ in gravity from the average type of offence and do not fit within the normal levels provided. In such cases judges may evaluate aggravating or mitigating circumstances according to guideline examples or exercise complete discretion if necessary. As Huber (1982: 21) argues-

**this statute therefore ensures through careful gradation of the different forms of commission of the offence that a certain uniformity is achieved in sentencing and, at the same time, that the judge retains his discretion to consider the actual case under trial with regard to individuality of the act and the actor.**

3.50 There is still, however, considerable scope for judicial discretion in fixing the actual prescribed sanction within the upper and lower limits, although the Penal Code provides explicit principles for determination of punishment in paragraph 46. Apart from stating in paragraph 46(1) that the **foundation of punishment is guilt and that the judge must consider the effects of the punishment on the offender's future life, many factors circumscribe how the nature and extent of any penalty is decided with reference to the purpose of punishment in the individual case.**

3.51 **The principles of punishment in paragraph 46 state that all the circumstances, both mitigating and aggravating, must be taken into account by examining certain listed factors. For example, the motives and aims of the offender, the manner of perpetration and the wrongfully caused effects of the act, the offender's conduct after the crime are cited as relevant. It is significant that paragraph 46(3) specifically states that circumstances that already represent the statutory constituent elements of the crime may not be taken into account. Mitigation rules are presented in paragraph 49 which provide margins for replacing the sanction originally imposed.**

## **SENTENCING IN ENGLAND AND WALES**

3.52 Sentencing law in England is complex and maximum penalties for criminal offences are scattered among a large number of criminal statutes dating back in some cases to 1861. **It is generally criticised for its lack of any logical structure or coherence in their arrangement.** It has been the habit of Parliament to change maximum penalties for individual offences in a piecemeal manner, usually by increasing them in response to a particular clamour. This resulted in a number of anomalies, for example **a man who fondles the breasts of a 15 year-old girl with her consent commits indecent assault punishable with ten years imprisonment. If he goes further and has sexual intercourse with her consent, he is guilty of unlawful**

**sexual intercourse, an offence punishable with a maximum of two years imprisonment.**

3.53 This piecemeal approach to law reform in respect of sentencing has characterised English sentencing legislation. It has resulted in a maze of statutory provisions spread among a large number of statutes, many of which were amended so frequently that they bear little or no relationship to the provision enacted originally. Establishing the law that should be applied in a particular case is accordingly very difficult and this is complicated by the fact that statutory provisions are frequently enacted, but not brought into force.

3.54 The Criminal Justice Act, 1991 provided for the first time in England and Wales a reasonably coherent statutory framework for the selection of financial, community and custodial sentences. In line with the White Paper, *Crime Justice and Protecting the Public*,<sup>52</sup> the sentencing principles in the Act are primarily based on just deserts while other traditional sentencing objectives such as deterrence, rehabilitation and incapacitation are given less prominence.

3.55 In the White Paper it was explicitly stated that **the severity of the sentence should be directly related to the seriousness of the offence. However, this principle was abandoned in the case of violent offenders posing a threat to public safety in favour of protective sentencing for such offences. The main objective of sentencing was to express the principles of denunciation and retribution.**

3.56 The **criteria for the imposition of a custodial sentence** and for determining its length are set out in the Act. A court **is allowed to impose a custodial sentence only if the offence committed by the offender, considered in isolation or in combination with other offences, is so serious that only a custodial sentence can be justified for the offence.** No definition or explanation of seriousness is provided, but it is stated that in assessing the seriousness of an offence, a court may have regard only to the circumstances of the offence and in particular that previous convictions and the offender's response to previous sentences must be disregarded for this purpose.<sup>53</sup>

3.57 In **determining the length of a custodial sentence** the court is to impose a sentence that is **commensurate with the seriousness of all the offences for which the offender is being sentenced**,<sup>54</sup> again, previous conviction are to be disregarded in assessing the seriousness of the offences. In relation to the imposition of a custodial sentence, and the determination of the length of a custodial sentence, the court is allowed to take account of aggravating factors of an offence disclosed by the circumstances of other offences committed by the offender. Courts are allowed to mitigate a sentence by reference to any factors that are

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52 Cm 965, 1990.

53 See sections 3(3) and 29(1).

54 See section 2(2)(a).

considered relevant in mitigation.<sup>55</sup>

3.58 Corresponding rules were enacted to govern the imposition of community orders. A unit fine system was enacted applicable to the magistrates' courts only. In determining the amount of a fine in all but a few exceptional cases, the court is required to determine the number of units that is commensurate with the seriousness of the offence or offences and then calculate the value of the unit in the case of defendant. The unit represents the offender's weekly disposable income: it would be at least £4 in the case of an adult and never more than £100.

3.59 In 1996 a new White Paper on sentencing reform titled *Protecting the Public: The Government's Strategy on Crime in England and Wales*<sup>56</sup> was published. The White Paper contains far reaching proposals in respect of sentencing. The White Paper **proposed the abolition of parole and proposes that any term of imprisonment imposed by the court should be served in full**. However, for the first 12 months of a sentence, or all of a sentence of less than 12 months, a prisoner would be able to earn a small discount of six days a month by co-operating with the prison authorities. Furthermore, **it is proposed that as a matter of general principle a sentencer should not have regard to the possibility of releases when determining the length of a fixed term of imprisonment**.

\* **Mandatory sentences**

3.60 The White Paper contains a number of proposals on mandatory sentences. It is, for example, proposed that **serious violent and sexual offenders convicted a second time would automatically receive a life sentence**, with the tariff fixed by the judge. The tariff would be based on objectives of retribution and deterrence, and release would be permitted only when the offender is no longer considered to be a risk to the public. Furthermore it is proposed that previous convictions **for relevant** offences will count as qualifying convictions, including convictions as a young offender. The second offence must be committed after the commencement of the new legislation and after he or she has been convicted of a previous qualifying offence. The proposals, however, fail to delineate the distinctions of gravity. In exceptional cases the courts will have a discretion not to pass an automatic life sentence. This is intended to allow for the occasional unforeseen circumstances where it would be unjust and unnecessary to impose the life sentence.

3.61 The White Paper also proposes a **mandatory minimum sentence for drug dealers**. The mandatory minimum sentence of seven years imprisonment is reached where the third qualifying conviction is reached. Qualifying convictions include any previous convictions for relevant offences and these must relate to separate court appearances. As with automatic life sentences the mandatory sentence might be avoided in genuinely exceptional cases. Further

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55 See section 28.

56 Cm 3190 (1996).

repetition following a mandatory sentence would result in a further mandatory sentence, although the proposals fall short of prescribing a higher mandatory sentence in such circumstances.<sup>57</sup> These proposals for mandatory sentences have been highly controversial and have been severely criticised by the judiciary in particular.

**3.62 Mandatory minimum prison sentences are also proposed for persistent repeat burglars.** The relevant offences are burglary or aggravated burglary of a dwelling. The mandatory minimum of three years imprisonment can only be imposed where the three qualifying convictions all relate to offences after the commencement of the Act. Again, the court is given the discretion not to impose the mandatory sentence in genuinely exceptional cases.

## SENTENCING IN CANADA

3.63 In 1987 the Canadian Sentencing Commission<sup>58</sup> investigated the process of sentencing

and recommended that the following principles should govern sentencing practices in Canada:

### 4. Principles of Sentencing

Subject to the limitations prescribed by this or any other Act of Parliament, the sentence to be imposed on an offender in a particular case is at the discretion of the court which, in recognition of the inherent limitations on the effectiveness of sanctions and the practical constraints militating against the indiscriminate selection of sanction, shall exercise its discretion assiduously in accordance with the following principles:

- (a) **The paramount principle governing the determination of a sentence is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence.**
- (b) Second, the emphasis being on the accountability of the offender rather than punishment, a sentence should be the least onerous sanction appropriate in the circumstances and the maximum penalty prescribed for an offence should be imposed only in the most serious cases.
- (c) Subject to paragraphs (a) and (b) the court in determining the sentence to be imposed on an offender shall further consider the following:

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57 See R Henham "Back to the Future on Sentencing: The 1996 White Paper" Vol 59 November (1996) *The Modern Law Review* 861 et seq.

58 Canadian Sentencing Commission *Sentencing Reform: A Canadian Approach* February (1987) at 154-155 (Emphasis added).

- (i) any relevant aggravating and mitigating circumstances;
  - (ii) a sentence should be consistent with sentences imposed on other offenders for similar offences committed in similar circumstances;
  - (iii) the nature and combined duration of the sentence and any other sentences imposed on the offender should not be excessive;
  - (iv) a term of imprisonment should not be imposed, or its duration determined, solely for the purpose of rehabilitation;
  - (v) a term of imprisonment should be imposed only:
    - (aa) to protect the public from crimes of violence,
    - (bb) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration justice,
    - (cc) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.
- (d) In applying the principles contained in paragraphs (a), (b), and (c), the court may give consideration to any one or more of the following:
- (i) denouncing blameworthy behaviour;
  - (ii) deterring the offender and other persons from committing offences;
  - (iii) separating offenders from society, where necessary;
  - (iv) providing for redress for the harm done to individual victims or to the community;
  - (v) promoting a sense of responsibility on the part of offenders and providing for opportunities to assist in their rehabilitation as productive and law-abiding members of society.

3.64 With regard to mitigating and aggravating factors the Commission recommended the following:<sup>59</sup>

- 11.8 The Commission recommends that the following list of aggravating and mitigating factors be adopted as the primary grounds to justify departures from the guidelines:

### **Aggravating factors**

1. Presence of actual or threatened violence or the actual use or possession

- of a weapon, or imitation thereof.
2. Existence of previous convictions.
  3. Manifestation of excessive cruelty towards victim.
  4. Vulnerability of the victim due, for example, to age or infirmity.
  5. Evidence that a victim's access to the judicial process was impeded.
  6. Existence of multiple victims or multiple incidents.
  7. Existence of substantial economic loss.
  8. Evidence of breach of trust (e.g., embezzlement by bank officer).
  9. Evidence of planned or organized criminal activity.

### **Mitigating Factors**

1. Absence of previous convictions.
2. Evidence of physical or mental impairment of offender.
3. The offender was young or elderly.
4. Evidence that the offender was under duress.
5. Evidence of provocation by the victim.
6. Evidence that restitution or compensation was made by the offender.
7. Evidence that the offender played a relatively minor role in the offence.

3.65 The Commission also recommended the adoption of sentencing guidelines and amending the Criminal Code to grant to the Courts of Appeal the power to establish sentencing policy governing the application of sentencing guidelines. It was furthermore proposed that judges be required to give written reasons if a sentence which departs from the guidelines, is imposed. As point of departure four presumptions are used to guide the imposition of custodial and non-custodial sentences; they are:<sup>60</sup>

- \* **unqualified presumptive disposition of custody;**
- \* **unqualified presumptive disposition of non-custody;**
- \* **qualified presumptive disposition of custody; and**
- \* **qualified presumptive disposition of non-custody.**

3.66 The Commission conceded that sentencing guidelines can take many forms and be implemented in varied ways. **The Commission recommended presumptive guidelines that would be statutory in nature, but which would not be mandatory in the sense that the sentencing judge would have the discretion to deviate from the adopted range in appropriate cases.** Presumptive guidance is in effect statutory orders that impose a predetermined sentence range to the judge. A system of guidelines present the court with an approach based on general sentencing practices and trends in an attempt to assist in identifying

the factors most relevant to the case. (The proposals of the Commission were much debated in Canada but never enacted).

\* **Mandatory sentences**

3.67 The Commission also considered the **continued existence of mandatory minimum sentences and concluded that, with the exception of those prescribed for murder and high treason, minimum penalties serve no purpose that can compensate for the disadvantages resulting from their continued existence. The Commission raised two important constitutional considerations against the continued existence of mandatory sentences, namely the concern that the imposition of a mandatory sentence of imprisonment may constitute “cruel and unusual punishment” and that they authorise “arbitrary” imprisonment.**

3.68 Both these objections raise the issue of the constitutionability of mandatory sentences. The Canadian Charter (section 12) stipulates that “everyone has the right not to be subjected to cruel and unusual treatment or punishment”. In terms of section 5(2) of the Narcotic Control Act the prescribed sentence for importing any narcotic into Canada is “imprisonment for life but not less than seven years”. In *R v Smith*<sup>61</sup> five of the six supreme court judges held that the mandatory minimum sentence offends section 12 (and is not saved by section 1, the limitation clause).

3.69 The court held that, though a state may impose punishment (minimum or maximum), **“the effect of that punishment must not be grossly disproportionate to what would have been appropriate”**.<sup>62</sup> The test is **“whether the punishment prescribed is so excessive as to outrage standards of decency”**. Such punishment will have one or more of the following features:

- (1) The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;
- (2) The punishment goes beyond what is necessary for the achievement of a valid social aim ...; or
- (3) The punishment is arbitrarily imposed.<sup>63</sup>

3.70 Though section 12 may be infringed, section 1 could “salvage” it if some “important societal objective” will be achieved. *In casu*, the court fails the “proportionality test because the means chosen to achieve the object is disproportionate. The impairment of rights is not a

61 1987 (1) SCR 1045.

62 1072.

63 1097-98 Emphasis added.

“minimum” one, but its “indiscriminate nature” casts its net too wide: sentencing the “small offender” to seven years imprisonment in all cases is not necessary to deter the serious offender.

**3.71 After careful consideration the Canadian Commission recommended the abolition of mandatory minimum penalties for all offences except murder and high treason.**

**APPENDIX A**  
**PART 2**

**COMMENTS ON ISSUE PAPER ON  
MANDATORY MINIMUM SENTENCES**

## Criticism against presiding officers

2.1 Mr I Redelinghuys, Magistrate Kroonstad, offered the following comments. In his view the courts are very often in the spotlight of negative criticism. Sentencing is one of the sources of severe criticism against the courts. Courts are criticised for sentencing disparity, for not imposing salutary sentences, for imposing too lenient sentences, and for being the reason for the lack in legitimacy of the criminal justice system. However, magistrates are frustrated by *inter alia* the following dilemma(s):

- \* In *S v Pieters 1987 (3) SA 717 (A)* it was stated that a court of appeal will only reverse a decision of the trial court if it appears that the trial court has exercised its discretion in an improper or unreasonable manner. The courts have developed a number of tests for determining when it is appropriate to interfere with the trial court's decision, for example if the sentence imposed "induces a sense of shock" or it reveals a "striking disparity compared to the sentence which the court of appeal would have imposed as court of first instance" (*S v M 1976 (3) SA 644(A)*; *S v N 1988 (3) 450 (A)*; *S v Petkar 1988 (3) SA 571(A)*). It is alleged that the same principles apply to courts of review. Magistrates courts, however, experienced the courts of appeal and review as being very much in favour of the accused. It also seems that courts of review are very keen to interfere with sentences imposed and the interferences are not always limited to sentences that are "startlingly inappropriate", "induces a sense of shock" or in cases involving gross irregularities. Courts of review are known for criticising and querying magistrates for imposing heavy sentences. Often reasons are requested for sentences that are not gross or excessive in the circumstances of the case and the query suggests to magistrates that a sentence is too heavy. Sometimes it is evident that the sympathy of the courts of review lie with the accused or that much weight is given to the accused's personal circumstances. Therefore, before passing sentence, magistrates have to consider what view a court of review will take of the matter.

## Parole and/or correctional supervision

In practice, after a sentence has been imposed, review proceedings have been finalised and the sentence has been confirmed, it is often discovered that the accused has already been released on parole. In some instances at the point of sentencing it is discovered from an accused's record of previous convictions that had he or she served the sentence imposed for the last conviction in full, he or she should still have been in prison at the time when the crime for which he has to be sentenced was committed. In cases where an accused was sentenced to pay a fine with a term of imprisonment as an alternative and he did not pay the fine, it often serves no purpose to make an order preventing the Commissioner of Correctional Services to act in terms section 287 (4) of the Criminal Procedure Act, 51 of 1977, because, although such order forbids the Commissioner to convert the sentence to one of correctional supervision the accused would only be released on more favourable conditions (parole).

Although it is not always an appropriate sentence in the circumstances of a case or it may not be regarded as just punishment for the specific crime, courts often

impose a sentence of correctional supervision merely in order to make sure the accused serves some kind of punishment and that the sentence imposed is served in full.

### **Serious crimes and other crimes**

- \* It is sometimes suggested that mandatory minimum sentences and/or sentencing guidelines should be set for so-called serious crimes such as rape, murder and armed robbery. Although these crimes require immediate and swift action one should not lose sight of the fact that these crimes represent but a small number of the larger crime problem. Most of the crimes tried in magistrates courts are of a less serious nature and the community expect just sentences for these crimes as well. When the issue of sentencing policy is discussed these crimes should be included in the discussions. All crimes should be treated in accordance with the same sentencing principles and to categorise crimes and set different attitudes, rules or guidelines for certain serious crimes would be a step backwards and complicate sentencing decisions.

### **Inconsistency and disparity**

Although courts are criticised for disparity in sentences one should bear in mind that although different sentencers impose different sentences for similar offences, the contrary is also true, namely, there are as many different circumstances as there are cases. It does not matter how sophisticated the guidelines are, it will never be possible to provide for the variety of circumstances experienced each day. The nearest one can get to uniformity in sentencing is to act within the ambit of set principles and the developed guidelines.

### **Mandatory minimum sentences**

Mr Redelinghuys is opposed to enactment of mandatory minimum sentences. In some instances magistrates courts have a raised punitive jurisdiction, for example in terms of section 13 of the Stock Theft Act, 58 of 1959, sections 3,4, and 5 of the Dangerous Weapons Act, 71 of 1968, section 149 of the Road Traffic Act, 29 of 1989, and section 17 of the Drug and Drug Trafficking Act, 140 of 1992. In practise, however, magistrates are hesitant to use the increased jurisdiction since the courts of review are unlikely to confirm such high sentences. Enactment of mandatory minimum sentences and sentencing guidelines will not improve the existing system and is not, and never will be, a way to secure uniformity in sentencing practices because of the unique and individual character of each case which has to be decided upon in accordance with the circumstances of the case. It may be regarded as an interference by the legislature with the functions of the judiciary.

### **Purposes of sentencing**

- 2.2 Mrs E Murray, on behalf of the National Council of Women of South Africa, is of the view

that the main purpose of punishment is deterrence. Justice must not only be done but it must be seen to be done and at present it is not seen to be done. Known criminals boast that they are unlikely to be caught and brought to book, the legal process is so inefficient that they will escape imprisonment or any punishment and will be back on the streets in a very short time. There is insufficient truth in this boast to make the more timid members of the public look the other way when a crime is committed in their presence for fear of retribution from the perpetrator should they report what they have seen.

2.3 The less timid members of the public, and especially those who have suffered in some way as a result of crime, tend to take the law into their own hands. The successes of the forces of law and order need to be made known. It is not enough that the newspapers report that prisons are overcrowded, it is necessary for the public to know that persons who commit crime are in prison and will remain there for a number of years. It should be considered that publicity in the form of photographs, dates of conviction and the particulars of the crime should be on display outside lower courts, police stations, government buildings and other public places in the areas where the crime was committed for all to see and that the judicial officer in handing down sentence should give instructions that this be done.

2.4 Crime is reduced in countries where criminals are mutilated, because the public see that they have been punished. If a more sophisticated way could be found of putting white-collar offenders into stocks where their shame would be witnessed by their peers, it would undoubtedly have a salutary effect. Some method of sentencing should be found that would "bite" and in this regard advice should be sought from traditional leaders of African Tribes. As things stand the offender goes to prison for a short or longer period, is secluded from the public; he might well be on holiday or working in a different part of the country. He returns to his home in good health, having been well looked after, and the big question is whether he or she has really been punished for the offence committed. It can be said that no stigma is attached to a prison sentence.

2.5 She proposes that if an offender has been shown to be a "goal bird" repeatedly this must have an effect when he returns from his period of "seclusion".

2.6 Tshwaranang Legal Advocacy Centre submits that in order to successfully address the crime problem in South Africa the committee ought to be driven by long-term preventive strategies rather than by short-term punitive measures. Spending large sums of money on building new prisons will not curb criminality if the socio-economic problems of unemployment and poverty are not resolved, and inequalities between men and women are not addressed. A holistic rather than a piecemeal, approach to solving the crime problem in South Africa would be to the benefit of society at large.

2.7 Tshwaranang Legal Advocacy Centre raises a number of concerns that relate to the constitutionality of mandatory minimum sentences:

- \* Potential violation of an accused person's right to a fair trial.
- \* Potential violation of the independence of the judiciary.

2.8 Mr FVA von Reiche, Magistrate Pretoria, argues for the reintroduction of the death penalty and corporal punishment and an constitutional amendment to make this possible. In his view these sentencing options would provide the retributive objective of punishment, which the Viljoen

Commission mentioned as the main objective of punishment in South Africa. He furthermore argues in favour of a declaration of a state of emergency to curb the crime wave

### **The methodology of sentencing**

2.9 A Committee of the Law Society of the Cape of Good Hope is of the view that the individualised approach to sentencing, which is currently permitted within our criminal justice system, is the safeguard to a fair sentencing system. It is suggested that minimum sentences could be introduced by way of guidelines but should always be subject to the discretion of the court. It is after all the job of the sentencing court to devise a sentence to fit the criminal as well as the crime.

2.10 NICRO (Jhb) NICRO (Jhb) and the Johannesburg Child Welfare Society call for a balanced approach to the sentencing of perpetrators of sexual abuse of children, and also in the setting of bail for suspects in such cases. They state that what is missing in our judicial system is an approach to sentencing and bail that properly uses current knowledge about child sexual abuse and the characteristics of different kinds of offender. A large proportion especially of incest perpetrators and adolescent offenders can be very effectively treated, and can function as productive citizens and effective family members. For this group, treatment should undoubtedly be provided wherever possible. It is a far cheaper option and usually has far happier outcomes for the child victims than do very draconian approaches. This however means compulsory, intensive treatment and management in a specialized programme, not token interventions such as a brief weekly session with a therapist with little expertise in this area.

2.11 Certain offenders pose a permanent, severe danger to children and should remain indefinitely in either a prison or a psychiatric hospital. Others can, while undergoing treatment, function in the community under strict supervision, for example their movements should be constantly monitored, and unsupervised contact with children should be prohibited, as a condition to them remaining out of prison.

2.12 Our courts seem to be passing sentence and granting bail without adequately informing themselves about the nature of the offence in question or of the specific offender. For example, a Community Service Order which does not guarantee strict monitoring of the movements of a known paedophile does nothing to protect children. Neither does corporal punishment of adolescent molesters - this is more likely to increase their problems. A suspended sentence with an inadequate or vaguely-worded treatment order for someone with an established pattern of sexual molestation is self-defeating.

### **Is there a need for legislation to regulate the imposition of sentence in respect of certain serious crimes?**

2.13 Judge JA Howard, Judge President of the Natal Division of the High Court, and most of the judges in his Division, are of the view that there is a need for legislation to regulate the imposition of sentence in respect of all serious crimes that feature regularly in trials in the High Court and the lower courts.

2.14 The Johannesburg Child Welfare Society welcomes the Issue Paper and its commitment to the development of a more effective system for dealing with serious crime. They support legislation to provide clear guidelines for sentencing in respect of serious crimes.

2.15 Mr AM Bluhm is of the opinion that if codification of the entire body of law is envisaged, mandatory sentences would make perfect sense as this type of sentencing would fit in with codification. However, he cannot think of any valid reason why any sentence should be mandatory. No two crimes committed can be regarded as exactly the same, because method, the reasons for the crime, the circumstances in which it was committed, all vary. If it were true that crimes committed are in fact mirror images, then the prosecution should use similar facts more often as this will make their burden more bearable. In reality this will be a rarity and because of this criminal matters are highly specialised.

2.16 To force any judicial officer to comply with prescribed sentences will result in what happened during the previous governments term of office, where presiding officials became a rubber stamp for government and its politics. If presiding officers are to become rubber stamps in imposing sentences, sentencing should rather be left to the Correctional Services Department as this type of justice will degrade the stature of judicial officers. It will send a clear message to the community that judicial officers are not competent, they are biased and not impartial. It is within the power of the law giver to prescribe minimum and maximum sentences for any crime, but the individual sentence to be imposed and how long that sentence should be, should be left to the discretion of the judicial officer. This discretion must be exercised in relation to the proved facts before the court and on hearing both the prosecutor and Counsel for the defence before sentencing.

2.17 He is further of the opinion that to regulate and prescribe sentencing will destroy the newly founded Constitution, as the right to a fair trial will have no meaning. What follows after sentencing will not be fair, since legislation can never by way of numerous clauses make provision for every crime that is or can be committed. Once one exception to the rule is made the whole reason for mandatory sentences disappear. The public at large should be the judge of whether a sentence is fitting or not. The practical experience gained on the bench cannot be taught or bought, and this experience is one of the yard sticks for successful and appropriate sentencing. The High Court decisions are followed by the lower courts and the reasons given by the Judges for imposing a sentence is one of the guidelines that the lower courts use when imposing sentence. The fact that someone might or might not agree with a particular sentence is neither here nor there. As long as the community at large is reasonably satisfied with the sentence and that sentence is carried out, the majority of the community will be satisfied and this is the real essence of democracy.

2.18 Mr MT van der Merwe, Attorney-General of the Free State, is of the view that any form of legislation prescribing mandatory minimum sentences cannot be supported. It is, however, suggested that attention should be given to the role of the Parole Board who is responsible for the early release of sentenced prisoners. Punishment should be swift and sure and the way the Parole Board operates at present causes uncertainty. As a result much of the deterrent affect of punishment is lost in the process. There is no need to regulate the imposition of sentence in respect of certain serious crimes. What is required is to give the courts adequate jurisdiction and to appoint capable presiding officers (judges and magistrates).

2.19 The Women's Lobby is of the view that there is need for legislation to regulate the

imposition of sentence in respect of certain serious crimes. The community must be protected and the victims, not the offenders, must be the primary focus of concern. Sentencing as prevention and deterrence must be emphasised. All violent crimes should be targeted for such legislation, such as rape, murder and sexual assault of children. These must exact custodial punishment of the severest order without parole and with the full sentence served. In this way the interests of the community will be served.

2.20 Mr LJ Robberts, Attorney-General of the Eastern Cape, is of the view that legislative guidance should not be limited to serious crimes, but should include crimes which could have serious impact on the stability of the economy of the country or the maintenance of law and order. Stock theft has a serious impact on the economy of the country. Examples of the latter would be corruption and extortion in the police services.

2.21 Mrs E Murray, on behalf of the National Council of Women of South Africa, is of the view that, having heard all the evidence it should be the prerogative of the judicial officer to decide in his wisdom and with his training and experience what a suitable sentence should be. Nevertheless, public opinion in the present climate of widespread violent crime is that imprisonment should be the minimum sentence for many of these violent crimes. The Council supports this view.

2.22 Mr FVA von Reiche, Magistrate Pretoria, argues in favour of such legislation.

2.23 A Committee of the Law Society of the Cape of Good Hope notes the concern that presiding officers have a great deal of freedom within the legislative framework and that the principles which guide them are imprecise and vague. The committee is not persuaded that these criticisms are valid and recommends that presiding officers should retain their sentencing discretion, in the knowledge that such discretion is curbed by legislation and by the courts of appeal or review.

2.24 Advocate PC Rammutla, Principal State Law Adviser of the Gauteng Provincial Government, is of the view that to restore the confidence of our society in the criminal justice system, Government is obliged to prescribe a sentencing policy for certain serious crimes. Undoubtedly there is a need for legislation to regulate the imposition of sentence for serious crimes.

### **Is there a need for mandatory minimum sentences?**

2.25 Mr AM Bluhm is of the view that no crime should have mandatory sentences imposed, except where a law may prescribe a minimum and a maximum sentence.

2.26 Mr Smit, an attorney of the firm Smit & Maree is of the view that the solution to South Africa's crime situation is the reintroduction of corporal punishment for serious offences. In the case of juveniles, corporal punishment should be an option for the following offences, theft, housebreaking, rape, assault, fraud, violent offences, indecent assault and some other less serious offences. In the case of adult offenders corporal punishment should be an available sentencing option. The view is expressed that imprisonment places a heavy financial burden on the State while corporal punishment can be an effective deterrent. The advantages of such an

option are:

- \* an effective swift punishment;
- \* instead of a prisoner being kept in custody for years, corporal punishment is finalised quickly;
- \* no negative connotations revert to the offender;
- \* the offender is not exposed to negative influences of co-prisoners; and
- \* the option does not have negative medical implications for the offender.

2.27 The view is furthermore held that the death penalty should be available for murder, high treason and rape with aggravating circumstances. Imprisonment should be considered only in cases where the accused person is a dangerous criminal awaiting trial. If he or she is convicted of a less serious offence and it is clear that the person presents a danger to the public such person should serve the required term of imprisonment until he or she is rehabilitated. In cases of minor offences, where corporal punishment is not appropriate, the offender should be referred for community services at hospitals, mortuaries or other essential services over weekends where they could be of value to the State. There are many people trained in criminology who could be employed as social workers to oversee such community services to the benefit of the State. Government should not hesitate to pass strict laws in order to curb the increasing crime rate and the solution to the problem is to be found in the proposals set out above. Less emphasis should be placed on the rights of offenders and more emphasis on the rights of the public who need protection.

2.28 Mr P Hennessy, executive director of the New South Wales Law Commission points out that in Australia the Northern Territory has recently introduced mandatory minimum sentences for certain offences amidst some controversy. The Sentencing Amendment Act, 1996 provides for compulsory imprisonment of property offenders. Western Australia has also given Courts a discretion when imposing a custodial sentence upon a young offender to make a special order that the offender serve an additional 18 months, with the possibility of supervised release after 12 months.

2.29 The judges of the High Court, Northern Cape, Kimberley, are of the view that for the reasons stated by Corbett, CJ and Botha, JA, in *S v Toms; S v Bruce*, 1990 (2) SA 802 (A) they are totally opposed to mandatory minimum sentences being prescribed by the Legislature.

2.30 The Magistrate, Pretoria North is of the view that there is a definite need for mandatory sentences for serious offences.

2.31 Mrs E Murray on behalf of the National Council of Women of South Africa is of the view that there is a need for mandatory minimum sentences.

2.32 Mr JA Swanepoel, Director of the Office for Serious Economic Offences, states that from a judicial perspective the concept of minimum sentences is unacceptable. In support of the submission reference is made to the decision *S v Mpetha* 1985 (3) SA 702(A) at 706D where it was stated

I do so with regret for this case illustrates the injustice which can flow from a statutory enactment which lays down a compulsory minimum sentence and takes away from the trial Judge the discretion which he normally enjoys in the imposition of sentence.

2.33 Such criticism of section 52 of the Criminal Law Amendment Act could be countered if the following were possible:

- \* a lighter sentence could be imposed in the case of mitigating circumstances being found;
- \* such sentence could be partly suspended;
- \* the extent of the crime was such that special measures were reasonable and justifiable in an open and democratic society.

2.34 A member of the Society of Advocates Free State Division is totally opposed to any form of mandatory sentences, whether in general or in respect of certain offences. A judicial officer will always sentence an offender according to the broad parameters of certain guidelines unless there are unique circumstances present which compel him or her to diverge from that norm. Should a judicial officer err on the side of leniency, there are safeguards to be found in section 210A and section 316 B of the Criminal Procedure Act that empower an Attorney-General to take the matter on appeal to a higher court. This system works well and there is no reason why this should be altered. If, on occasion, unacceptable sentencing occurs, it can be rectified and if not, it is simply one of those imperfections of human life which will have to be borne with fortitude.

2.35 Tshwaranang Legal Advocacy Centre does not support the implementation of mandatory minimum sentences in the form of legislation because:

- \* in the USA it has been shown that the high cost of implementing mandatory minimum sentences far outweighs its successes;
- \* there is little evidence of a correlation between mandatory minimum sentencing and deterrence against crime;
- \* mandatory minimum sentences go against the principle of proportionality in sentencing because it removes the power of the judiciary to impose sentences which fit the crime. Judges no longer have the power to consider mitigating factors;
- \* research has shown that prior criminal activity is the best indicator of future dangerousness but mandatory minimum sentencing applies to the crime and not the offender. Consequently a first time offender is likely to receive the same sentence as a previously convicted offender.

2.36 Mr FVA von Reiche, Magistrate Pretoria, argues that interference by the legislature with the sentencing discretion of the judicial officer would be unconstitutional. Apart from this consideration the need to individualise sentences makes the enactment of mandatory minimum sentences unacceptable.

2.37 A Committee of the Law Society of the Cape of Good Hope is opposed to the introduction of more stringent sentences but instead recommends that offenders be required to serve out the

full term of sentences actually imposed by courts subject only to review in terms of the new provisions on parole. The committee is of the view that there is a real risk that the political need to address public demand is in danger of being promoted above the protection of legal rights of the offender to a fair trial and a fair punishment.

2.38 The Committee agrees that when passing sentence the values, which society wishes to uphold, should be protected and that such values should similarly inform any reform of the criminal justice system including sentencing. The committee is of the view that periodical imprisonment is not utilised to its full potential. The courts are reluctant to declare offenders habitual criminals and the committee suggests that such declarations should be applied more readily. The committee is of the view that existing sentence provisions and options are broad and therefore adequate. The committee supports the quotes of Chief Justice Corbett and Botha JA in *S v Toms and S v Bruce* regarding a number of attempts made by the legislature to limit sentencing discretion by providing for mandatory minimum sentences. The committee agrees that these attempts amount to an undesirable intrusion by the legislature on the jurisdiction of the courts to determine the appropriate punishment and potentially result in grave injustice. Fairness is the most important component of sentencing and this requires the court to impose individualised sentences.

2.39 The Committee is furthermore of the view that the root of the problem lies in the several previous attempts by the legislature to control sentencing discretion by introducing mandatory minimum sentences. All such attempts have been strongly criticised and as a result the Viljoen Commission recommended that minimum sentences be abolished and that prescribed sentences for corrective training and the prevention of crime be removed from the statute book. The Committee recommends that serious consideration be given to investing in the proper training and education of magistrates with a view to achieving a measure of consistency in the imposition of sentences. There is also a need for community education on sentencing options so that the community is more likely to understand and accept the outcome of the court process.

2.40 Advocate PC Rammutla, Principal State Law Adviser of the Gauteng Provincial Government, proposes that arguments in favour of mandatory minimum sentences must address:

- \* possibility of effective abolishment of individualised sentencing;
- \* violation of the principle of proportionality;
- \* crimes to which the mandatory laws applied are arbitrarily selected and bear no relationship to public safety, culpability, law enforcement or deterrence.

2.41 The Director of Public Prosecutions, Witwatersrand, is *inter alia* for the reasons stated below, opposed to the introduction of mandatory minimum sentences in the Criminal Law Amendment Act, 105 of 1997 and commented as follows on the draft Bill which was introduced:

2.42 The objective of this Bill is unequivocally intended to achieve a short-term solution for a far more serious problem than that which is apparent at first glance. Although the purpose of the Bill might be laudable in the short-term, it's long-term effect might be far-reaching as it touches

on to the cornerstone of our whole judicial system, namely the independence of our judiciary. Long, before the advent of a human rights culture any attempt to interfere with the judicial discretion, specifically in respect of sentencing, was frowned upon.

2.43 In *S v Mpheta* 1985 (3) 702 (AD) at 706 C-D Corbett JA (as he then was) referred to "the injustice which can flow from a statutory enactment which lays down a compulsory minimum sentence and takes away from the trial Judge the discretion which he normally enjoys in the imposition of sentence" when he dealt with the compulsory minimum sentence in respect of a contravention of section 2(1) of Act 83 of 1967 (Terrorism); and

2.44 In *S v Thoms: S v Bruce* 1990 (2) SA 802 (A) Smalberger JA dealt with minimum sentences as follows:

'The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court (*R v Mapumulo and Others* 1920 AD 56 at 37). That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of a balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualisation of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law (*S v Rabie* 1975 (4) SA 855 (A) at 861 D; *S v Scheepers* 1977 (2) SA at 158F - G).

2.45 Leaving aside the independence of the courts for a moment the second and more serious problem is that this Bill will be very difficult to defend when its constitutionality is challenged. Section 35(3)(n) of the Constitution provides as follows:

'Every accused has a right to a fair trial, which includes the right -

- (ii) to the benefit of the least severe of the prescribed punishment if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing...

2.46 There can be no doubt that section 52(3) of the proposed Bill which provides for such prosecution to continue and to be concluded as if section 52 had at all times been in operation will be in direct conflict with section 35(3)(n) of the Constitution. It is also difficult to see how it can be limited in terms of the provisions of section 36(1) of the Constitution.

2.47 A recent judgement of the full bench of the High Court of Namibia (*S v Vries* 1996 (12) BCLR 1666 (NM)) declared a mandatory sentence in terms of section 14(1)(b) of the Stock Theft Act, 12 of 1990 (Namibia) to be unconstitutional. The full bench decided section 14(1)(b) of the stock Theft Act, 12 of 1990 in respect of the words "of not less than three years, but" to be in conflict with Article 8(2)(b) of the Namibian Constitution. Article 8(2)(b) of the Namibian Constitution provides that no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. Although article 8(2)(b) of the Namibian Constitution is somewhat different to section 35(3)(n) of our Constitution there are certain tangent points involved. It is suggested that the proposed Bill will have more negative implications on the judicial system than

the advantage gained by it for the sake of public perception.

2.48 The mere fact that the proposed section 52 will only be in operation for two years makes it very vulnerable to an attack on constitutional grounds. In any event experience has taught that the time lapse from arrest to the conclusion of a trial in the Regional and High Courts is approximately 18 to 24 months. Very few accused will therefore really feel the brunt of this legislation. Bearing in mind the probability that section 52(3) might be declared unconstitutional lawyers will obviously adopt delaying tactics in order to prevent their clients from receiving the minimum sentences.

2.49 Apart from the constitutionality of the Bill a few practical questions need to be clarified, for example, the classification of murder, rape and robbery in Part I creates an untenable situation and should be steered away from. Why murder with a dangerous weapon or a fire-arm should be more heinous than setting a person alight, physically strangling or beating a person to death with one's fists (all offences for which the death penalty has previously been imposed) is beyond comprehension.

2.50 Mr PB Monareng, Regional Court President Mmabatho, is opposed to the introduction of mandatory minimum sentences. He argues that in most instances where an act is proscribed an offence by statute the penal provision is also provided. Most statutory offences that are serious have accompanying penalty clauses and if well executed, legislation to regulate the imposition of a sentence would be superfluous. The Provision of Dependence Producing drugs, act 41 of 1971, previously provided for a compulsory sentence if an accused person was convicted of dealing in the drugs, but that was done away with for the reason, in his view, that it deprived the judicial officer of his or her discretion in the imposition of an appropriate sentence. That circumstances, which may militate against the imposition of the mandatory minimum sentence when found, be recorded will constitute a deviation from the actual purpose for the imposition of mandatory minimum sentences.

2.51 He is of the view that it will be nearly impossible to lay down a formula for the imposition of sentence because there is no magic therein. Each case should be approached on its own peculiar circumstances. The current factors that are taken into account for imposing lenient sentences are adequate and may be expanded depending on the case in issue. The thrust is that there should be a narrow relationship between the sentence imposed and the offence for which the accused has been convicted. The aggravation circumstances are gleaned from the trial itself.

2.52 Dr N Hutton, from the University of Strathclyde, does not feel that he is in a position to say whether there is a need for regulation of the imposition of sentence in respect of certain serious crimes. This is a judgement for those with a closer connection to life in South Africa. However, he states that the use of mandatory minimum sentences in the United States has met with considerable judicial opposition and has in some states, particularly California, resulted in dramatic rises in the prison population with the inevitable fiscal implications for the government. If South Africa decides to proceed with mandatory minimum sentences there will be a significant cost. It appears that the main aim of mandatory minimum sentences in the South African context is to improve public confidence in the administration of criminal justice. The implication is that the imposition of such sentences will assist in the fight against crime. The newspaper extracts contained in the first chapter of the issue paper illustrate the demand for tougher sentences. However, evidence from other jurisdictions suggests that there is little connection between sentencing policy and crime rates. In other words it is unlikely that imposing mandatory minimum

sentences for certain serious violent offences will reduce the prevalence of these offences. If the policy proceeds and there is no appreciable fall in these offences, there may be a public demand for even tougher sentences which in turn may not reduce prevalence. This can produce a dangerous spiral resulting in ever higher prison populations, but perhaps more ominously, a further diminution in public confidence in the criminal justice system. In other words, the policy may produce exactly the opposite effect from that which is desired.

### **Which crimes should be targeted for this purpose?**

2.53 Mr LJ Robberts, Attorney-General, Eastern Cape, is of the view that the emphasis should be on violent crime, serious economic offences and corruption and extortion in the public service and police services. Regarding violent crime the following offences should be targeted:

- \* Murder, in particular where policemen, security personnel or children are victims;
- \* Armed robbery, in particular of farmers, banks or financial institutions and so-called vehicle hijacking;
- \* Rape, in particular where it occurs in the privacy of the victim's home and as a result of breaking and entering, instances of so-called gang rapes or where the victim is particularly vulnerable such as young children and cases of serious indecent assault;
- \* Kidnapping;
- \* Serious cases of housebreaking
- \* Assault with the intent to cause serious bodily harm where a firearm or a dangerous weapon is used or where a dangerous wound is inflicted;
- \* Corruption and extortion, especially in the police force or officials in the administration of justice;
- \* Serious economic offences such as serious theft, fraud, and forgery and uttering, in particular where the offenders were in positions of trust and the offences were committed repeatedly and over a period of time;
- \* Stock theft;
- \* Motor vehicle theft;
- \* Dealing in drugs or possession of large amounts of drugs for the purpose of sale, in particular for repeat offenders;
- \* Offences relating to coinage;
- \* Drunken driving, especially with regard to repeat offenders; in this regard the compulsory suspension of drivers licences should be implemented and enforced;
- \* Escaping from lawful custody or assisting a prisoner to escape where the prisoner is serving a substantial period of imprisonment .

2.54 The Magistrate, Pretoria North is of the view that the crimes set out in Schedule 5 of the Criminal Law Amendment Act should be targeted.

2.55 Mrs E Murray on behalf of the National Council of Women of South Africa is of the view that all crimes of violence should be targeted for this purpose.

2.56 Tshwaranang Legal Advocacy Centre submits that in targeting specific crimes the Sentencing Commission ought to conduct an audit of sentences handed down for specific crimes, to assess the impact these have had on offenders.

2.57 Tshwaranang Legal Advocacy Centre motivates for minimum mandatory sentencing guidelines in violent crimes against women and children. Present rape law does not include other sexual offences like incest and penetration with an object. In establishing which crimes should be subject to minimum sentences it is recommended that the investigation dovetails with the investigation into the review of sexual offences against children.

2.58 The Criminal Procedure Amendment Bill dealing with circumstances in which bail may be denied makes reference to violent crimes in Schedule 6 which the Commission may find helpful. In terms of rape the Bill proposes that bail should be withheld when a dangerous weapon or firearm is used, accompanied by an assault with the intent to do grievous bodily harm, the offence was committed in connection with or formed part of the commission of the offence of housebreaking with aggravating circumstances or the girl was under the age of 14 years.

2.59 The United Nations Standard Minimum Rules for Non-Custodial Measures which provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment may assist the Commission in determining whether or not non-custodial sentences are an option to consider in determining which crimes should be targeted. A child offender might benefit from non-custodial measures instead of imprisonment which could assist with the psychological problems experienced by such a person. The UN Minimum Rules referred to above state that in order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment the criminal justice system should provide a wide range of non-custodial sentences or measures from pre-trial to post-sentencing dispositions, the purpose of which is to provide alternative options to incarceration, to reduce imprisonment and to rationalise criminal justice policies taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

2.60 Mr FVA von Reiche, Magistrate Pretoria, argues that violent crimes in particular should be targeted in legislation regulating sentencing practices.

2.61 Advocate PC Rammutla, Principal State Law Adviser of the Gauteng Provincial Government, is of the view that even though the seriousness of crimes differ, violence may serve as a guideline when formulating legislation prescribing minimum mandatory sentences. Without hesitation crimes such as murder, rape, robbery, child molestation should fall within the category of offences where mandatory minimum sentences is a requirement. Offences such as possession of unlicensed firearms and ammunition punishable in terms of the Arms and Ammunition Act, should have their prescribed sentences in terms of that Act removed and be governed by a new law prescribing minimum sentences. The present crime wave is fuelled by these numerous unlicensed firearms possessed even by school children. Legislation regulating parole procedures should not be coined in such a way that it would defeat the intention of a minimum sentence. It is furthermore proposed that an offence such as escaping from custody should also fall within the category for prescribed mandatory minimum sentences. The advantages of the proposed system may probably outweigh the disadvantages: discrepancy, disparity and inconsistency in sentencing by various courts of this country, which have been

criticised by a number of role players, will be improved.

2.62 Judge JA Howard, Judge President of the High Court, Durban, and most of the judges in his Division, propose that murder, rape, robbery, child abuse, car theft, other serious thefts and frauds, aggravated assaults, housebreaking, arson and drug trafficking should be targeted in legislation regulating the imposition of sentences.

2.63 The Johannesburg Child Welfare Society welcomes the Issue Paper and its commitment to the development of a more effective system for dealing with serious crime. Crimes to be targeted for this purpose include, but should not necessarily be limited to, crimes of violence, sexual offences and child abuse. In relation to the latter category the safeguarding and rehabilitation of children and the prevention of future crimes should be the paramount concerns. It is at the same time necessary to develop a system that incorporates special sensitivity to the needs of victims of crime, rather than a grid approach based on a set formula. The latter formula might satisfy adult public opinion but could be very damaging to child victims, for example mandatory lengthy prison sentences for all forms of child sexual abuse would be likely to drive the problem further underground. Such an approach would:

- \* increase the terrifying threats and other forms of pressure which perpetrators exert on victims to maintain secrecy;
- \* increase the pressure on family members to disbelieve a child who reports that incest is occurring;
- \* increase the reluctance of victims to disclose that they are being abused, especially where the offender is a family member;
- \* increase the pressure on victims who have already disclosed abuse to recant, in a desperate attempt to bring an end to the upheaval which disclosure has caused in their families; and
- \* increase the pressure on defence lawyers to obtain dropping of charges or a “not guilty” verdict at all costs, on technical grounds or by harassment.

**How should the question of lenient or excessive sentencing and inconsistency in sentencing be addressed?**

2.64 As long as we have crime, and it can be committed in different ways for different reasons, this question will, in the view of Mr AM Bluhm, remain unanswered. Every case is unique and must be judged on its own merits and circumstances. Sentencing should befit the crime and in one case it might warrant excessive sentencing whilst in another a simple warning might suffice for the same crime. This is disparity at its best but anything else might destroy the true administration of justice. If consistency in handing down sentences is what we are after the simple solution is codification and total disregard for any reason why a crime was committed. This will be the worst day for humanity. The community in his view do not object to the inconsistency of the sentence handed down but to the execution thereof. If a court sentence someone to one year imprisonment it does so for good reasons and for anyone else, including Parliament, the President or any other body to change that sentence or to release someone after three months is what the public objects to. They feel that justice was not done and they are in his view correct. To release prisoners from prison because prisons are overcrowded or the prisoner all of a sudden became a Christian or behaved in prison is a lot of nonsense. It is not the criminal who needs protection but the individuals comprising the community.

2.65 Mr MT van der Merwe, Attorney-General, Free State, is of the view that the appointment of capable presiding officers would solve the problem.

2.66 The Women's Lobby is of the view that the Courts must not have too wide a discretion in sentencing. There is a need for a structured sentencing policy and for sentencing guidelines with public safety as the focus. Innocent until proven guilty may have been carried too far.

2.67 The judges of the High Court, Northern Cape, Kimberley, are opposed to the establishment of any Sentencing Guideline Commission along the lines set out in the Issue Paper. The only attraction of the schemes in some of the countries mentioned is the abolition of the parole system.

2.68 The Magistrate, Pretoria North is of the view that the best way to address the problem will be the enactment of mandatory minimum sentences for certain serious offences, combined with a discretion on the part of the presiding officer to depart from the sentences under certain conditions. This option will be the best solution for mandatory minimum sentences. It is proposed that the Criminal Procedure Act be amended to provide for mandatory minimum sentences, with the discretion remaining with the presiding officer in respect of common law crimes as per schedule 5 of Act 75 of 1995. The Acts regarding statutory offences as per schedule 5 of the said Act should also be amended.

2.69 Mrs E Murray on behalf of the National Council of Women of South Africa is of the opinion that the issue should be addressed by enacting mandatory minimum sentences.

2.70 Mr I Redelinghuys, Magistrate Kroonstad, is of the view that in order to reach more uniformity in sentencing and the imposition of more just sentences that reflect the sense of justice of society, it would help if the courts of review leave the magistrates and loosen their hands to impose just sentences in accordance with the circumstances of the case and to limit interference to sentences that are gross or irregular.

2.71 Mr FVA von Reiche, Magistrate Pretoria, argues that training of judicial officers, in particular officers presiding in the lower courts is necessary to address the issue of inconsistency and disparity in sentencing.

2.72 Advocate PC Rammutla, Principal State Law Adviser of the Gauteng Provincial Government, is of the view that questions of lenient or excessive sentencing may be addressed by:

- \* educating presiding officers through courses/seminars;
- \* researching thoroughly and comparing our system with other countries, such as Latin America;
- \* sentencing policy should be developed to guide presiding officers. Even though this may be a formidable task, the gap between lenient and excessive sentencing will be improved; and

- \* community sentencing, compensatory orders, efficiency of prescribed treatment programmes should be looked into for certain category of offences.

2.73 Judge JA Howard, Judge President of the High Court, Durban, and most of the judges in his Division, propose that questions of lenient or excessive sentencing should be addressed by introducing guidelines modelled on those of the State of Minnesota. The legislature should not resort to prescribing mandatory minimum sentences. We should follow the Minnesota sentencing guidelines and grid adapted to suit local conditions. The Judge or magistrate passing sentence would select the appropriate severity level (top line of the grid) and give reasons for his selection. He would then impose the prescribed term of imprisonment or, if he considered that to be inappropriate, some lesser period. In the latter event he would have to give reasons for departing from the prescribed sentence.

2.74 The Johannesburg Child Welfare Society support the development of a set of guidelines in terms of which the courts would be obliged to take into account a range of factors, as in the approach taken for example by the Sentencing Reform Act in the USA. Particularly in cases of child abuse it is necessary to take into account the needs and interests of the victim. In cases of incest, for example, it would be important to consider whether the victim and the family as a whole is likely to benefit from treatment, and also whether appropriate treatment facilities are in fact available.

### **What is proposed in relation to those issues as an effective basis for reformatory legislation?**

2.75 Mr MT van der Merwe, Attorney-General, Free State, is of the view that it has been proved in practice that mandatory minimum sentences are no solution to the problem. Instead the solution is simple, namely the appointment of capable presiding officers and addressing the release of sentenced offenders on parole.

2.76 The Women's Lobby is of the view that there be presumptive statutory guidelines but mandatory in so far judges would have discretionary powers. Redress must be the guiding principle. The community must be both protected and compensated with the punishment of the offender. Electronic monitoring should be used for non-violent offenders such as for economic crimes and certain minor crimes. Rapists and sexual assault offenders, when paroled or released, should be electronically monitored for long periods following release. Lengthy community service should be utilised for civil offences and minor crimes. Further research is needed on the efficacy of rehabilitation and skills-training in prisons.

2.77 Mr LJ Robberts, Attorney-General, Eastern Cape, favours the Minnesota sentencing guidelines. However, there should be collaboration between the sentencing commission and the parole board.

2.78 Mrs E Murray on behalf of the National Council of Women of South Africa proposes that effective publicity be given to the successes of the forces of law and order where they exist.

2.79 Tshwaranang Legal Advocacy Centre submits that there may be value in attempting to streamline sentencing in violent crimes against women and children to address the disparities in sentencing of untrained judicial officers. They support the following reform measures:

- \* the use of legislative sentencing guidelines to assist and guide judicial officers in determining appropriate sentences. In the USA it has been shown that as opposed to mandatory minimum sentences, guidelines offer a better means of sentencing because they give greater consideration to the salient offence and offender characteristics and avoid unjust sentencing “cliffs”. Guidelines offer the judiciary guidance in sentencing without compromising the discretion they may have to ensure fairness in sentencing;
- \* all sentences handed down be accompanied by written reasons of the presiding officer. All too often sentences seem unimpeachable because the reasoning which motivates them are known only to the judicial officer who hands down the sentence. A procedure in which judicial officers are required to put their reasoning process in writing is supported. Such procedure would be in line with section 32(1)(b) of the Constitution, which provides for access to information that is held by another person and that is required for the exercise or protection of rights.
- \* The establishment of a Sentencing Commission or similar structure to monitor and evaluate the implementation and success of such guidelines. They propose the establishment of such a Commission to review all sentences handed down in terms of the guidelines. Such Commission should be constituted by relevant stake-holders such as judges, assessors, psychologists and members from the NGO community. The Commission should ensure that no gross anomalies arise through the implementation of guidelines and would only interfere with a sentence where it displays a gross injustice to the accused or the victim.

2.80 A Committee of the Law Society of the Cape of Good Hope notes that until two decades ago presiding officers in most countries enjoyed a wide sentencing discretion to impose the sentence they deemed appropriate subject only to the prescribed maximum penalties. This sentencing discretion led to criticism, similar to the criticism leveled against the approach followed in South Africa. The Committee notes that there appears to be an international need for sentencing reforms which need has arisen from public criticism. The Committee found the aggravating factors that operate in the Canadian sentencing system most interesting. The Committee notes that if members of the bench in lower courts had less work and/or more trained personnel to do the work, the efficiency of the courts would show a marked improvement. It is suggested that the inadequacy of the present system could be dealt with by an intake of qualified personnel, for example the appointment of persons from outside the ambit of existing court personnel (such as the appointment of an attorney to the magistrate’s court bench). There would also be great advantage to be gained from the training of personnel.

2.81 The Committee rejects the option of setting up a sentencing commission to develop guidelines in respect of certain offences and remains firmly of the view that judicial officers should retain the unfettered discretion to impose appropriate sentences.

2.82 The Committee believes that the proposed development of new sentencing guidelines which are not peremptory but only operate to guide the bench in the exercise of its discretion amounts to nothing more than a duplication of existing guidelines to be found in the SA Criminal Law reports and criminal law journals. Furthermore, there is no need for the adoption of new

legislative guidelines to determine the severity of the punishment and/or the penal value to be attributed to particular offences. Our current legislation provides for all possible sentences and the courts are effectively bound by existing precedents. The Committee does not support the enactment of the principles of sentencing and suggests that aggravating and mitigating factors applied in the existing system be retained. The Committee does not support the enactment of statutory orders that predetermine the range of sentences.

2.83 The Committee believes that there is no need for new legislation to regulate the imposition of sentence and makes no recommendation as to the offences to be targeted for mandatory sentences. The Committee proposes that the jurisdiction of regional courts be increased.

2.84 The Johannesburg Child Welfare Society is of the view that the following principles should form the basis of reform in respect of sexual offences against children:

In deciding sanctions for a person who has been found guilty of committing a sexual offence against a child:

- (a) the sanctions should ensure the safety of the child, the family and the community.
- (b) the sanctions should promote the restoration of the child, family and community;
- (c) the young sexual offender bears special consideration in respect of sanctions and rehabilitation;
- (d) in considering the long-term goal of safety and security of children, families and communities, the possibility of rehabilitating the sexual offender should be considered; and
- (e) the interests of the victim should be considered in any decision regarding sanctions.

2.85 These principles have validity in cases involving child victims whether or not the offence is specifically sexual.

2.86 Dr N Hutton, University of Strathclyde, is of the view that the central question in the issue paper is to “restore legitimacy to the criminal justice system”. In his view approaching this by the crime control route carries some risks. An alternative is to focus on justice. The issue paper recognises that many of the attempts to reform sentencing have been influenced by the “just deserts” approach, which emphasises proportionality and fairness in punishment and places less emphasis on the instrumental effects of punishment for crime control. His view is that this is the most appropriate basis for a sentencing policy in South Africa. Other legitimate aims of sentencing can be subsumed within the limits set by desert.

2.87 It is, rather easier to support the principle of desert than it is to specify how this might be put into practice. Desert may resolve the problems of inconsistency and disparity in theory but how can this be achieved in practice? The most difficult task in any system of guidance for sentencers, whether it be narrative or numerical guidelines or even computerised information systems as have been tried in New South Wales and recently in his local jurisdiction, Scotland, is to define seriousness. Everyone agrees that similar cases should receive a similar penalty but

everyone disagrees about how similarity is to be defined. There are so many factors which may legitimately be taken into account in assessing the seriousness of a case that it is extremely difficult to fix these in a set of rules. Where this has been tried in the USA many judges have complained that the rules produce their own forms of injustice. Although a sentence may be in conformity with the guidelines, and therefore by definition consistent, it may appear to a judge to be manifestly unjust given the circumstances of the particular case.

2.88 The removal of judicial discretion in sentencing is likely to produce different kinds of injustice. It is a matter of judgement whether this is an improvement on the injustices produced by the operation of discretion. In his view, the best way of restoring legitimacy to the criminal justice system in South Africa is by a blend of different approaches. The primary emphasis in sentencing should be on justice. Judges should pursue consistency in sentencing by giving primary consideration to proportionality, and secondary consideration to the other aims of sentencing. A Sentencing Commission or similar body should give some form of narrative rather than numerical guidance to sentencers on how proportionality should be operationalised in the courts. This could provide a more systematic approach to sentencing which would help to increase public confidence in the system.

2.89 Greater emphasis should be placed on providing constructive approaches to punishment in the community in the spirit of reconciliation and respect for human rights contained in the constitution. Training for judges in race and gender awareness should be further developed and sentencing training could also be introduced to promote the pursuit of a consistent approach to sentencing promoted by the Sentencing Commission.

2.90 Finally, some attention should be given to public education about sentencing. Research in other jurisdictions has shown that the public are very ill informed about sentencing practices. Both the public and the judiciary should be provided with high quality information about the sentencing of the court so that the pursuit of consistency can take place in the context of accurate knowledge of sentencing rather than the anecdotal and partial information that is typically presented in the media. It is interesting that the evidence presented for a lack of public confidence in sentencing in the first chapter of the report was almost entirely drawn from media reports or reflected unsubstantiated opinions. This is an area of public policy which arouses strong emotions. **In his view this makes it all the more important to try to bring a rational and dispassionate approach based on the evidence of research.**

### **Which issues should be included in the investigation?**

2.91 Tshwaranang Legal Advocacy Centre submits that the inclusion of the following issues should contribute positively to the debate around minimum sentences:

- \* The distinction between violent and non-violent offences.

They are of the view that applying mandatory sentences indiscriminately to violent and non-violent offenders may result in gross unfairness in certain circumstances. In addition, they would only support the implementation of drastic measures in the case of violent offenders.

\* Training of judicial officers.

They propose the implementation of compulsory training of judicial officers who engage in sentencing. In making decisions that may have far reaching consequences for an accused, law enforcement agents need to be educated about their own biases and prejudices, the impact of a particular sentence on the accused and the victim and society in general.

\* Inclusion of victim's and communities concerns.

They are of the view that sentencing an offender does not happen in a vacuum and the healing and recovery of a victim is often predicated upon an appropriate sentence. The Issue Paper does not mention that a victim's input into sentencing may be of valuable assistance to the court in coming to a decision that will benefit all affected parties. For example, in cases of domestic violence incarceration is not always the appropriate sentence because the woman may not want the abuser to be imprisoned due to her financial dependence upon him, and her fear that when he is released he will seek vengeance. The principles of restorative justice demand that the views of the victim and the community be taken into account. In addition to assisting the court to come to an equitable sentence the input of victims would also mainstream women's voices into the legal process, from which they have been marginalised.

By involving the community and the victim in the sentencing process greater respect for the law and ownership of the management of criminal justice will be promoted and offenders will be reminded of a sense of responsibility towards the community. This will ensure a proper balance between the rights of the offender and the rights of the victim and concern of the community for public safety and crime prevention.

\* Inclusion of gender perspective.

They submit that the issue paper fails to take into account a gendered perspective. Most victims of gender violence are women and most perpetrators are men. This is a legally significant fact, which must be incorporated into an understanding of how sentencing could address gender inequality in South Africa. A gendered perspective would also address the sexist stereotyping that occurs in sentencing women. If minimum mandatory sentences without any judicial discretion were introduced Tshwaranang Legal Advocacy Centre is concerned about the negative impact this would have on women offenders. Women who kill their partners after years of abuse will be treated as ordinary murderers and special circumstances, like the battered woman's syndrome, will be ignored. This situation will perpetuate discrimination against women by failing to take into account their special circumstances.

\* Inclusion of the cost implications in new sentencing alternatives.

They are of the view that in order to facilitate an informed debate around the issue it would be helpful to have some ideas of what cost implications of various sentencing alternatives are for the South African economy.

2.92 The Johannesburg Child Welfare Society proposes the inclusion of the following issues:

- \* there is a need for a stronger emphasis on the interests of victims and other potential victims as a key consideration in sentencing;
- \* principles of restorative justice should be incorporated where appropriate;
- \* simultaneous attention should be paid to the provision of various back-up resources that are necessary if enlightened and effective sentencing is to be possible. There are a number of offenders who will continue to pose a risk to children while at the same time there are offenders who can be effectively managed in the community and this is often the option that has the most positive potential for the victim, as well as being by far the least costly to the taxpayer.
- \* one option, which seems not to be considered, is the court-ordered use of secure psychiatric hospital facilities. Attention could be paid to the experience elsewhere in the world with in-patient sexual offender treatment programmes as an alternative option;
- \* while there seems to be clear recognition of the fact that a prison is not in itself rehabilitative, it is nevertheless necessary to promote rehabilitative processes in the prison system;
- \* monitoring of offenders who are released from prison on parole or community service orders or correctional supervision is critical in ensuring that appropriate sentencing is indeed effective in protecting the community;
- \* it is necessary to examine the question of what type of court system is best designed for dealing with crimes against children, as this is likely to affect the nature of sentencing, for example, a more inquisitorial type of court might have a slightly different range of options; and
- \* there are several countries in which success has been achieved with diversion programmes, particularly for incest offenders. These allow for removal of cases from the criminal justice system, conditional on full and successful compliance with the terms of an intensive rehabilitation programme. Such an option would also be indicated for many juvenile offenders. New legislation should be sufficiently broad in scope to allow for referrals of appropriate cases to such programmes.

2.93 Mr PB Monareng, Regional Court President, Mmabatho, is of the view that the only matter that needs attention, is the serving of sentences already imposed. It will not serve any purpose for the courts, in their endeavour to curb crime, to impose stiff sentences, which are then not served in full or a substantial portion thereof. The parole system needs to be looked at because it is farcical for judicial officers to impose sentences merely to be substantially reduced by the Parole Board.

**EXTRACT FROM ISSUE PAPER ON RESTORATIVE JUSTICE**

## EXTRACT FROM ISSUE PAPER ON RESTORATIVE JUSTICE

### \* **Legislative framework for co-ordination of services**

2.25 In foreign jurisdictions legislation has been introduced to co-ordinate victim support services. For example, in New South Wales international norms are reflected in a Charter of Victims' Rights that establishes administrative guidelines designed to secure minimum standards for the fair treatment of victims by Government agencies involved with justice, health and community service. In addition, the Director of Public Prosecutions has implemented procedures and policies designed to give effect to those standards which, *inter alia*, include the establishment of a Witness Assistance Service to provide support and assistance for witnesses during the prosecution process; the production of information pamphlets for victims and witnesses and ongoing officer training and community education on issues relating to victims and witnesses.

2.26 During 1991 a Victims Advisory Council was established comprising of representatives from government agencies (Attorney-General, Health, Community Services, Police and Women) and community representatives. The terms of reference of the Council are to assess all services provided to victims by government agencies and community organisations, co-ordinate services to ensure they are complementary, disseminate information about the services available for victims, identify inadequacies in victim assistance and advise on the establishment and funding of a community-based victims agency.

### \* **Consultation between prosecutor and victim**

2.27 The prosecutor's duty is to see to it that justice is done and to ensure that the community's interests are taken into account when a crime has been committed. This power is derived from the community's permission to entrust prosecutors with the administration of justice with the right to act against offenders on behalf of the community. Public prosecutors can therefore play an important role in the prevention of secondary victimisation by promoting the interests of victims.

2.28 In most cases victims are unaware of the functioning of the administration of justice. They don't understand the complex procedures and feel intimidated by the legal procedures. Prior to the commencement of the trial, the public prosecutor is in the perfect position to inform victims of what is expected from them and to refer them to the available victim support services. Examples of provisions for crime victims within the criminal justice system in foreign jurisdictions are: considerate reception by the police, referral to support agencies, provision of advice on preventive measures, the right to be notified of the outcome of the investigation or of ensuing criminal proceedings, the right to inform the court about restitution from the offender.

### \* **The victim impact statement**

2.29 Dr H F Snyman, a former member of the project committee, discusses the victim impact statement in the following terms:<sup>65</sup>

2.30 The Victim Impact Statement is a statement made by the victim and addressed to the presiding officer to be considered in the sentencing decisions. The Victim Impact Statement consists of a description of the harm, in terms of the physical, psychological, social and economic effect that the crime had, and will have in future, on the victim.<sup>66</sup> Sometimes this statement may include the victim's statement of opinion on his or her feelings about the crime, the offender and the sentence that he or she feels is appropriate.

2.31 The victim impact statement usually takes the form of a written statement that is presented to the court as part of the pre-sentence report. It can, however, also take the form of an oral statement by the victim when decisions are made by the court on sentencing. This last format of the Victim Impact Statement is only used in some states of the United States of America.<sup>67</sup>

2.32 The form, content and means of implementation vary greatly. In the United States for example, some jurisdictions require a written Victim Impact Statement, attached either to the pre-sentence report or as an affidavit that becomes part of the court file. Responsibility for the preparation of the Victim Impact Statement can rest with criminal justice personnel, like the prosecutor, police or probation officer, or with an independent outside organisation like victim service specialists. Victims may also, or in some cases only, provide oral information in court prior to sentencing.<sup>68</sup> The Victim Impact Statement can include objective information or both objective as well as subjective evaluations of injury, including psychological harm suffered by the victims.<sup>69</sup>

65 Quotation from a paper submitted by her to the Commission.

66 Hinton, M "Valuing the victim. The use of victim impact statements in sentencing." Unpublished paper read at the 8th International Symposium on Victimology 22 - 26 August 1994 Adelaide Australia.

67 Erez, E "Victim impact statements" In: *Trends and issues in crime and criminal justice*. P Grabosky (ed) (1991) Australian Institute of Criminology No 33 at 2.

68 McLeod M "Victim participation in sentencing". *Criminal Law Bulletin* (1986) No 22 at 501 at 503.

69 Douglas R & Klaster K "Systematising police summaries in the motion court: victim impact statements through the back-door". Unpublished paper read at the 8th International Symposium on Victimology 22 - 26 August 1994 Adelaide Australia.

\* **Victim-offender mediation**<sup>70</sup>

2.33 Schemes involving mediation between victims and offenders ensure wider victim participation in the justice system by allowing victims to take part in the resolution of the case. Mediation may be organised without face to face contact between the parties and one of its main aims is to address the concerns of the victim.

2.34 Mediation is considered appropriate when the offender and the victim wish to come to an agreement about the offender's future contact with the victim or where the parties desire some form of compensation or reconciliation. The process has the potential to address the needs of the victim and it may promote the restoration of victim losses. Restitution can take the form of monetary compensation or community service at the agency chosen by the victim. Through person to person communication, tension can be alleviated and conflict takes a humanitarian form. It may furthermore contribute to a more satisfactory experience of the application of the law.

2.35 Victim-offender mediation is recognised in foreign jurisdictions in the following forms:<sup>71</sup>

**(i) Family group conferences**

2.36 A family group conference is a meeting of the offender, the victim (if he agrees), the supporters of each and a mediator where a plan for dealing with the offender is formulated. It is mostly used to deal with juvenile offenders and it may operate instead of a prosecution or prior to sentence. It is a means to establish a greater degree of community control. Family group conferences aim at reparation rather than retribution.

**(ii) Community Youth Conferences (CYC)**

2.37 Community Youth Conferences was introduced as a pilot scheme in six areas of New South Wales following a white paper on juvenile justice in August 1994. A government appointed Council issues guidelines and monitors the scheme. Matters may be referred to the CYC by the police or the Children's Court and victims may participate. Outcomes can involve apology, reparation to the victim or to the community in the form of community work.

**(iii) Community Aid Panels (CAP)**

2.38 Community Aid Panels is an example of a mediation programme for adult offenders although it is not limited to adult offenders. It currently operates in New South Wales and it was first introduced in the Wyong Local Court in 1987. The Panels are used after a plea of guilty has

70 See New South Wales Law Reform Commission Discussion Paper 33 *Sentencing* 1996 at 358-369.

71 See New South Wales Law Reform Commission Discussion Paper 33 *Sentencing* 1996 at 357-369.

been entered but before sentencing and the court adjourns for a period to allow the panel to discuss related matters.

2.39 A panel consists of a police officer, lawyer and two members of the community who will discuss with the offender (and his family if he is a juvenile) the circumstances of the offence and any related problems. The panel is required to recommend a course of action that may involve voluntary community work, skills training or counselling. The matter is returned to court for final determination. Victims are not required to participate, the outcomes can have a restorative orientation and offenders may agree to compensate the victim or to perform community service.

#### **(iv) Circle sentencing**

2.40 The judges of the Territorial Court of Yukon in Canada devised a community conference scheme, which operates as a pre-sentence option for more serious adult offenders. It was first conducted in 1992. Conferences are conducted with all participants arranged in a circle and such sessions are conducted within the context of the court proceedings and have no independent legislative base.

2.41 Matters are referred to a sentencing circle at the request of the offender or his or her legal representative. Eligibility was initially decided by judges but such decisions are increasingly made by Community Justice Committees, which consist mostly of lay members of the community.

2.42 Sentencing circles are open to the public and steps are taken to involve persons affected by the crime as well as those who can contribute resources to resolving the issues involved. Support groups for both victims and offenders, usually consisting of a number of relatives, neighbours and friends, are encouraged from an early stage. A sentencing plan is devised and the offender's support group becomes responsible for the monitoring, implementation and review of the plan.

## **CHAPTER 4**

### **POSSIBLE SOLUTIONS**

#### **(A) VICTIM EMPOWERMENT AND COMMUNITY PARTICIPATION**

##### **\* Background**

4.1 Like the rest of the world the United Nations initially was also far more concerned with the rights of offenders than the rights of victims. The first United Nations Congress on the Prevention of Crime and the Treatment of Offenders dealt mainly with offenders' and prisoners' rights. Only at the Seventh Congress in Milan in 1985 did victims of crime appear on the agenda. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power contains the

following statement in respect of victims of crime:<sup>72</sup>

#### **Access to justice and fair treatment**

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
  - (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have required such information;
  - (b) allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
  - (c) providing proper assistance to victims throughout the legal process;
  - (d) taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
  - (e) avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

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72 United Nations 1992 *Compendium of United Nations standards and norms in crime prevention and criminal justice*. (1992) 211 ff.

**Restitution**

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.
9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

**Compensation**

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
  - (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
  - (b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.
13. The establishing, strengthening and expansion of national funds or compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

**Assistance**

14. Victims should receive the necessary material, medical, psychological and social assistance through government, voluntary, community-based and indigenous means.
15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims and guidelines to ensure proper and prompt aid.
17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.

\* **Co-ordinated victim support services**

4.2 Present support services for victims of crime and violence in South Africa seem to be limited, fragmented, unco-ordinated, reactive in nature, and therefore ineffective. The planning and establishment of these services are often not community-driven and happen on an *ad hoc* basis which results in difficulties. Services do not cater sufficiently for the diversity of the population and certain services are over-utilized, for example services that focus on women and children, while others tend to be inaccessible because of their location and service fees or are poorly marketed and therefore not used. Furthermore, there is also a lack of long-term planning and unawareness of the plight of victims and what services are available. Many victims go unsupported, remain traumatised, become victims again or even turn to crime and violence themselves.

4.3 The existing "prisoner's friend" system in South Africa is insufficient and even the name of the service does not serve the interests of victims. When, for example, the Attorney-General decides not to institute a prosecution for technical reasons or because of a lack of evidence, the victim should be informed. In particular where the offender is acquitted the victim should be informed of the acquittal and of the reasons therefor.

4.4 Where the offender has been convicted and sentenced the victim should be informed about the nature of the sentence and what it entails. Where the offender is sentenced to imprisonment the victim should be referred to a person employed by the Department of Correctional Services who should be required to inform the victim about the date of release. Where the offender is considered for early release due to amnesty or good behaviour the circumstances should be explained to the victim in order to ensure that the punishment is not regarded as a mere symbolic act.

4.5 The advantage of consultation between the prosecutor and victim lies in the resultant improvement of the community's confidence in the justice system. The increase in the workload of prosecutors arising from the consultation process should be balanced with the value it will have for victims of crime.

\* **The need for legislation to co-ordinate victim support services in South Africa**

4.6 Although a victim support movement is at present gaining momentum in South Africa it will take years before the needs of victims will be addressed satisfactorily unless a permanent council or body is established by legislation to co-ordinate the establishment of services needed. Comments are invited on the following proposals:

- (a) A Victim's Advisory Council or an office for a Victims of Crime Co-ordinator should be established through legislation to address the plight of victims.
- (b) The Council should comprise representatives from government agencies such as the Departments of Justice, Health, Welfare, Police Services and community based representatives from NGOs and CBOs.
- (c) Legislation should provide for a number of principles that should govern the

treatment of victims. The following principles are proposed:

- victims should be dealt with at all times in a sympathetic, constructive and reassuring manner and with due regard to his or her personal situation, rights and dignity;
  - victims should be informed at reasonable intervals of the progress of police investigations concerning the offence, except where such disclosure might jeopardise the investigation;
  - victims should be informed of the charges laid against the accused;
  - victims should be informed of any decision concerning the accused to accept a plea of guilty to a lesser charge or a guilty plea in return for a recommendation on sentencing;
  - victims should be informed of any decision not to proceed with a charge against the accused;
  - where any property of a victim is held by the state for purposes of investigation or evidence, inconvenience to the victim should be minimised and the property returned promptly;
  - a victim should be informed about the trial process and of the rights and responsibilities of witnesses;
  - a victim should be protected from unnecessary contact with the accused and defence during the course of the trial;
  - a victim's residential address should be withheld unless the court directs otherwise;
  - a victim should be given an explanation of the outcome of criminal proceedings and of any sentence and its implications; and
  - a victim who is known to have expressed concern about the need for protection from an offender should be informed of the offender's impending release from custody.
- (d) Legislation should spell out the functions of the Victims Advisory Council, for example:
- to promote the principles outlined above;

- to encourage the provision of efficient and effective services for victims;
  - to promote reforms to meet the needs of victims;
  - to develop educational and other programmes to promote awareness of the needs of victims;
  - to disseminate information concerning the operation of the Act and the functions of the Council;
  - to ensure, as far as practicable, that victims receive the information and assistance they need in connection with their involvement in the administration of justice;
  - to advise the Minister on matters relating to victims; and
  - any other function assigned to the Council.
- (e) The following proposals in respect of consultation between victims, the police and prosecutors are submitted for comment:
- Guidelines should be issued to the police and prosecutors on the treatment of victims of crime in the criminal justice process.
  - Guidelines should be developed by the Victim Advisory Council.
  - If necessary, legislation should be adopted to enforce these guidelines.

**\* The victim impact statement**

4.7 At present victim impact statements are not formally recognised in South Africa. The following proposals are submitted for comment:

- Victim impact statements ought to be generally admissible at the sentencing hearing. The purpose of such statements should be to provide a measure of the seriousness of the offence and it should be spelled out in legislation.
- Victim impact statements should only be admissible in respect of cases where they furnish the court with particulars that are not already before the court in evidence or in a pre-sentence report.
- For the purpose of such a statement “victim” should be defined as the

person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers injury as a result of the offence.

- Victims should have the option to tender a statement and the right to request the prosecutor to refrain from presenting the court with details of injury.
- Victim impact statements should be signed, or otherwise acknowledged as accurate by victims before they are received by the sentencing court.
- Such statements in sworn form ought to be tendered by the prosecution at the sentencing process.
- The statements ought to address the actual physical, psychological, social and financial consequences of the offence on the victim and not the question of an appropriate sentence which ought to be imposed.
- The court should have the discretion to disallow a statement and the author should always be subject to cross-examination on the contents of the statement.

**\* Victim-offender mediation**

4.8 Schemes involving mediation between victims and offenders ensure wider victim participation in the justice system by allowing victims to take part in the resolution of the case. Mediation may be organised without face to face contact between the parties and one of its main aims is to address the concerns of the victim. The following proposals are submitted for comment:

- Referral by the court to a mediation process should be considered when the victim and the offender wish to come to an agreement about the offender's future contact with the victim or where the parties desire some form of compensation or reconciliation.

(i) Family group conferences

- Family group conferences involving the offender, the victim, the supporters of each of them and an independent mediator should be considered where appropriate.

(ii) Community Youth Conferences

- Legislation should provide for Community Youth Conferences to deal with

sentencing of young offenders. Matters may be referred to the CYC by the police or the Children's Court and victims may be allowed to participate in the process and outcomes can involve apology, reparation to the victim or to the community in the form of community work.

(iii) Community Aid Panels

- Community Aid Panels should be considered in appropriate cases, in particular where the community has an interest in the outcome of the case and where the panel may be required to recommend a course of action which will involve voluntary community work, skills training or counselling.

(iv) Circle sentencing

- Circle sentencing may be considered in order to involve persons affected by the crime as well as those who can contribute to resolving the issues involved, eg relatives, neighbours and friends.

## **(B) A COMPENSATION SCHEME FOR SOUTH AFRICA: PROPOSALS FOR COMMENT**

### **\* Introduction**

4.9 In what follows the Commission raises some of the issues which should be dealt with when considering the introduction of a compensation scheme for South Africa. In the course thereof certain proposals are made and the purpose thereof is to elicit comments, suggestions and proposals for reform of this aspect of the law. The Commission would welcome any suggestions and proposals for law reform on this matter and the provisional proposals submitted for comment are discussed below under the different headings.

### **\* The necessity for a compensation scheme**

4.10 South Africa is far behind the rest of the world in respect of victim support in general and victim compensation in particular. From the information available to the Commission it appears that the introduction of a central compensation scheme for victims of crime in South Africa has become a matter of urgency. The right of a victim to recover damages by way of a civil action is of little comfort to a victim considering the financial position of most criminals, their ability to compensate victims and the unprecedented crime wave that is sweeping our country. In order to address this problem, there appears to be a need to introduce a compensation scheme which will restore confidence in the administration of justice through a just and fair functioning. In order to achieve this, consideration should be given to a number of factors. The introduction of a compensation scheme will, however, place a heavy financial burden on the State and the first question that needs to be addressed is whether such a scheme should be established and whether or not alternative procedures should be considered to achieve the same results.

4.11 The Commission invites any suggestions, proposals and comments on the necessity for the introduction of a compensation scheme for victims of crime in South Africa. The Commission

would also appreciate comments on alternative methods to redress the plight of victims of crime. One possibility is to amend the Criminal Procedure Act to compel the courts to consider the compensation of victims of crime by providing for a compensation order as a condition to the suspension of sentence, wholly or partially.

\* **The establishment of a compensation scheme**

4.12 If a compensation scheme is to be introduced in South Africa a number of factors should be considered. The Commission therefore also invites comments on specific aspects related to a compensation scheme which are outlined below.

**(i) Rationale for the introduction of a compensation scheme**

4.13 The rationale for the introduction of a compensation fund in South Africa should be that the State has a moral duty to compensate victims. Victims should have a right to compensation and it should be awarded out of sympathy, goodwill and for humanitarian reasons.

**(ii) The administration of the scheme**

4.14 The compensation scheme should be known as the "Criminal Injuries Compensation Scheme" and its administration entrusted to an independent and newly created Board known as the "Criminal Injuries Compensation Board".

4.15 The members of the Board should be appointed by the Minister of Justice. The Chairperson should be a judge or a person with a legal background while the other members should represent the following occupations:

law;  
 medical science;  
 penology; and  
 police services.

4.16 The enabling statute should provide for the Minister of Justice in co-operation with the Minister of Finance to regulate the details of the management of the Fund, the procedure relating to grants from the Fund, the form in which applications should be made, the manner in which the accounts of the Fund should be kept and any other matter which is considered necessary or expedient to prescribe in relation to control of the Fund.

**(iii) The sources of the compensation fund**

4.17 The compensation scheme should be funded from the following sources:

- Twenty percent (20%) of all fines imposed by courts should be paid into the fund. Exceptions should be provided for, for example fines paid to local authorities;
- a surcharge of R50 for every conviction in court should be paid by the accused;
- money confiscated in terms of the Act on the Proceeds of Crime;
- an amount to be determined annually in the budget known as a “Grant in Aid”.

**(iv) The definition of victim**

4.18 For purposes of payment to victims, victims should be defined as:

- any person who directly suffered injuries as a result of the commission of a violent crime (including survivors of sexual assault);
- the dependants of a direct victim who suffered loss or damage as a result of the death of the victim; and
- persons generally referred to as good Samaritans who assisted in the arrest of the offender, assisted the law enforcement officials in the performance of their duties and who assisted in restoring law and order or peace.

**(v) The nature and extent of the scheme**

4.19 Compensation should be awarded to:

- Any “victim” of so-called violent crimes including offences where the violence may be defined as indirect such as arson, poisoning or intimidation;
- victims of offences such as drug trafficking, sexual exploitation of children (child prostitution, child trafficking etc);
- the dependants of victims contemplated above;
- any person injured in an attempt to prevent the commission of a crime or when assisting a law enforcement officer;

- any South African citizen, visitor to the country or guest labourer within the country who is a victim of the crimes contemplated above;
- victims of human rights violations should at this stage not be included since they are to be dealt with in terms of the Promotion of National Unity and Reconciliation Act.

4.20 In order to qualify for compensation victims should be required to:

- Report the crime to the police within a reasonable time;
- apply for compensation within a year of the report to the police;
- assist the police in its investigation;
- be prepared to disclose their role in the commission of the offence.

4.21 A tariff in terms of which the amount of the reward is fixed should not be considered with the introduction of the scheme.

**(vi) The status of the applicant**

4.22 Should compensation be considered where -

- the victim and the offender are members of the same household; and
- the offence is committed against a victim while he or she is serving a term of imprisonment?

4.23 Injuries justifying an application for compensation must relate to actual bodily harm, which may include emotional or physical harm and even pregnancy caused by or arising from a recognised offence.

**(vii) Minimum and maximum compensation awards**

4.24 Most jurisdictions include a mechanism in terms of which a minimum award is allowed as well as a ceiling for maximum awards. When considering the reasons for minimum and maximum awards it appears to be easier to determine the minimum amount than to determine the maximum amount. With reference to the minimum amount it denies a number of persons or victims the opportunity to apply for compensation. In most jurisdictions this has little effect since most claims are for pain and suffering.

4.25 The effect of a maximum award for compensation is, however, problematic. It would be

difficult to make proposals without consultation. It would also depend on the approach and policy adopted by the Board. In this regard the Board would be confronted with important questions namely, should damages be awarded as in the case of actions brought under the common law and if the maximum award is exceeded should it be reduced to the prescribed maximum? Furthermore, the question arises as to whether the Board should award damages based on the seriousness of the injuries in proportion to the maximum amount allowed by law. It is suggested that in order to make the fund viable and to get the fund off the ground, a maximum amount of, for example, R30 000 should be determined.

4.26 A minimum amount which would justify a claim should be fixed by law (for example R200).

4.27 In order to make the scheme viable and cost effective a maximum award for compensation (for example R30 000) should be fixed by law.

#### **(viii) General guidelines**

4.28 The following proposals are submitted for comment:

- The State should be allowed to institute a civil action against the offender only after the victim has elected not to institute a claim.
- Payment for compensation should be allowed either in a single amount or in instalments.
- Restitution for monetary loss should include loss of income, loss of maintenance to a dependant of the victim and funeral costs.
- Claims for loss of property should not be allowed under the scheme although exceptions may be considered. (In cases of the so-called “good Samaritan”.)
- Claims for compensation for pain and suffering should be allowed.
- Claims for compensation should be considered in accordance with the principles of the common law as applied in civil actions.

**COMMENTS ON ISSUE PAPER ON RESTORATIVE JUSTICE**

**PART 2****COMMENTS ON ISSUE PAPER ON RESTORATIVE JUSTICE****Compensation**

2.1 Compensation by the State from a State Compensation Fund is included in the comments because of its relevance as an alternative to compensation or restitution by the offender. The need for and viability of such a compensation fund will, however, be considered in a separate investigation. Prof L de Koker, University of Orange Free State supports a compensation fund but also supports the creation of an asset forfeiture fund as well as mechanisms similar to the distribution of assets in an insolvent estate to ensure fair distribution of funds confiscated in terms of the Proceeds of Crime Act, 76 of 1996.

2.2 The Act allows the State under particular circumstances to obtain a confiscation order that can drain the estate. Victims of the offender with claims for compensation may find that the confiscation order has left the estate with no assets to levy execution against. He points out that in English Law, section 71 (1C) of the Criminal Justice Act allows the court to take into account that a victim of any relevant criminal conduct has instituted an intent to institute civil proceedings for loss, injury or damages sustained in connection with that conduct. In particular, the court might preserve the assets of the defendant for purpose of a claim by the defendant while making the remainder of the assets subject to confiscation.

2.3 The creation of a compensation fund as proposed will not necessarily solve the matter - victims will then share money with the other victims.

2.4 The Democratic Party supports the creation of a compensation fund. They introduced a private members bill to this effect in 1997.

2.5 The National Council of Women of South Africa points out that the concept of compensation to victims is not strange or alien to South African law. Our common law allows the victim to sue for compensation in a civil claim.

2.6 Although a compensation scheme seems ideal the public is already grossly over-taxed and any further burden on the taxpayer should be avoided. The sources of such a fund, that is a grant in aid, a surcharge or levy in respect of all fines imposed and money confiscated in terms of the Proceeds of Crime Act is supported. However, in cases of a conviction for corruption where the victims are unidentified members of the public it would be difficult to allocate compensation. It is proposed that where large quantities of dagga are confiscated it should be exported to countries where the use of dagga is legal instead of being destroyed as is the case at present. This would provide a fruitful source of revenue for the fund.

2.7 They propose that suitable convicts should be hired to work in gardens and to engage in work to the benefit of the community. In cases of arson, for example, gangs responsible for burning of huts during faction fights in the province should be sent to another province to rebuild the huts.

2.8 In cases of assault priority should be given to the hearing of the case while victims should not be charged with hospital fees in respect of serious injuries sustained. In cases of rape no form of compensation seems sufficient. Perpetrators should be punished severely while victims should not be dependent on the charity of non-governmental organisations for support and therapy. A clear routine should be set up between the Police, the Department of Health and the Department of Social Welfare to render every possible assistance. The matter of police protection of victims calls for serious thought.

2.9 H L Hlongwane of the Directorate Community Corrections points out that when a court imposes a sentence of correctional supervision in terms of section 276 (1)(h) of the Criminal Procedure Act 5, of 1977 the court may set a condition to this sentence that the offender pays compensation to the victim. The Department of Correctional Services handles such payments.

2.10 Failure by the offender to comply with such an order will result in him or her being referred to the trial court to consider a possible alternative sentence. After discussion with members of the community it became clear that in certain circumstances victims do not want monetary compensation. If, for example, a goat a sheep or cattle were stolen they would prefer restitution - being reinstated. This is something they would understand.

2.11 The creation of a compensation scheme would only encourage criminals to further their actions and it may lead to fraud and corruption by the community with a resultant increase in workload on the functionaries in the criminal justice system. If compensation is considered it should be paid by the offender.

2.12 The National Council for Women of South Africa supports the United Nation's declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Long delays in bringing criminal cases to court have the effect of denying justice to the victim. Victims should be entitled to full and regular consultation with public prosecutors and the situation where months go by without the victim knowing any information as to what is happening creates resentment and brings the law into disrepute.

2.13 Mr Maree, an attorney of Pietersburg, points out that section 300 of the Criminal Procedure Act is inadequate in that it only provides for compensation in cases of damage or monetary loss as a result of theft or fraud. It is insufficient for compensation in cases of assault.

2.14 He proposes that to ensure effective administration of a compensation fund, experts from the private sector should be appointed. In cases of fraud or theft the courts should make use of section 300. However, problems arise in cases of violent crimes. It is proposed that courts be allowed to order compensation in such cases according to established principles and that the award be recovered by means of an order for execution or other steps provided for in civil practice.

2.15 An alternative would be to allow for claims against a compensation fund provided certain conditions are met. The victim should have the right to proceed in the Magistrate's or High Court if he or she is not satisfied with the award in terms of the scheme. The proposed scheme would address the problem where offenders are unable to pay compensation to the victims of crime.

2.16 Advocate N Cassim (on behalf of the Johannesburg Bar) points out that in the South

African criminal justice system as it presently exists, the victim of crime has been rejected. In *S v Lekgathe* 1982 (3) SA 104 (B) attention was drawn to the inadequacy of section 300 of the Criminal Procedure Act since it did not cater for the pain and suffering of the victim. Section 297 (1)(a)(i) of the Act entitles the court to impose a duty to compensate the victim of an assault as a condition of suspension of a sentence of imprisonment. This would be proper only where there is a real prospect that the accused will be in a financial position to pay such compensation within a reasonable time. This form of restitution once more serves the need of the offender in that he avoids the penalty of incarceration, but it cannot provide a comprehensive remedy in terms of victim compensation.

2.17 All participants at a workshop hosted by the Centre for Criminal Justice, University of Natal, overwhelmingly supported the idea of a compensation fund. It is argued that because the scheme could be open to abuse, any claim should depend on the seriousness of the injuries sustained by and the seriousness of the crime committed against the victim. The scheme should be properly administered by a transparent, independent body that will be democratically elected and audited on a regular basis. The scheme should also aim at uplifting the victim by providing skills training. Rather than paying out money to certain victims only, the compensatory award should be directed towards training in courses of the victim's choice. The scheme should be funded by contributions from people such as Business Against Crime, the Government and others. Some wrongdoers should receive a sentence of paid community service, but 80% of their earnings should be paid to the victim.

2.18 Mr S Segal suggests that in view of the ravaging and disabling criminal attacks, hijackings and robberies there is a need for the urgent creation of a fund (Victims Fund for Compensation for pain, suffering and bodily disfiguration). This fund would assist victims whose medical expenses, incurred as a result of crime, exceed the limits of their medical aid schemes, and victims should be able to claim the unpaid balance from the compensation fund. The fund could also be used to assist victims of crime who have incurred medical expenses when the perpetrators of the crime are unknown.

2.19 Advocate N Cassim points out that members of the legal profession have since 1982 been calling for the establishment of a compensation scheme. The rationale for such a scheme should be based on a social justice principle, namely that society is responsible for the environment which leads to crime. The fact that a crime is committed proves that the State has failed in its duty of affording safety and protection to its inhabitants and consequently the State must pay the cost of victimisation as a matter of right.

2.20 The levelling of a R50 surcharge for every conviction should be made payable by the offender failing which will result in an alternative of imprisonment. Compensation should be paid even in those cases where the victim and the offender are members of the same household and where an offence is committed against a person serving a sentence of imprisonment.

2.21 The injuries justifying an application for compensation must relate to actual bodily harm, which includes emotional or physical harm and even pregnancy caused by or arising from a recognised offence as well as financial loss incidental thereto, such as loss of income, loss of maintenance to a dependent of a victim and travel expenses.

2.22 Provision should be made for minimum and maximum awards and similar provisions as those relating to fare paying passengers in the Motor Vehicle Insurance Act should apply. The

State should be allowed to institute a civil action against the offender only after the victim has elected not to do so. Payment for compensation should be allowed either in single amounts or in instalments. Claims for compensation should be considered in accordance with the principles of the common law as applied in civil actions.

2.23 Ms van der Walt, Magistrate Pretoria-North, supports the concept of compensation for victims of crime in general. However, whatever scheme is introduced, it would of necessity lead to actions being instituted on false charges for the sole purpose of financial gain. It would be very difficult to identify such cases prior to the eventual hearing and it would have a definite effect on court roles. It could well lead to the establishment of a significant number of additional courts to handle the extra work. Their office has embarked on a strategy whereby sentence is suspended in terms of section 297(1)(a) of the Criminal Procedure Act on condition that the victim be compensated directly by the offender. This strategy has brought about a significant increase in the court attendance of witnesses.

2.24 Lawyers for Human Rights has reservations regarding a compensation scheme for victims of crime in South Africa. Given the fiscal constraints it would appear that the amounts paid would have to be limited. A system that would work like the Workmen's Compensation Fund, where it takes years for the matter to be set down for a hearing, will only exacerbate the frustration of victims. Lawyers for Human Rights would instead support the establishment of mediation, counselling and legal support centres in magistrates courts throughout the country. These centres could offer counselling and advice to victims as well as mediation between victim and perpetrator. These centres could be funded from fines as well as money confiscated from the proceeds of crime and an annual amount to be determined in the budget known as a Grant in Aid. The idea of a surcharge for every conviction may have some merit but would need to be thought through very carefully. Victimless crimes may need to be excluded as might juvenile offenders.

2.25 The SA Council for Social Work proposes that the administration of the compensation scheme should be entrusted to a newly created board known as the Criminal Injuries Compensation Scheme and that it should be chaired by a judge or other legal person and that members of this board should be drawn from other occupations such as law, medical science, penology and police services. People with a background in the social sciences should, however, play a crucial role in developing the board. Social workers, criminologists and psychologists are all directly involved with victims as people, such as in pre-sentencing reports, counselling and training of volunteers as counsellors and supporters to victims. This places them in a strong position to understand particular social and emotional consequences that victims suffer and these would be important considerations for the proposed board.

2.26 Mr PJ Jacobs, magistrate Bloemfontein, points out that the main problem is whether the State would be able to afford the financial burden of a compensation fund. In the light of financial considerations it is submitted that compensation be awarded to a small group of defined victims only; persons referred to as "Good Samaritans" should be excluded since they are not victims in the real sense of the word; there seems to be no reason why a victim serving imprisonment should not benefit from the scheme. An amendment to the Criminal Procedure Act to compel courts to consider compensation of victims of crime by providing for a compensation order as a condition of a suspended sentence wholly or partially is a necessity.

2.27 Mr M de Kok, Regional Court Magistrate, supports the establishment of a compensation

scheme. He proposes that the courts should be compelled to consider compensation when considering sentence. In terms of section 297(1)(b) of the Criminal Procedure Act, a court can impose a suspended sentence on condition that the victim be compensated for damages, and if the accused is prepared to pay compensation, the court can take it into account in mitigation of sentence. In many instances, however, accused persons are unable to pay compensation because they don't have the means to do so. It is therefore advisable that a compensation scheme such as the one proposed be established to compensate victims of crime.

2.28 Jacob Raseroka and Lawrence Muzame, researchers for the National Institute for Public Interest Law and Research are of the view that there is a need for the establishment of a compensation board, which shall regulate the activities of the compensation fund. The compensation board should not only be composed of members from the Police, law, and medical science, but should also reflect the diverse community. No standard form of compensation should be adopted, but each case should be viewed on its own merits.

2.29 The scheme should be funded without inconveniencing the taxpayer. South Africa's economy is not advanced to levels similar to European countries where such compensation schemes are in place.

2.30 Mr AM Bluhm proposes that if a criminal is in a financial position to pay compensation, this should be awarded to the victim through criminal procedures and not civil litigation. As a rule one out of possibly 1, 000 criminals might be in a financial position to pay compensation, but this will be to the detriment of his or her innocent family. No state-paid claims for compensation should be considered. The Criminal Procedure Act should allow for any compensation with respect to medical services, loss of property and so forth, but not for pain and suffering, if the convicted person is in a financial position to pay. The State should provide medical services and counselling to the victim and or his or her family free of charge. State pensions should also be paid to victim's children and families who have lost their breadwinner or to a victim who is incapacitated.

2.31 The Women's Lobby thinks that the State is obliged to set up a compensation fund but all efforts must be made to locate the assets of the offender. It is a good idea that compensation funds be supplemented with a levy payable by convicted offenders.

2.32 A committee of the Law Society of the Cape of Good Hope cautions that the criminal justice system attempts to achieve the most fair result for the offender and the victim by balancing their respective versions and interests against time honoured principles of objectivity. It is within the civil justice system that complaints have traditionally sought financial compensation, again within the context of time honoured principles geared to deliver the most fair results for both parties. The committee is concerned that the proposed blurring of the boundaries between these systems may undermine these principles to the detriment of both systems. In general, the committee is concerned that the prospect of compensation may cause complainants to exaggerate injuries suffered, with a view to improving the financial reward for such injuries. The committee is of the opinion that section 300 of the Criminal Procedure Act is under-utilised, that implementation of that provision might well be promoted and recommends that a similar provision be made in respect of correctional supervision.

2.33 The committee supports the principles of access to justice and fair treatment, restitution, compensation and assistance extracted by the Law Commission from the Declaration of Basic

Principles of Justice for Victims of Crime and Abuse of Power, but cautions that the level of compensation envisaged would constitute an impossible burden on the State. Accordingly, the committee recommends that consideration be given to the existing provision for compensation for pecuniary loss. The committee believes that such an amendment would make adequate provision for the perceived need to offer compensation in certain circumstances, without introducing a new area of investigation and new prosecutorial procedures to a criminal justice system which is already over-burdened.

2.34 With regard to the proposed introduction of a compensation scheme the committee agrees that there is a definite need for such a scheme, the committee agrees that there is a definite need for victim support and comments that, while South Africa may be behind the rest of the world in the area of victim compensation, the creation of a compensation scheme cannot be a priority in the South African context where financial resources are already stretched. The committee does not believe that victim compensation will assist in addressing the prevailing crime wave and recommends that all financial resources be applied to the support of an effective justice system.

2.35 The committee is not persuaded that the State has a moral duty or obligation to compensate victims and recommends that this premise be thoroughly investigated. While the case for compensation based on sympathy, goodwill and humanitarian reasons may be easier to argue, the committee repeats its earlier submission regarding the inevitable drain of such a scheme on the financial resources of the State. With regard to the proposed administration of the scheme it is clear that the creation of a board, together with an administrative support system, would present a substantial cost. The committee is not persuaded that the contemplated sources of funding are realistic, in particular the proposed surcharge for convictions. The allocation of 20 percent of all fines paid and moneys confiscated in terms of the Proceeds of Crime Act is unlikely to meet the inevitable demand for compensation, if introduced. The committee accepts the definition of "victim" and the suggestions regarding the range of persons who should receive compensation (were such a system to be introduced) but cautions that the wider the scope of the definition and the scope of persons qualifying for compensation, the greater the potential demand for compensation.

2.36 The committee supports the proposed requirements to qualify for compensation and recommends that consideration be given to broadening the scope thereof. The committee believes that the exclusion from compensation of victims and offenders of the same household and victims serving terms of imprisonment is not constitutionally sustainable. Furthermore, if such a scheme is to be introduced compensation will of necessity have to be paid for all physical injury, including pregnancy as a result of rape and emotional harm. Consideration should also be given to compensation for damage of property.

2.37 With regard to the range of awards and the possible introduction of maximum and minimum awards, the committee recommends that a bank of precedent decisions will inevitably be created and be reviewed against changing circumstances. The committee cautions that a maximum award of R 30 000 may serve only to undermine the contemplated benefit of introducing a compensation scheme, especially where that amount offers no real compensation and causes lower awards disproportionate to the actual damages suffered.

2.38 Advocate Botha of the office of the Attorney-General, Bloemfontein, is of the opinion that the State has a duty to create a safe and orderly society. If it fails in this duty and the people

suffer as a result thereof, the State should be held responsible and accountable. A compensation scheme should not be funded with taxpayers money, but rather from other sources. He proposes that the success or not of a prosecution flowing from an injury should play a role in determining whether the injured individual should be compensated.

2.39 The South African Agricultural Union supports the idea that if the State fails to create a safe environment it should be held accountable for compensation. Victims may suffer serious injuries during violent attacks and a compensation scheme should be structured in such a way as to include compensation for the following :

- a once-of payment;
- compensation for medical expenses in the long term; and
- compensation for personal property in cases of violent offences only.

2.40 The proposed process should also make provision for compensation to be claimed from the offender. Awards in terms of the proposed procedure must be determined by the seriousness of the offence and the injury suffered as a result of the offence. The criminal process should be adapted to make provision for the needs of victims, in particular their practical, financial, medical and psychological needs. The establishment of a co-ordinated victim support service on a national and provincial level is welcomed. It is, however, not necessary to create a new structure in order to achieve this. The most important aim of the support service should be to co-ordinate the existing structure and to advertise the service as widely as possible.

2.41 H Wetmore propose that compensation should be extended to include property. While section 300 of the Criminal Procedure Act makes provision for the payment of compensation to victims of crime at the request of the prosecutor, this is not mandatory. Prosecutors do not even inform victims of this possibility and such compensation should be mandatory. No criminal should be allowed to benefit from their crime. The thief must make restitution. The issue paper's position is that those who suffered loss or damage of property must resort to civil action and rightly argues that this is beyond the understanding or ability of most of our citizens.

2.42 The most difficult questions are where will the money for compensation come from and how will the scheme be administered? He proposes that funds for a compensation scheme be obtained by:

- \* fines paid as a sentence should be paid into the fund;
- \* a surcharge of R 50 for every conviction;
- \* money confiscated in terms of the Act on the Proceeds of Crime;
- \* an amount determined annually by Government;
- \* attachment of the offender's assets;
- \* where the offender has insufficient funds, the State should provide work opportunities on prison-farms, prison factories and public works projects under appropriate security arrangements;
- \* where the offender does not pose a threat to society he or she could be employed in the public labour market, ideally in the place of previous employment, where necessary under a form of house or work arrest, where his or her skills would not

be lost to the nation and where higher earnings would make the whole compensation scheme more viable.

2.43 These additional sources of income would have many advantages. It will serve to hold the offender accountable and responsible for compensation; it will create a closer relationship between the crime and the penalty; the public sense of justice will be satisfied; and the offender will learn the reality of “what you sow is what you reap.” If offenders bear the cost of the crime committed, they will have a sense of having atoned their sins and this will enable them to ameliorate the sense of guilt and begin a new way of life. Punishment should also be a deterrent to repeating crime and to preventing others from committing the crime. If offenders know that after they have murdered their enemy they must then support their enemy’s family for the rest of their lives, they may well think twice before committing the crime.

2.44 With regard to the administration of the scheme the State should not inflate the bureaucratic structures to which the civil service is prone. It is likely that the proposed central board will require many regional sub-structures to manage implementation of the scheme throughout the country. This could become an additional drain on the State’s finances. The courts are understaffed in administrative staff, prosecutors, magistrates, and judges and this shortage needs to be addressed first before spending vast amounts on the new scheme. With enough of these officials in place, they can be delegated local application of the compensation scheme, accountable to the national board.

2.45 Mr L Naidoo, member of the Criminal Law Procedure Committee of the Natal Law Society, is of the opinion that the State has a moral duty to compensate victims of crime and not a legal duty. Therefor victims should not have a right to compensation but a right to apply for compensation either from the State or the offender. The latter has a legal duty to compensate the victim. Where victims and offenders are from the same household compensation should only be allowed if the offender will not benefit directly from this compensation. If one subscribes to the view that prisoners do not forfeit their rights because they are in prison or have committed an offence then compensation should also be allowed to victims who are serving sentences of imprisonment. A statutory maximum should be set as a ceiling in order to make the fund viable. However, the courts should make an order irrespective of whether it exceeds the limit. The balance would therefore be calculated and provision should be made to recover this balance from the offender.

### **Victim and community involvement in sentencing**

2.46 Prof de Koker, University of the Orange Free State supports the right of the victim to address the court on sentencing. It is an important measure to empower victims, but it should not create an obligation for the victim nor should it influence the court unduly.

2.47 Pagad, Kwa Zulu Natal, submits that victims should be empowered in their search for recognition through direct participation in the criminal justice system. There should be improved consultation between the victim, the police and prosecutors and legislation should recognise victim impact statements. Procedures involving victim-offender mediation should be introduced.

2.48 C Goodenough was attacked during 1996 and became the complainant in an attempted murder case. In her view prosecutors do not have adequate time to inform victims. Victims

should be consulted before prosecutors accept pleas on lesser charges. Victims have a need to inform the court of the effects that the criminal act had on their lives.

2.49 Advocate N Cassim is of the opinion that community panels should be part of the sentencing process in appropriate cases where the community has an interest in the outcome of the case. Victim-offender mediation is a delicate process and should be considered in those cases where the victim and the offender belong to the same family, neighbourhood or community. To this end the establishment of specific mediation or reconciliation facilities involving psychologists and members of the legal profession as facilitators should be established.

2.50 All participants at a workshop hosted by the Centre for Criminal Justice, University of Natal, agreed that community representatives should be elected whenever there is a crime committed by a member of that community and the representatives should be involved in the sentencing stage to decide how the perpetrator should be sentenced. They then have to report back to the community.

2.51 Mr PB Monareng, Regional Court President, North West is of the view that it cannot be overstated that the community must be invited to participate in the justice process. Accused persons would be properly punished if there is participation in the process by people they know and people who they live with because they should, after all, be reintroduced into the community after serving their sentence.

2.52 Jacob Raseroka and Lawrence Muzame, researchers for the National Institute for Public Interest Law and Research are of the view that community involvement in sentencing is an important element, which should be added to the criminal justice system. Family group conferencing, community youth conferences, community aid panels and circle sentencing are some forms of community involvement. Community aid panels and community youth conferences seem to be too theoretical a solution for South Africa. Family group conferences are a more workable solution for South Africa, especially with juvenile offenders. The community would know more about the offender than an outsider and hence can formulate a better plan to deal with the offender. The community acts as watchdog and this has both reparation and retributive effects. It is submitted that community involvement would be enhanced by-

re-visiting the jury system;

re-visiting the African indigenous court system;

allowing the community to act as watchdog over offenders particularly where the offender is released on parole or is given a suspended sentence; and

the State should seek ways of promoting community policing as an essential tool in the criminal justice system.

2.53 The Women's Lobby supports the need to involve the community in the criminal justice system and the need to promote the victim's interest by helping to alleviate secondary victimisation such as injury, loss of work and loss of family. There is a need to involve the community in the criminal justice system to remove the impersonal element of the State as the punitive patriarch. However, they caution against some people's possible attitude of vengeance.

2.54 The NCPS Programme Team on Victim Empowerment strongly supports the need for

legislation to co-ordinate victim support services. The Programme Team emerged from a workshop held in August 1996. This workshop enabled the first major attempt at co-ordinating key stakeholders in both public and private sectors involved in service delivery for victims of crime. A Victim's Rights Charter is crucial in this regard and it would establish basic administrative guidelines designed to secure minimum standards for the fair treatment of victims service agencies dealing with justice, health and community services. The Programme Team has identified the compilation of a Charter of Victim's Rights as a matter of urgency. The example of a Victims Advisory Council in Australia was used in the issue paper, but the Team draws attention to the existence of a number of international models of formal, permanent, statutory bodies whose terms of reference are specific terms of reference to co-ordinate policy initiatives and service delivery for victims of crime.

2.55 The Team points out that the statistics on crime referred to in the issue paper are outdated and crime statistics are released on a quarterly basis. The Police statistics only refer to reported incidence of crime and the Commission is advised to also consider victim surveys. The Programme Team with the assistance of the Secretariate for Safety and Security is currently engaged in a project to initiate a victim survey in South Africa. Under the NCPS the Department of Welfare is the lead Department for the Victim Empowerment Programme and the Programme Team deals specifically with the needs of victims and represents the strong movement towards establishment of co-ordinated victim support services in South Africa referred to in the issue paper. These facts should be contextualised. The current position of the State President's Fund for Victims of Terrorism needs to be clarified and this would enable a proper assessment to be made on possible sources for the proposed Compensation Scheme/Fund. In terms of restitution and compensation the Commission is advised to follow the standards established by the United Nations.

## Victim impact statements

2.56 Advocate N Cassim points out that there is a need for recognition of victim's rights and one of the mechanisms to do so would be to allow victim impact statements to be admissible. Victim impact statements should be in the form of a sworn affidavit before being received by the sentencing court and it should be limited to address on the actual physical and financial consequences of the offence on the victim.

2.57 Lawyers for Human Rights is not convinced that victim impact statements are in the interests of victims in all cases. Sometimes victims feel more vulnerable if they give too much detail about the impact of the crime. Also, unless the person who takes the statement is well trained the victim may experience the trauma during the statement-taking.

2.58 The paper does not indicate who is going to take the statements, and whether this would be a category of worker already working within the criminal justice system or whether it is intended that a completely new class of worker would be employed to undertake the work. It is submitted that neither the police officials nor prosecutors would be qualified to undertake this kind of work. Probation officers would probably be more able to do the work, but there are less than 100 probation officers country wide. Social workers or psychologists in private practice or appropriately trained community members could undertake the work on a sessional basis.

2.59 The proposal that there should only be victim impact statements in cases where the particulars are not before the court has some merit in that these are certainly the cases where the statements is most relevant. The statements must, however, always be given voluntary and the victim should be able to request the prosecutor not to reveal certain details. Lawyer for Human Rights agrees that statements ought to address the actual physical, psychological, social and financial consequences of the offence on the victim and not the question of sentencing. The proposal in terms of which cross-examination on the statement is allowed is not supported.

2.60 The Law Society of the Cape of Good Hope suggests that victim impact statements should be unnecessary except perhaps when a plea of guilty is entered. Even then, the possible impact on the victim should be addressed in evidence in mitigation /aggravation of sentence.

2.61 Mr L Naidoo, member of the Criminal Law Procedure Committee of the Natal Law Society, is of the opinion that victim impact statements can and will for various reasons be abused and it is therefore necessary to built in certain checks and balances such as:

- \* statements should be sworn;
- \* should only address physical, psychological injury and financial consequences of the crime but not appropriate sentences;
- \* the court should have the ultimate discretion on whether to allow the statement; and
- \* the author must be subject to cross-examination on the contents of the statements.

2.62 The NCPS Programme Team on Victim Empowerment is of the opinion that the victim

impact statement is not uncontroversial. Before deciding that victim impact statements should be encouraged or supported, it needs to be determined whether or not they have the effect of empowering victims. The victim impact statement cannot be taken at the time of the initial reporting of the crime for the obvious reason that the full impact of the crime on the victim may not be apparent at that stage. The statement therefore needs to be taken at a later stage and it may be that having to relate the impact of the crime at a time when healing has begun to take place is not in the interests of the victim. Victims feel more vulnerable if the offender knows the full impact of the crime and it can be seen to be a further invasion of privacy. If the concept is accepted, there are a number of practical issues which need to be addressed to determine whether or not they are in fact workable, for example, who should take the statement. If the statement is to be nothing more than a purely subjective statement it would seem that it would have to be taken by someone who is either qualified or specifically trained to understand victim issues and recognise signs of post traumatic stress. Secondly, if it is planned to utilise existing personnel in the current justice system such as prosecutors or police officers it is difficult to see how their training would equip them to undertake such task. A better option would obviously be to have appropriately trained persons undertaking this task. This would carry a price tag since it would be necessary to have a large enough pool of people who can communicate with victims in their own language and who also have the necessary training. A third issue to be considered is that in cases where the accused pleads guilty, insufficient time will usually have passed for an impact statement to be taken before sentencing is due to take place. In matters concerning guilty pleas it may be of particular importance to have a statement of the victim, as there will be no evidence of this on record other than possibly medical evidence. There is a case to be made for victim impact statements in such cases, even if it is not workable or affordable to obtain such statements in every case. The Team do not support the proposal that legislation should provide for victim impact statements unless the aim and the method is fully in line with victim empowerment.

2.63 If victim impact statements are to be admissible, they would be particularly useful in cases where there is insufficient evidence of the effect of the crime on the victim, for example, in the case of a guilty plea or in cases where the full impact of the crime was not evident through the testimony of the victim. This does not mean that in principle a good model of victim impact statements should not be extended more broadly, although practical difficulties and cost implications may make it difficult.

2.64 The Team is of the view that the definition of a victim as the person against whom the offence was committed or who was a witness to the act or threatened violence and who suffers injury as a result of the offence, appears to be a reasonable one. It might be useful to consider accepting evidence of persons close to the victim who may not have witnessed the offence but who can bear testimony to the effect that the crime had on the victim. This may be useful where the victim is a young child who is too young to express him or herself. The Team supports the notion that the tendering of victim impact statements should be completely voluntary, and that the victim's wishes regarding information about the injury or any other information that makes the victim feel vulnerable should be respected.

2.65 If the statement is taken under oath the problem of the veracity of the statement would be solved. The administering of the oath may occasion practical difficulties unless the person taking the statement is also a commissioner of oaths. Whether the statement should be tendered by the prosecution is another matter. If offered by the prosecution as evidence, the practice of tendering victim impact statements may feed the retributiveness of the adversarial system. It may be better to have the statement put before the court at the request of the presiding officer,

in much the same way that the pre-sentence reports are usually requested by the court. The Team supports the proposal that impact statements should generally address the actual physical, social and financial consequences of the offence on the victim and not the question of the appropriate sentence which ought to be imposed. If the court is to have a discretion to disallow the statement there would need to be clear guidelines or criteria. Cross-examining the author of the statement is a difficult issue. Although common law would probably support this it would put the usefulness and practicability of the statements at grave risk. It would rarely, if ever, be in the interests of the victim to be brought to court and to be cross-examined about the effects of the crime.

## **Annexure C**

Annexure C is available in Microsoft Word format and as a separate pdf file.

## **APPENDIX D**

### **COMMUNITY CORRECTIONS**

## COMMUNITY CORRECTIONS AS A SENTENCING OPTION

### Introduction

1.1 Over the last decade, state and local governments in a number of countries have come to realize that the nearly exclusive use of probation and incarceration strategies is expensive and inadequate to effectuate positive change in most non-violent offenders. As a result, there has been movement towards developing comprehensive community-based correction programmes to punish and treat non-violent offenders while seeking to incarcerate violent/chronic offenders for longer periods of time.

1.2 These programmes, known as "intermediate" sanctions, are designed to accomplish many of the traditional goals (control, supervision, and so on) of probation and incarceration while also placing an increased emphasis on rehabilitating the non-violent offender. Additionally, these initiatives rely more on inter-agency collaboration and integrated service delivery.

1.3 It is important to note that a sentence of community corrections does not provide the ultimate solution to crime and victimization. It is neither a substitute for nor a replacement of probation and incarceration, but rather provide a bridge between the two while substantially enhancing the overall effectiveness of the criminal justice system.

### Ideals Guiding the Use of Community Corrections

1.4 The following objectives are targeted in the development of community corrections programmes:

- \* Community corrections programmes are usually more cost-effective and prudent punishment for non-violent offenders;
- \* Incarceration should be reserved for violent, predatory and chronic offenders who pose a safety risk to the public;
- \* The least restrictive and least expensive means of sanctioning offenders should be utilized consistent with public safety needs;
- \* Offenders in community corrections should be held accountable for their behaviour and they should learn the consequences of their actions;
- \* Victim reparation, community service, education and employment should be part of any community corrections sentence;
- \* Community corrections should help reduce the negative factors that contribute to crime (e.g. substance abuse, lack of marketable skills, unemployment) and increase the positive factors that help prevent crime (e.g. sobriety, education, employment); and
- \* Effective crime-reduction policies and community corrections programmes must be based upon reliable statistics, research, and qualitative agreement.

1.6 Community corrections programmes are developed to increase:

- \* inter-agency collaboration;
- \* effective utilization of resources;
- \* offender/program responsibility; and
- \* public/political confidence;

and to decrease:

- \* recidivism/victimization;
- \* probation revocations;
- \* jail/prison overcrowding; and
- \* system costs.

## COMMUNITY CORRECTIONS IN CANADA

### Background

1.7 This section describes initiatives in Canada that attempt to reduce the use of incarceration by reducing the length of time for which the sentence is enforced, that is the time actually served in a prison. The possibility exists in a number of jurisdictions for the judge to declare at the time of sentencing that the person is to be imprisoned only on weekends, and be released for the "intermittent" days. Another popular practice is as follows: a sentence of imprisonment is pronounced by the judge and the convicted person is admitted to a prison, but, at some point in time during the "administration" of the sentence, is able to benefit from an "early release". A range of mechanisms has been created for this purpose in many jurisdictions throughout the world, with varying degrees of "supervision" attached to them: temporary absence programmes; day parole; release into the community during the day only or, to the contrary, only at night with attendance at the prison for a work assignment or other occupation during the day; release (or partial release) to a specialized or supervised setting, or, simply back home. There also exist some important community-sponsored programme initiatives that provide prisoners with preparation for successful community reintegration, thereby making earlier release from custody a more likely prospect.

1.8 These various forms of release, particularly those occurring very early in the sentence, are sometimes supervised, in part or in full, through electronic monitoring or surveillance. Finally, in some jurisdictions, wilderness camps are also considered to be an alternative that alleviates the enforcement of incarceration in a more institutional custodial setting. These initiatives are successfully keeping many individuals out of prison without added risk to the community. There is overwhelming evidence that dangerous, violent crime almost never occurs after such early releases. To guarantee that none would ever happen, countless successful early releases would have to be disallowed, frustrating and embittering many. This would further impact on prison costs and likely contribute to even more serious social problems in the future.

1.9 The early-release programmes have not been affecting overall recidivism rates. To the contrary, for some offenders it is incarceration and longer confinement that seem to increase the risk of recidivism. Because these measures are trade-off's for imprisonment, stringent conditions may be imposed with a zero-tolerance approach to non-compliance so that a person

may be re-admitted to prison without committing another criminal offence, therefore increasing the prison population.

1.10 Another concern is that these measures are not reducing costs, because the manner in which many are administered is very expensive as well as cumbersome and ineffectual in at least some jurisdictions. It is not anticipated that cost savings will ensue in the future unless a deliberate policy decision is made to reduce prison space. Without this, there has been little inclination on the part of prison administrators to favour early releases at the expense of empty prison beds. There is overwhelming evidence pointing to the comparative success rate these community measures have had whenever and wherever they have been used, and to their enormous potential for cost savings if they were not tied to prison admissions and capacities.

1.11 Most of Canada's federal offenders serve only part of their sentences in prison. Part of the time, they serve in the community, adhering to certain conditions and supervised by professional staff of the Correctional Service of Canada (CSC). On any given day there may be about 14,000 offenders in prison and another 10,000 on some form of conditional release. The work of gradually releasing offenders, making sure they do not present a threat to anyone and helping them adjust to life beyond prison walls is called community corrections. Such work is essential because experience has shown that most criminals are more likely to become law-abiding citizens if they participate in a programme of gradual, supervised release.

### **Focus on Public Safety**

1.12 The Correctional Services of Canada is responsible for protecting society by controlling offenders and by helping them to change the attitudes and behaviours that led them into criminal activity. The first steps towards change are taken in the prison setting. However, if the change is to be lasting, it must continue in the community to which almost all offenders eventually return. The transition from confinement to freedom can be difficult, and offenders have a better chance of success if they receive supervision, opportunities, training and support within the community to which they must readjust.

1.13 Conditional release occurs only after a thorough assessment of the safety risks that offenders may pose to society. Those who appear unlikely to commit crimes or break certain rules may go on conditional release as a reward for and incentive to making positive changes in their lives. In addition, the law requires release of offenders who have served two third of the sentence, but only if they are not considered dangerous. Both types of offenders must abide by specific conditions when they are back in the community and they are carefully supervised by CSC staff. If offenders violate the rules, they may be sent back to prison. Moreover, CSC works to prepare offenders for eventual release through prison programmes that promote law-abiding lifestyles. Such programming continues while offenders are on conditional release.

### **Types of Release**

1.14 The different kinds of recognised conditional release in Canada are:

- (a) **Escorted and unescorted temporary absence:** These are short absences granted for various reasons including contact with family and medical consultations. Offenders on

such leave may be escorted by prison staff or volunteers. Offenders who are unescorted are monitored by community staff.

- (b) **Programme release:** Offenders considered low risk are released for longer periods to take part in treatment or educational programmes. These releases are granted by either wardens of prisons or a separate agency.

The National Parole Board has exclusive authority to grant two other forms of release - day parole and full parole - based on information and assessments prepared by the CSC prison and community staff. Before granting such releases, Board members must be satisfied that the offender will not pose an undue risk to the community and will fulfill specific conditions.

- (c) **Day parole:** Offenders participate in community-based activities and return nightly to a supervised residence. Day parole generally occurs during a six-month period prior to full parole. It allows offenders to prepare for the next stage in their return to community life.
- (d) **Full parole:** Offenders live by themselves or with their families. Most offenders are eligible for full parole after serving one-third of their sentences.

All the above forms of release are granted at the discretion of the National Parole Board or CSC. In addition, Canadian law decrees two forms of mandatory release.

- (e) **Statutory release:** By law, offenders not considered dangerous must be released after serving two thirds of their sentences. Only those who meet the criteria set to ensure public safety are let out. The National Parole Board may add conditions to those imposed on all offenders to protect society and to assist the offender begin a new life. These offenders, like all others on conditional release, are supervised in the community by CSC staff.
- (f) **Release on expiry of sentence:** This is not a conditional release but the full release required when someone has served the entire sentence. It applies to offenders who were considered too dangerous to return to the community under statutory release. In addition, some offenders eligible for conditional release choose to stay in prison until the end of their sentences.

## Conditions

1.15 When released, all offenders must adhere to certain standard conditions set out in the release certificate. For example, they must travel directly to their homes and report regularly to their parole supervisor. Additional conditions may also be imposed to control behaviour. These may include curfews, restrictions on movement, prohibitions on drinking, and prohibitions on associating with certain people (such as children, former victims, and so on). CSC staff can take action if they believe the offender is violating release conditions or may commit another crime. They can suspend the release and return the offender directly to prison until the risk is reassessed. Some offenders may remain in prison. Others may be released again but under

more severe restrictions and after more supervision or community support services are in place.

## **COMMUNITY- BASED SENTENCES IN NEW ZEALAND**

1.16 The following community sentencing options are available in New Zealand:

- \* Periodic detention;
- \* Community service;
- \* Supervision; and
- \* Community programmes.

1.17 In the course of the discussion reference will also be made to combined sentences and reviews of community-based sentences.

1.18 There are currently four community-based sentences in New Zealand, set out in the Criminal Justice Act of 1985. They are:

- periodic detention (sections 37-45);
- community service (sections 29-36);
- supervision (sections 46-52); and
- community programmes (sections 53-57).

1.19 These sentences can be imposed by the District or High Court but not the Youth Court. However, young offenders aged 15 to 16 years can be transferred from the Youth Court to the District Court for sentencing where the Youth Court has entered a conviction. The sentences of community service and periodic detention preceded the Criminal Justice Act of 1985. Prior to 1985 New Zealand also had the disposition of probation in the Criminal Justice Act 1954, and the community programme was originally named community care when it was introduced in 1985. The above options will be discussed briefly hereafter.

### **Probation**

1.20 Under the Criminal Justice Act 1954, an offender convicted of an imprisonable offence could, instead of receiving a sentence of imprisonment, be released on probation for a period of at least one year and no more than three years (section 6). The offender was placed under the supervision of a probation officer and the offender's consent was not required. Release on probation was, strictly speaking, an order of the court rather than a sentence. Probation could be combined with a fine, a disqualification from a driving order, or a motor vehicle confiscation order (section 6(2)). Certain statutory conditions applied in all cases, and the court could impose a wide range of additional conditions to ensure appropriate supervision by the probation service and guidance and assistance to the offender.

1.21 The statutory conditions (section 7) were that the offender was to report regularly to the probation officer, to have his or her place of residence and his or her employment approved by

the probation officer, to notify the officer of any change of address, to comply with any direction of the officer requiring him or her not to associate with any particular person, or persons of a specified class, and to be of good behaviour and commit no offence against the law. The additional conditions to be imposed at the court's discretion included paying prosecution costs, damages or compensation to the victim, applying for a prohibition order, abstaining from the use of alcohol or drugs, not owning or possessing any specified article (for example a car), undergoing a specified course of training or education, additional conditions relating to residence, employment, or earnings, and any conditions the court thought necessary for ensuring good conduct or for preventing offending (section 8). The probation officer could apply to the court for the remission, suspension, or variation of an additional condition, for the imposition of a new condition or an extension of the term of probation where that was originally less than three years, or for a discharge of the probationer (section 9).

1.22 A breach of any of the conditions of probation was punishable with imprisonment (a maximum term of three months) or a fine (section 10). The court could then also impose a sentence on the probationer for the original offence (section 11). Treatment centres which gave probationers specialist medical and psychological assistance came into existence from 1968. In 1979/80 over 70% of offenders released on probation were aged 20 years or less. The Criminal Justice Act 1954, and with it the probation order, were repealed by the Criminal Justice Act of 1985.

### **Periodic detention**

1.23 Periodic detention was first introduced in 1962 in an amendment to the Criminal Justice Act of 1954, as a residential measure available for young people aged 15 to 20 years who were convicted of an offence punishable by imprisonment, or liable to be committed to prison for failure to pay a fine imposed by a Magistrate's Court. It was to be for a maximum term of 12 months. The Act allowed a fair amount of discretion in fixing the times and frequency of attendance at a periodic detention centre, although the sentence usually involved residence at a work centre from Friday evening to Sunday morning, and attendance at the centre for 2 to 4 hours on one evening during the week, for a programme of work and activities under the supervision of resident wardens. It was not available if the offender had previously been sentenced to detention in a detention centre or to borstal training, or incurred a custodial sentence of one month or more. Both a probation report and a medical report were required before the sentence could be imposed. A term of probation for up to one year could be ordered to follow periodic detention.

1.24 While at the work centre the detainees were to participate in such activities, classes, or groups, or undergo such instruction as the warden considered conducive to the offender's reformation and training. It was intended that much of the work would be done around the centre itself, maintaining the grounds and the buildings, but that offenders would also be involved in outside community work projects to help them develop some sense of obligation to the rest of the community.

1.25 The sentence was intended to fill a gap between the custodial sentences of imprisonment, borstal training, and detention in a detention centre and the alternative non-custodial penalties of a fine or probation. There was some similarity with the attendance centre provisions in the United Kingdom. Those receiving the sentence were youths whose offences were mainly disorderly behaviour, assault, wilful damage, and fighting, these offenders being the intended target of the legislation. By 1966 there were four work centres, for males only. From then on the sentence

was subject to numerous modifications.

1.26 In 1966 periodic detention became available as a sentence for anybody over 15, and non-residential work centres, involving work in the community on Saturdays, were established for adults. Later, non-residential centres became available for youths, and the distinction between residential and non-residential centres was formalised in legislation in 1975. In some areas non-residential detainees were also required to attend evening programmes (which did not involve manual work) once a week (usually Wednesday) although this never became widespread. In 1974 the first centre for female offenders was opened. Residential periodic detention remained for 15 to 20-year-olds but was phased out once it became possible for younger offenders to be sent to non-residential centres. In the 1980 Annual Report of the Department of Justice it was announced that the remaining residential centres would be closed down progressively over the next five years. Along with the removal of the upper age limit for those on whom the sentence could be imposed, the 1966 amendments limited the group of offenders excluded from the sentence (those who had served a previous institutional sentence) to those under 21, and permitted the offender to be placed on probation concurrently with, and not merely subsequently to, periodic detention, although the probation period could still continue for up to one year after the end of the periodic detention. By this time the sentence was being imposed for a greater variety of offences, including for example burglary. The 1975 amendment further reduced the application of the exclusion category to those required to attend at residential centres only. In 1976 provision was made for reporting centres to supplement work centres and the prior requirement for a medical report to be considered by the court was removed (unless the offender requested it).

1.27 In the Department of Justice Annual Report for 1974-75 it was pointed out that the sentence was meant for offenders who would otherwise have been sent to prison, and one of its principal objects was to help keep offenders in the community whenever possible. On any Saturday throughout New Zealand there are over 1200 offenders working in the community as periodic detainees. Most of them would not have gone to prison and would previously have been fined or sentenced to probation. The sentence was therefore not being used principally for those for whom it was intended, namely those who would otherwise have gone to prison.

1.28 Periodic detention in its present form in the Criminal Justice Act 1985 is similar to the non-residential periodic detention introduced in 1966. The 1985 Act largely repeated the provisions in the 1954 Act. The provision which authorised an offender to request a medical examination before a sentence of periodic detention was imposed was deleted. Periodic detention may be imposed upon any offender over the age of 15 who is convicted of an offence punishable by imprisonment. It is for a maximum term of 12 months. The sentence requires the offender to attend a specific periodic detention work centre for up to 18 hours per week for the duration of the sentence, except for public holidays. No individual period of detention can be longer than 10 hours. The centre must be within reasonable distance of the offender's place of residence. Generally the sentence involves reporting on Saturday to undertake community work, between specified hours, outside of the centre under the supervision of assistant wardens who are part-time employees of the Department of Corrections. In recent years many centres have begun to provide work during the week, to the extent that about half the total periodic detention muster now reports on a weekday. It is also possible for periodic detainees to be directed to attend classes or groups. There are currently 60 periodic detention centres in New Zealand. The detainee is under the legal custody of the warden of the centre during the reporting period (section 42).

1.29 The community work arranged for the offender must be undertaken:

- \* at a hospital or educational institution, or at or for the benefit of a charitable institution or organisation; or
- \* at the home of an old, infirm, or handicapped person or at an institution for such persons; or
- \* on land owned, leased, occupied, or administered by the Crown or any public body (section 60 (2)).

1.30 The work undertaken by detainees cannot include tasks normally performed by regular employees of the above organisations (section 60(3)) and offenders are not entitled to any remuneration in respect of the work they perform (section 61). There is provision for a limited degree of flexibility in reporting times and days of attendance (section 40(2)-(4)) and wardens have a certain amount of discretion to excuse attendance at certain times and may allow a one week break after a period of three months has been served (section 41).

1.31 For breaches of periodic detention an offender is liable to a maximum term of imprisonment of three months or a maximum fine of \$1,000 (section 45). Periodic detention was intended to be used for those offences where a moderate punitive sanction is indicated, together with some degree of deterrence and denunciation. It also involves the concept of reparation to the community at large and is relatively cheap to administer. It was thought that it would be accepted as an appropriate penalty for most property offences, especially when used in conjunction with reparation or restitution to the victim and it had little incapacitative effect.

1.32 The courts have generally regarded periodic detention as the most severe sentence available short of a custodial one (see for example *R v Tevaga*<sup>73</sup>). In *Wijlens v Police*<sup>74</sup> the court stated that:

Considered in its wider context, it is clear that periodic detention was intended as a halfway house between full imprisonment on the one hand and some of the more liberal community-based sentences on the other. Periodic detention still retains a strong punitive element with intermittent confinement and a constant reminder to persons serving the sentence that they have offended against the community and have a debt to repay.

1.33 The Criminal Justice Act of 1954 provided for Periodic Detention Work Centre Advisory Committees chaired by magistrates. The other committee members were representatives from the Federation of Labour, the legal profession, the churches, Police, Department of Social Welfare, and the Probation Service. The committees provided advice about staff appointments, the work programmes to be carried out by detainees, and matters of general policy. These committees were the forerunners of the Criminal Justice Advisory Councils established under section 134 of the Criminal Justice Act of 1985, which had a far broader range of functions relating to facilities and activities for all offenders serving custodial or community-based sentences. These Councils were abolished in 1993.

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73 [1991] 1 NZLR 296 at 297.

74 HC, Auckland AP, 20 June 1994, 17 TCL 39/10).

1.34 The inclusion of rehabilitation programmes into periodic detention is currently being piloted or under development in three areas: a violence prevention programme for Māori offenders in South Auckland; a "Straight Thinking" programme in Hamilton; and a programme targeting offenders with driving offences in Christchurch.

### **Community service**

1.35 In 1980 an amendment to the Criminal Justice Act of 1954 was passed, establishing the sentence of community service. It came into effect on 1 February 1981. It was introduced in response to a growing body of opinion that felt that in some instances it is appropriate to exact some form of community service from an offender. It also set out to replace a practice of doubtful legality under which the courts sometimes made community work a condition of probation. It was acknowledged that the community service order was similar to an order that already existed in the United Kingdom since 1972. Community service was distinguished from periodic detention in two respects. Unlike periodic detention, an offender sentenced to community service would not be in the custody, or under the supervision, of a statutory officer, and there was no element of probation involved as there could be with periodic detention. The offender would be free from controls other than those related to carrying out the community service. This was essentially saying that community service had less supervision and regulation than periodic detention. It was argued that in appropriate circumstances it could instil in an offender a greater sense of community responsibility.

1.36 This was the first sentence in New Zealand in which part of the responsibility for the supervision of an offender was given to people within the community and the only sentence for which the consent of the offender was to be obtained before its imposition. Under this sentence an offender convicted of an imprisonable offence may be sentenced to undertake community service for a period of between 20 and 200 hours. In addition to being satisfied that the sentence is appropriate having regard to the offender's character and personal history and any other relevant circumstances, and that the offender understands the purpose and effect of the sentence and consents to it, the courts must also be satisfied that suitable service is available (section 31). There is no requirement that the court consider a pre-sentence report before imposing sentence, although most judges insist on a written community service assessment covering the requirements of the sentence. When the 1980 Amendment Act was passed the court was able to impose probation concurrently with community service but only if in the special circumstances of the case, the court was satisfied that the offender required supervision (section 3(2)(b)). This particular provision was not carried over into the 1985 Act.

1.37 The hours of work must be performed within 12 months. Within that limitation, the nature of the work and the times at which it is performed are determined by agreement between the offender and the community agency for which the work is done, subject to the approval of the supervising probation officer. The work must be undertaken:

- \* at or for a hospital, or at or for a charitable, educational, recreational, or cultural institution or organisation; or
- \* at or for an institution or organisation for old, infirm, or handicapped persons; or
- \* on land owned or administered by the Crown or any public body. (section 60(1)).

1.38 As with periodic detention, those serving a sentence of community service are not to undertake tasks normally performed by regular employees of the above organisations (section 60(3)) and offenders are not entitled to any remuneration in respect of the work they carry out (section 61).

1.39 A breach of community service is punishable by a fine only, up to a maximum of \$500 (section 36). Community service orders constitute a less punitive sentence than periodic detention and are appropriate for those offences or offenders for whom the latter sentence is not indicated, but who require the impact of personal effort, and the interference with personal liberty which it entails. It has less of a deterrent and denunciatory content than periodic detention, although these elements are present. It has a content of general reparation to the community and in some instances may benefit the victim. It costs little to administer and is also inexpensive in terms of human and social cost. It is flexible and can take advantage of the benefits offered by diverse cultural and ethnic groups. Because of the offender's direct involvement with community agencies, he or she may be influenced by the example and work, thereby involving a rehabilitative element in the sentence in some cases. It has no incapacitative effect.

1.40 The courts have ranked community service below periodic detention in severity, and viewed it as particularly appropriate where the gravity of the offence and the public interest do not require a custodial sentence or a sentence of periodic detention, and where there is either no apparent need for continuing supervision by a probation officer, or community service is regarded in the circumstances as having particular rehabilitative value.<sup>75</sup> The nature of the sentence is such that the criteria for determining the suitability of the sentence arise from the person of the offender and his or her circumstances, with rather less emphasis on the seriousness of the offending. It would appear to be an inappropriate sentence for the aggressive anti-authoritarian individual, or the inadequate excessively dependent person. There must be a measure of motivation and active consent. The sentence is also appropriate in cases where the offender lacks the means to pay a fine.

### **Supervision and community programme**

1.41 These two sentences were introduced in the 1985 Criminal Justice Act (with community programme then called community care). They replaced the probation order as provided in the Criminal Justice Act of 1954. The two sentences were the result of the report of the 1981 Penal Policy Review Committee. Two of the terms of reference for the committee were to consider the means by which the incidence of imprisonment could be reduced, and to investigate means of increasing the availability of sanctions that kept the offender in the community. The Committee believed that the community service order and periodic detention should be retained, but that the current probation order should be replaced by three new orders:

- \* A supervision order which was described as a "penal sanction involving surveillance and control of the offender in the community". It would closely resemble the probation order in terms of the restrictions and conditions that could be imposed with it and would not require the offender's consent. The suggested maximum length of the order was two years. It would be appropriate for offenders

at risk in the community because of their lifestyle or associates and for whom no community-based programme was appropriate or available. It could also be used to ensure the payment of fines or reparation.

- \* A treatment order, which was described as applicable to those "whom the court feels are in need of medical or similar treatment for an addiction or other problem not warranting formal committal". The offender's consent to undergo treatment would be sought and sentence would be deferred pending the outcome of the treatment. Progress would be monitored by a supervisor of offenders (which was the proposed new name for a probation officer) and in the event of the course of treatment not being completed the offender would be brought back to court to be dealt with on the original offence, or discharged. No maximum length for the order was suggested.
- \* A community care order described as a means to place the offender "in the care or supervision of an approved person or agency in the community in accordance with a programme developed in conjunction with them by a supervisor of offenders and recommended to the court". The principal aim of this order would be "to put an offender into a community environment where he will be subject to influences and examples expected to have a beneficial and supportive effect". The offender's consent to attend such a programme would be sought. As with the treatment order, sentence would be deferred while the programme was being completed. No maximum length for the order was suggested.

1.42 These new measures (in particular the "community care order") represented a further decentralisation of the justice system into the community. They showed an increasing commitment to the idea that anti-social conduct could not be remedied by isolating the offender from society and that, frequently, anti-social or criminal behaviour reflected social pressures brought to bear on, and sometimes aggravating, the personal circumstances of individuals. The trend toward community-based measures also reflects the concern for the financial cost of imprisonment. The probation service was to have a central management role in these new measures and new responsibilities to match offenders with programmes.

1.43 The introduction of the Criminal Justice Act was motivated by the profound changes in social conditions and outlooks in New Zealand over the last 30 years. In particular, there has been a lamentable increase in serious violence, including rape and other serious offending. Communities have become much more concerned about the interests of the victims of crime. If offenders are expected to live a law-abiding life there is a need for much greater community involvement in dealing with offenders.

1.44 The objectives of the Act are therefore dominated not just by thoughts of reforming those who break the law but also by the need to protect the community from violent offenders, and to establish a more cost-effective criminal justice system with an increased emphasis on community participation and decision-making, and with compensation as an effective sanction of first resort.

1.45 In accordance with the views of successive Governments, the Criminal Justice Act contained four important sentencing principles in sections 5 to 7:

- \* offenders convicted of an offence punishable by five or more years imprisonment who used serious violence in committing the offence, were to be imprisoned unless there were special circumstances;
- \* in determining the length of imprisonment for such a case the court was to have regard to the need to protect the public;
- \* offenders convicted of property offences punishable by imprisonment for a term of seven years or less were not to be imprisoned except in special circumstances; and
- \* when considering sentence the courts were to have regard to the desirability of keeping offenders in the community as far as is practicable and consonant with promoting public safety, and when imposing imprisonment were to make the term as short as those concerns permitted.

1.46 The Act introduced a twin-track policy of sentencing – dealing severely by way of imprisonment with people who commit serious offences involving violent or dangerous behaviour, and lowering the level of penal response for those who commit less serious offences, particularly property offences. However, the central directions of the Act were essentially confined to whether a custodial sentence should be imposed or not and did not give much direction about which community-based sentence should be imposed in which circumstances, and the relevant severity of each type of sentence, or indeed what their different aims might be. This despite the fact that to an offender and to society there is a great difference between a sentence of nine months of periodic detention and one of 40 hours of community service or four months in a community programme.

1.47 The Act came into force on 1 October 1985, abolished probation and introduced the two new community-based sentences (rather than orders) of supervision and community care. Supervision had similarities with the probation order but with much of the previous rehabilitative framework stripped from it so that it was more of a surveillance mechanism. The name change was designed to emphasise the penal character of the sentence. Community care aimed to combine the two recommendations for a treatment order and a community care order. It was thought to be distinct because community care required the offender's consent, was more broadly defined, and less structured and control-orientated, than supervision. It placed more emphasis on developing relevant programmes for offenders.

## **Supervision**

1.48 When it was introduced in 1985, supervision differed from the previous order of probation in some important respects. Unlike probation, supervision could not be imposed in conjunction with a custodial sentence or any other community-based sentence except periodic detention. Also, there was no provision in relation to supervision similar to that under the previous Act that allowed the payment of damages for injury, compensation for loss suffered through the offence, or court costs, which could be made a condition of probation. There was also provision under the 1954 Act for payments to be made within such period and by such instalments as might from time to time be directed by the probation officer. This allowed offenders to be prosecuted for a breach of probation if such payments were not made. Under the Criminal Justice Act 1985 it became possible to impose reparation, or compensation (as part of a fine), or court costs on an offender in addition to supervision, but these are separate penalties and cannot be formally linked as conditions of a supervision sentence. Another difference is that the minimum term of

supervision is six months, compared with one year for probation.

1.49 The sentence of supervision may be imposed on an offender convicted of any offence punishable by imprisonment. The sentence is to be for a period between six months and two years and does not require the offender's consent (section 46) unless the court imposes a condition that the offender undertakes a specified course of training or education. The standard conditions of the sentence are broadly similar to those that applied under the 1954 Act when an offender was released on probation. They place an offender under the supervision of a probation officer, which entails reporting to a designated officer as and when required to do so (usually once a week in the initial stages and rarely less frequently than once a month), and obeying any directives from the officer which prohibit residence at a particular address, specified employment, or association with specified persons. The offender is required to notify the probation officer of where they live and work and any related changes (section 49).

1.50 In addition to the standard conditions, the court can impose additional conditions such as:

- \* requiring the offender to undertake a specified course of education or training designed to improve work skills or social skills (a condition which requires the offender's consent);
- \* conditions relating to the offender's place of residence, finances, or earnings;
- \* any other conditions to reduce the likelihood of further offending that the court thinks fit (section 50).

1.51 There are no clear guidelines as to what the limits on "other conditions" may be. Under section 51, an offender (or any probation officer) may apply to the court for the remission, suspension, or variation of any conditions imposed by the court.

1.52 The courts have usually considered supervision to be appropriate for offenders who warrant some degree of supervision and control but whose offences are not serious enough to warrant periodic detention or a fully custodial sentence. In a case involving sexual offending<sup>76</sup> the Court of Appeal stated that:

In any case where continued therapeutic counselling is desirable, if there is to be any departure from the approach of imprisonment the most likely possibility is a sentence of supervision of up to 2 years, on conditions, under s 46. The supervision of a probation officer is then involved, as is not the case with sentences of community care.

1.53 Guidelines for Probation Officers, issued shortly after the Criminal Justice Act of 1985 came into force, stated that community care, community service, and reparation should be perceived as community-based options of first resort, and where an offender is unable or unlikely to comply with the conditions of these sentences or does not consent to their imposition, then periodic detention and supervision can take the role of back-up community-based sentences.

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76 *R v Accused* (CA406/92) [1994] 3 NZLR 157.

1.54 An offender who is subject to a sentence of supervision and who contravenes or fails to comply with any condition of the sentence commits an offence and is liable to a fine not exceeding \$500 (section 52(1)). There is not the option of imprisonment which was available for breach of probation under the Criminal Justice Act of 1954. The judge may, in addition to or instead of sentencing the offender for that offence, do either or both of the following:

- \* vary any condition of the sentence;
- \* impose any additional condition (section 52(2)).

1.55 Although a breach of the supervision sentence by itself does not warrant imprisonment, a probation officer can apply for a review of the sentence where the offender has been convicted of a breach under section 52. The court may then, having regard to a number of considerations, remit, suspend, or vary any conditions of the sentence, or impose any additional condition, cancel the sentence, or substitute any other sentence that could have been imposed for the original offence (which includes imprisonment) (sections 64-66).

### **Community programme**

1.56 The sentence of a community programme (termed community care until 1 September 1993) is available for any offence punishable by imprisonment, provided the offender consents. It requires the offender to undergo a programme, which if it is residential must not exceed six months and if it is non-residential must not exceed twelve months (section 53(1)-(2)). A programme is defined as:

- \* attendance on some form of continuing basis at one or more medical, social, therapeutic, educational, or rehabilitative amenities;
- \* placement within particular programmes;
- \* placement in the care of members of an appropriate ethnic group, such as a tribe, a sub-tribe, an extended family, or in the care of any particular member or members of any such group, such as an elder;
- \* placement in the care of members of an appropriate religious group, such as a church or religious order, or in the care of any particular member or members of any such group; and
- \* placement in the care of any other person or persons or of any agency (section 2).

1.57 The Act includes in the definition of the sentence of community programme Māori terms and concepts and the wide range of options within Māori social structures indicates that the sentence was viewed by the legislature as being particularly appropriate for young Māori offenders who may not respond to the forms of discipline provided by more traditional penalties.

Māori terminology was included in the definition in order that the legislation would give the Māori community recognition that it had a contribution to make in assisting the courts to make suitable dispositions, involving alternatives to imprisonment, for Māori offenders. The sentence is, however, not limited to placement in an ethnic or cultural group, and can potentially involve any individual or any community.

1.58 The court is not permitted to impose a sentence of community programme until a report on the nature and conditions of the programme available to the offender is given by or through a probation officer (section 54). The court, the offender, and the person or agency conducting the programme, known as the sponsor, must all consent to its terms. The Act makes it clear that consent to the imposition of the sentence does not constitute consent to any specific medical or other treatment or surgical procedure that might be part of the programme and that separate consent for such treatment is necessary (section 56). The report on the proposed programme may be included in a pre-sentence report, but in practice it is often provided by way of a written contract negotiated between the offender and the sponsor and signed by them. The contract states the name of the sponsor and the programme, the objectives of the programme, the tasks to be undertaken in pursuit of those objectives, and the term of the placement. A community programme may involve no work whatsoever, although it frequently does. The Act does not state who has legal custody or control of the offender as it does with community service and supervision (where the probation officer has a legal supervisory role) or periodic detention (where the offender is in the legal custody of a warden of a periodic detention centre). This is a matter agreed between the court, the offender and the community representative.

1.59 The courts have frequently considered the sentence of community programme as most appropriate for minor offences because they view it as principally rehabilitative rather than punitive and therefore not able to meet the requirements of punishment and deterrence for more serious offences. The Court of Appeal has stated<sup>77</sup> that "clearly community care is more oriented to rehabilitation of the offender in a supportive setting than to a community-based sentence under which the offender is also required to contribute significantly through serving the community". The objective of the sentence is thus to place the offender into a rehabilitative environment where it is envisaged that he or she will respond positively. With its main thrust being rehabilitative, the sentence would appear to have little if any deterrent or retributive effect.

1.60 Throughout the 1990's the average seriousness of cases of non-traffic offences that resulted in a sentence of community programme has been greater than that for the other community-based sentences, and the percentage of cases for violent offences resulting in community programme has been higher than that for cases resulting in periodic detention and community service. Unlike the situation with the other three community-based sentences, there is no offence of breach of community programme. The sentence may be varied or cancelled by the court.

### **Combined sentences**

1.61 The Criminal Justice Act of 1985 prohibits the simultaneous imposition of more than one type of community-based sentence for the same or different offences, with the exception of

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77 In *R v Grennell* (CA211/88, 12 September 1988).

periodic detention and supervision. This permissible combination originates from the ability to impose both periodic detention and probation under the Criminal Justice Act of 1954. All community-based sentences may be combined with a fine and/or reparation (section 13). The consequence of this is that the amount of an order of reparation can influence the nature and extent of a community penalty imposed contemporaneously.

1.62 The original 1985 Act did not allow the imposition of the combined sentences of periodic detention plus supervision and reparation for the same offence. Section 13 only allowed the court, when imposing reparation or a fine or both, to also impose one kind of community-based sentence (or a custodial sentence). Since section 11 required the court to impose reparation in cases where there had been loss of or damage to property (later, in 1987, to also include cases involving emotional harm to any victim), unless it was inappropriate. This meant that only if reparation was inappropriate and the offence was serious enough to warrant periodic detention, the court could also impose a sentence of supervision. Section 13 was amended in 1993 (Criminal Justice Amendment Act (No 2)) to allow the imposition of reparation or a fine or both in combination with any one kind of community-based sentence or the combination of periodic detention and supervision.

1.63 In 1993 the Criminal Justice Amendment Act enabled the courts to impose a community-based sentence cumulative on a sentence of imprisonment of twelve months or less, provided that the duration of the community-based sentences does not exceed twelve months (sections 39, 30, 47, 55). The Act also directed that a mixed sentence must not be imposed if the court would not have imposed a sentence of imprisonment in the first place, and that the total duration of the combined sentences must not exceed the term of imprisonment that would otherwise have been imposed for that offence (section 8A). The purpose of this power to impose combined sentences was, presumably, in part to encourage the courts to shorten the length of sentences of imprisonment. It is likely that these powers would also ensure that the court takes cognisance of the fact that offenders serving prison sentences of twelve months or less do not have conditions imposed by District Prisons Boards on their final release date. The new provision enables the same result to be achieved by the courts where they consider it would be helpful for an offender released after a short term of imprisonment, to have some sort of supervision as a follow up.

1.64 In 1993 the Criminal Justice Amendment Act allowed judges to suspend sentences of imprisonment of not less than six months and not more than two years. Prison sentences can be suspended for up to two years (section 21a(1)). A suspended sentence can be combined with any one of the community-based sentences or with both periodic detention and supervision (section 13(4)).

1.65 Where an offender serving a sentence of community programme or community service is subsequently sentenced for another offence to detention of any kind (including periodic detention), the sentence of community programme or of community service is automatically cancelled unless the court orders otherwise (section 63(1)). Where an offender serving a sentence of periodic detention or supervision is subsequently sentenced for another offence, the sentence of periodic detention or supervision continues unless the court specifically cancels it, or the subsequent sentence involves corrective training or a prison term of more than twelve months, in which case it is automatically cancelled (section 63(2)). Where an offender is subject to a community-based sentence which is cumulative on a term of imprisonment and is subsequently sentenced to a further period of imprisonment, so that the total period of

imprisonment exceeds twelve months, the community-based sentence is automatically cancelled (section 63(3)).

### **Reviews of community-based sentences**

1.66 Section 64 of the Criminal Justice Act provides for a probation officer to apply to the court for a review of any sentence of periodic detention, community service, or supervision where the offender has failed or is unable to comply with any condition or requirement of the sentence. Section 66 prescribes the powers of the court on a review. If the court is satisfied that the ground of the application has been established and, having regard to a number of other considerations, the court may remit, suspend or vary any conditions; or impose any additional condition of the sentence; cancel the sentence; or substitute any other sentence that could have been imposed for the original offence (which includes imprisonment or a different community-based sentence). The exception is where the sentence under review was imposed following a fines default (this only applies to periodic detention and community service). In this latter situation the court may substitute a term of imprisonment for a period not exceeding the maximum term that the offender could have received if imprisonment had been imposed under the Summary Proceedings Act for the fine default (rather than periodic detention or community service) but cannot impose a different community-based sentence or any other new sanction.

1.67 The sentence of a community programme may also be varied or cancelled by the court where the offender is unable to comply or has failed to comply with any of the conditions of the sentence, or the programme is no longer available or suitable for the offender, or continuation of the sentence is no longer necessary in the interests of the community or the offender. If the court cancels the sentence it may substitute a new sentence of community programme or any other sentence that could have been imposed for the original offence (section 57).

# **QUALITATIVE RESEARCH REPORT ON SENTENCING**

**An empirical qualitative study on the  
sentencing practices of the South African  
criminal courts, with particular emphasis  
on the Criminal Law Amendment Act no.  
105 of 1997**

by

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**18 April 2000**

**commissioned by *gtz***

**German Technical Co-operation  
Legislative Drafting Project**

# 1 Contents

1	<a href="#">Contents</a> .....	1
2	<a href="#">Acknowledgements</a> .....	3
3	<a href="#">Executive summary</a> .....	4
4	<a href="#">Comparisons between the qualitative and quantitative research findings</a> .....	10
5	<a href="#">Introduction</a> .....	12
6	<a href="#">Methodology</a> .....	13
6.1	<a href="#">Overview of methodology</a> .....	13
6.2	<a href="#">Description of the interviews and geographical locations</a> .....	13
6.3	<a href="#">Details of respondents</a> .....	14
6.4	<a href="#">Qualitative nature of study and lack of representivity</a> .....	15
7	<a href="#">Results</a> .....	16
7.1	<a href="#">Pre-implementation sentencing practice</a> .....	16
7.1.1	<a href="#">Estimates of pre-implementation sentences</a> .....	16
7.1.2	<a href="#">Opinions about pre-implementation sentencing</a> .....	17
7.1.3	<a href="#">Opinions about consistency in pre-implementation sentencing</a> .....	18
7.1.4	<a href="#">Victims’ interests and the use of compensation</a> .....	20
7.2	<a href="#">The Act and its impact on sentencing</a> .....	24
7.2.1	<a href="#">Preference for the situation pre- or post-implementation</a> .....	24
7.2.2	<a href="#">Opinions impact of the Act on judicial independence</a> .....	25
7.2.3	<a href="#">Opinions about the impact of the Act on severity of sentences</a> .....	26
7.2.4	<a href="#">Opinions about consistency in sentencing</a> .....	28
7.2.5	<a href="#">Opinions about the prohibition of suspended sentences</a> .....	30
7.2.6	<a href="#">Opinions on the possible impact of the Act on guilty pleas</a> .....	32
7.2.7	<a href="#">Interpretation of “substantial and compelling circumstances”</a> .....	33
7.2.8	<a href="#">Opinions on difficulties with interpretation of Schedule 2 of the Act</a> .....	36
7.3	<a href="#">Factors affecting sentencing</a> .....	37
7.3.1	<a href="#">Opinions on factors relating to <b>the accused</b> which affect sentence</a> ....	37
7.3.2	<a href="#">Opinions on factors relating to <b>crime victims</b> which affect sentence</a> ..	41
7.3.3	<a href="#">Opinions about factors relating to <b>judicial officers &amp; sentence</b></a> .....	44
7.3.4	<a href="#">Opinions about prison capacity as factor effecting sentencing</a> .....	46
7.4	<a href="#">Evidence used in sentencing</a> .....	48
7.4.1	<a href="#">Opinions about the adequacy of evidence for sentencing</a> .....	48
7.4.2	<a href="#">Opinions about the availability of criminal records</a> .....	50
7.4.3	<a href="#">Opinions about the role and prevalence of pre-sentencing reports</a> .....	51
8	<a href="#">Appendix A: Questionnaire</a> .....	53
9	<a href="#">Appendix B: Supplementary results data</a> .....	56

## 2 Acknowledgements

The GTZ/SALC Legislative Drafting Project commissioned this report. The contract was between the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH, and the following two Institutes: Institute for Human Rights and Criminal Justice Studies at Technikon South Africa, and the Institute for Security Studies (ISS).

The following researchers were involved in the research project: Ms Duxita Mistry and Mr Johan Struwig from Technikon South Africa, and Mr Martin Schönteich from the ISS. Ms Clare Hansmann, a researcher with the ISS, developed and maintained a database for the quantitative responses that came out of the research process. Ms Hansmann also assisted the research team in the coding of respondents' answers. Professor Dirk van Zyl Smit from the University of Cape Town's Institute of Criminology, Mr Willie van Vuuren, researcher at the SALC, and GTZ advisor Mr Rainer Pfaff assisted the research team in the design of the interview questionnaire.

## 3 Executive summary

### 3.1 Introduction

This research report seeks to provide the South African Law Commission with information it requires to evaluate the impact of the *Criminal Law Amendment Act 105 of 1997* on sentencing practice. The primary aim of the research was to investigate and report on the opinions and attitudes of various role players to the above Act and other aspects of sentencing practice in South Africa.

### 3.2 Summary of methodology

#### 3.2.1 Overview of methodology

Briefly, the following methodology was used:

- Between June 1999 and January 2000 personal interviews were conducted with 102 individuals involved in the sentencing process in South Africa's criminal courts.
- These role players interviewed were judicial officers (7 judges of the high court and 35 regional court magistrates); state prosecutors (23 public prosecutors working in the regional courts and 8 state advocates appearing in the high court); defence lawyers (19); and lay assessors (10).
- Interviews were conducted in four provinces, viz. Gauteng, KwaZulu-Natal, Eastern Cape, and Western Cape. Within each province, courts at which interviews took place were selected in such a way that they generally fell into urban, rural (or peri-urban), and previous homeland area categories. (Although this was in practice not always possible)

#### 3.2.2 Qualitative nature of study and lack of representivity

This report reflects the perceptions and opinions of the participants in the survey rather than objective facts. They are highly subjective and are intended to gauge the views of important role players in the sentencing process.

The opinions expressed in this survey are not necessarily representative of all judges, magistrates, prosecutors, defence lawyers and assessors. This is so for at least two reasons. First, these groups are not homogeneous. They do not have consensual views on all aspects of a controversial topic such as sentencing. Summarising their diverse opinions is thus inherently subjective and even includes significant views that are held by a minority or that were only expressed by one person. Second, the sample size was relatively small and thus where percentages are used to describe the prevalence of particular views in the sample, these may not accurately reflect the true balance of opinion among all judges, magistrates and members of other groups.

### 3.3 Summary of results

#### 3.3.1 Pre-implementation sentencing practices

The results are structured into four sections: (1) Pre-implementation sentencing practices; (2) the Act and its impact on sentencing; (3) factors affecting sentences; and (4) evidence used in sentencing.

### 3.3.1.1 *Estimates of pre-implementation sentences*

Respondents were asked what sentences were typically given before the Act came into effect. The most common sentence ranges (chosen by generally more than 60% of respondents) for five crimes are the following:

- **Murder – (Part I):** ten or more years imprisonment;
- **Murder – (Part II):** five years up to ten years imprisonment;<sup>1</sup>
- **Rape – (Part I):** ten or more years imprisonment;
- **Robbery (Part II):** ten or more years imprisonment;
- **Fraud (Part II):** five years up to ten years imprisonment

### 3.3.1.2 *Opinions about pre-implementation sentencing of crimes covered by the Act*

Judicial officers were evenly split between describing pre-implementation sentences as harsh or lenient. Most magistrates were of the view that previously they had wider discretion but admitted that there was no “consistency” in sentencing. They contended that direct imprisonment was the normative sentence for such crimes but said that their limited jurisdiction prevented them from sentencing heavily.<sup>2</sup> Prosecutors expressed views about pre-implementation inconsistency and said that sentencing depended on what a particular presiding officer viewed as serious. Some defence lawyers said that differences in sentence could be attributed to the severity of the crime or personal circumstances of the accused.

### 3.3.1.3 *Opinions about consistency in pre-implementation sentencing*

Respondents, including judicial officers, were equally divided on whether sentences for offences now covered by the Act were consistent or not pre-implementation. Equal numbers of respondent said that sentences were always / almost always consistent and never / almost never consistent while just under a third thought that past sentences were sometimes consistent.

### 3.3.1.4 *Victims’ interests and the use of compensation & restitution in sentencing*

The majority of all interviewees (60%) were of the opinion that the courts never or almost never take the interests of victims into account with regard to possible compensation and restitution when it comes to serious offences. All groups of respondents pointed out that most accused do not have the means to pay compensation to their victims.

There was consensus that victims should feature more prominently in the court process and various steps were suggested to improve victim involvement.

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<sup>1</sup> However, four of the seven judges interviewed thought that the sentences would have been ten or more years of imprisonment.

<sup>2</sup> Since October 1998, the maximum sentence in a regional magistrates’ court is generally 15 years imprisonment. Before this, the limit was 10 years imprisonment.

### 3.3.2 The Act and its impact on sentencing

#### 3.3.2.1 Preference for the situation before or after the implementation of the Act and opinions on its effect on judicial discretion and independence

Judicial officers and defence lawyers generally preferred the situation before the Act came into effect. This included 63% of those magistrates who expressed an opinion and all seven judges interviewed. By contrast, prosecutors and lay assessors tended to prefer the situation after the Act came into effect.

Reasons advanced for preferring the pre-implementation sentencing regime included:

- It is not possible to legislate for minima when prescribed sentences are so high;
- The Act risks unconstitutionality and decontextualising sentencing;
- It was a piecemeal approach to spilt the trial in the regional court and require sentencing in the high court;

Reasons given for preferring the post-implementation situation included:

- Increased jurisdiction for the regional courts;
- Pre-implementation, regional courts had to impose lenient sentences to avoid being overturned on appeal; and
- The Act would be a deterrent to criminals.

Judicial officers, prosecutors and defence lawyers generally agreed that the Act limits judicial discretion. More two-thirds of judicial officers and defence lawyers felt that the Act adversely affected judicial independence. *Inter alia*, they felt that that the Act introduced a lack of individualisation in sentencing and curtailed courts' discretion to impose a sentence appropriate in a particular case. Fewer prosecutors, although still more than 60%, viewed the Act as having an adverse effect on judicial independence.

#### 3.3.2.2 Opinions about the impact of the Act on harshness and consistency in sentencing

Respondents in all categories thought that the Act would make sentences harsher but more rigid. Some judges thought that some sentences would be unjust and arbitrary while another said that the Act would not have any impact on sentencing practices. Some magistrates felt that the Act would militate against past leniency and send a positive message to society but another said that some sentences would be overly harsh. Prosecutors emphasised the more punitive aspects of the law.

Almost 70% of all respondents thought that as a result of the prescribed minimum sentences there would be "consistency" in sentencing of crimes covered by the Act. However, for crimes not covered by the Act, opinions about consistency were more mixed and closer to those pre-implementation sentences for crimes now covered by the Act. More than a third of judicial officers (38%) said that such sentences would "sometimes" be consistent. There were differing views on the application of the term consistency. One judge opined: "It is important to emphasise that it is the sentencing practices which must be consistent since uniform sentences for the same crime ignore the facts of the case and can lead to grave injustices"<sup>3</sup>

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<sup>3</sup> For example, premeditated murder of a policeman to facilitate a robbery must be dealt with differently to a premeditated murder of a child molester by his victim when he is about to rape her again.

### 3.3.2.3 *Opinions on the prohibition of suspended sentences under the Act*

Nearly 55% of judicial officers generally (and five out of the seven judges in particular) thought that the prohibition on the suspension of sentences was either bad or very bad, while only a third were in favour of the provision. Even more defence lawyers (67%) thought the prohibition was bad. By contrast, the provision was well received by 84% of state prosecutors. Those in favour of the prohibition felt that removing the stipulation would negate the purposes of the Act.

### 3.3.2.4 *Opinions on the possible effect of the Act on guilty pleas to lesser charges*

There was a high degree of uncertainty among respondents about whether the Act would encourage accused persons to plead guilty to a lesser charge so as to avoid a tougher sentence in terms of the Act. No group had a majority view one way or the other and 20% of all respondents said that they did not know.

### 3.3.2.5 *Opinions on interpretation of various aspects of the Act*

Virtually all of the respondents (94%) said that there are no clear guidelines on what “substantial and compelling circumstances” mean. Although various opinions were expressed about the meaning of the phrase, these have subsequently been eclipsed by various reported judgements.<sup>4</sup>

It appears that respondents do not expect difficulty in classifying crimes under Schedule 2 of the Act. Almost all respondents (86 – 88%) said the court would not have difficulty in determining whether or not a murder was planned or premeditated or whether or not there was an element of common purpose or conspiracy in the commission of a crime.

### 3.3.3 Factors affecting sentences

There was general agreement with the rationale of the Act regarding its treatment of **youthful offenders**. Two thirds of judicial officers, and 60% of respondents generally, believed the fact that an accused is aged 16 but less than 18 does play a role in sentencing under the Act. Some respondents believed that juveniles commit most violent crime.

Respondents were asked whether various factors play a role in sentencing. The following percentages of respondents in general (and judicial officers in parenthesis) said that the listed factors did play a role in sentencing.

Factors relating to the **accused**:

- **lack of legal representation:** 32% generally (17% of judicial officers)
- **social standing:** 56% generally (41% of judicial officers)
- **poverty:** 61% generally (50% of judicial officers)
- **culture:** 43% generally (48% of judicial officers)
- **race:** 27% generally (17% of judicial officers)
- **gender:** 54% generally (48% of judicial officers)

Factors relating to the **victim**:

- **social standing:** 39% generally (24% of judicial officers)
- **culture:** 28% generally (21% of judicial officers)

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<sup>4</sup> These judgements are summarised in the discussion paper.

- **poverty:** 34% generally (29% of judicial officers)
- **race:** 25% generally (19% of judicial officers)
- **gender:** 62% generally (45% of judicial officers)

Factors relating to the **judicial officer:**

- **occupational background, character & outlook on life:** 70% - 72% generally (67% of judicial officers)
- **life experiences:** 80% generally (76% of judicial officers)
- **race:** 38% generally (26% of judicial officers)
- **gender:** 41% generally (19% of judicial officers)

### 3.3.3.1 *Opinions about prison capacity as a factor influencing sentencing*

Respondents were almost unanimous in their opinion that the capacity of the correctional system to carry out sentences should not be considered when sentencing accused persons.

### 3.3.4 Evidence used in sentencing.

#### 3.3.4.1 *Opinions about the adequacy of evidence for sentencing*

Respondents were considerably more critical of the state's ability to present evidence on sentence than the ability of the defence to do so. Only 23% to 27% of respondents felt that the **state** almost always or always presents adequate evidence to enable sentencing decisions, while a further 28% to 29% said that prosecutors did so sometimes. Respondents were more positive about the ability of the **defence** to present adequate evidence on sentence. Between 32% and 40% of respondents thought that the defence almost always or always presents adequate evidence to enable sentencing decisions, while a further 37% to 38% said that defence lawyers did so sometimes.

In the opinion of respondents, there was generally not much difference between crimes covered by the Act and for crimes not covered by the Act in respect of adequacy of evidence for sentencing.

#### 3.3.4.2 *Availability of criminal records*

Three-quarters of respondents thought that in 80% to 100% of cases the criminal record of the accused is available and submitted to the court when sentence is imposed in terms of the Act.

#### 3.3.4.3 *The role and prevalence of pre-sentencing reports*

More respondents thought that pre-sentencing reports played more of a role in sentencing of crimes not covered by the Act, than for crimes covered by the Act. For crimes **not covered by the Act**, 53% of the respondents thought that pre-sentencing reports play a large role and a further 34% thought they played a small role in sentencing. For crimes **covered by the Act**, 35% of the respondents thought that pre-sentencing reports play a large role and a further 39% thought they played a small role in sentencing.

More than 60% of all respondents thought that legal representatives were more likely to request pre-sentencing reports in cases where the Act applies. This figure was higher for state prosecutors and defence attorneys than for judicial officers.

## **4 Comparisons between the qualitative and quantitative research findings: perception versus reality**

The opinion survey results of the qualitative study showed what respondents subjectively believed the situation was or what it ought to be. These results are the subject matter of this report. By contrast, the parallel quantitative survey of sentencing practice showed more objectively the real situation. The quantitative results are presented in a separate report. To the extent that the two studies covered similar topics, this provides an interesting opportunity to compare perception and reality. This comparison is set out below.

### **4.1 Past sentencing**

In general, the respondent's perceptions of what sentences were typically given accords with what sentences were actually given pre-implementation. The quantitative study found that for pre-implementation murder, more than 50% of sentences were in fact from five to ten years of imprisonment.<sup>5</sup> Although that study did not distinguish between Part I and II murders, most of these murders would have been Part II and this accords broadly with the respondents' perceptions of sentences for these kinds of murders.

The quantitative study did not distinguish between rape that would have fallen under Part I or III but most would have been under Part III. The actual median sentence for all types of pre-implementation rape was eight years imprisonment. It is quite likely that the actual sentences for Part I rape would have been in excess of ten years had it been possible to make this distinction. This is also consistent with respondents' perceptions.

Respondents thought that sentences for Part II robbery were higher than they actually appear to have been pre-implementation. While respondents believed that this crime typically attracted sentences of ten years or more, the actual median sentence was six years with more than 50% of accused in fact getting from two to ten years.

Respondents' estimates of sentences for fraud involving more than R500 000 broadly accord with the few statistics available from Office for Serious Economic Offences (OSEO).<sup>6</sup> Respondents thought a typical sentence was from five years up to 10 years imprisonment. Of the ten OSEO cases finalised to date and generally involving more than R1m, four fell within this range, four were above and two were below respondents' estimates.

Most magistrates thought that direct imprisonment was the normative sentence for the violent crime listed in Schedule 2 of the Act. This proved to be correct as more than 90% of accused convicted for pre-implementation murder, rape and robbery were in fact given an effective custodial sentence.

### **4.2 Consistency in pre-implementation sentencing**

Respondents, including judicial officers, were equally divided on whether sentences for offences now covered by the Act were consistent or not pre-implementation. The quantitative study did find that there were statistically significant differences among

<sup>5</sup> See Paschke and Sherwin at page 28.

<sup>6</sup> See Paschke and Sherwin at page 29.

the eight police areas studied in the magistrates' court dominated sample. However, there were no significant differences among the four high courts. There was no measurement of consistency in length of prison sentence from judicial officer to judicial officer.

#### **4.3 Use of compensation**

The majority of all interviewees (60%) were of the opinion that the courts never or almost never take the interests of victims into account with regard to possible compensation and restitution when it comes to serious offences. This is borne out by the quantitative survey, which found that compensation was ordered in only 3% of pre-implementation cases for adult accused.

#### **4.4 Consistency in post-implementation sentencing**

Almost 70% of respondents thought that as a result of the prescribed minimum sentences there would be "consistency" in sentencing of crimes covered by the Act. However, the quantitative study found that post-implementation, there were still statistically significant differences among the regions and that the Act had apparently not improved regional consistency in sentence severity.

#### **4.5 Youth and sentencing**

Some respondents believed that juveniles commit most violent crime. But the quantitative study found that juveniles comprised a small proportion of the overall numbers of accused convicted for the crimes studied. Juveniles (under 18 year olds) comprised only 8% of both economic and violent crimes and 9% of murder, rape and robbery with aggravating circumstance.

#### **4.6 Conclusions**

- The estimates of past sentences by respondents were broadly in line with the measured sentences. This was particularly the case with murder and rape. Respondents were also correct in saying that the normative sentence for violent crimes under the Act was direct imprisonment.
- While respondents were divided in their opinions on whether pre-implementation sentences were consistent in the number of years of imprisonment, the quantitative study did find significant regional differences in sentencing severity in the magistrates' courts.
- The factual findings did not support respondents' expectations of greater post-implementation consistency in sentencing. While 70% of respondents expected greater consistency, significant regional differences in fact remained post-implementation.
- Respondents were correct in saying that compensation is seldom used as a sentencing option by courts.
- The opinion of a few respondents that juveniles commit most violent crime was not borne out by factual findings of the quantitative study.

## 5 Introduction

### 5.1 Aims of the report

This research report seeks to provide the South African Law Commission with information it requires to evaluate the impact of the *Criminal Law Amendment Act 105 of 1997* (“the Act”) on sentencing practice. The primary aim of the research was to investigate and report on the opinions and attitudes of various role players to the Act and other aspects of sentencing practice in South Africa.

Another party involved in the overall research project is the Institute of Criminology at the University of Cape Town, which focussed on quantitative aspects of sentencing. Their written report should be read in conjunction with this one.

### 5.2 The Act

The Act prescribes qualified mandatory minimum sentences for various crimes, such as murder, rape and robbery with aggravating circumstances. The sentence prescribed varies depending upon the severity of the crime and the number of previous convictions of the convicted person. The Act applies to certain crimes committed on or after 1 May 1998, the date the Act came into effect. The period before 1 May 1998 is referred to in this report as “pre-implementation” and the period thereafter as “post-implementation”.

### 5.3 Structure of the report

A section describing the methodology used in the survey follows this introduction. The results are divided into four sections. Briefly, each of these sections deal with the following:

1. **Pre-implementation sentencing practices.** This describes what respondents believed sentences to be before the introduction of the Act and their perceptions of consistency in sentencing. We also describe how much respondents believed that victim’s interests are taken into account during sentencing and how they thought this could be improved.
2. **The Act and its impact on sentencing.** This section reflects respondents’ views about the impact of the Act on harshness and consistency in sentencing. We report their beliefs on the Act’s effect on judicial discretion and independence and whether they preferred the situation before or after its implementation. This is followed by opinions on the prohibition of suspended sentences under the Act, the extent to which guilty pleas to lesser charges may increase because of the Act and various aspects of interpretation.
3. **Factors affecting sentences.** These are divided into those factors relating to the accused, the victim and the judicial officer. The section also considers to what extent respondents believed that prison capacity should influence sentencing.
4. **Evidence used in sentencing.** This describes opinions about the adequacy of evidence for sentencing including the availability of criminal records and the role and prevalence of pre-sentencing reports.

## 6 Methodology

### 6.1 Overview of methodology

Briefly, the following methodology was used:

- A pilot study<sup>7</sup> conducted in March 1999 preceded the research reported here.
- Between June 1999 and January 2000 personal interviews were conducted with 102 individuals involved in the sentencing process in South Africa's criminal courts.
- These role players interviewed were judicial officers (7 judges of the high court and 35 regional court magistrates); state prosecutors (23 public prosecutors working in the regional courts and 8 state advocates appearing in the high court); defence lawyers (19); and lay assessors (10).
- Interviews were conducted in four provinces, viz. Gauteng, KwaZulu-Natal, Eastern Cape, and Western Cape. Within each province, courts at which interviews took place were selected in such a way that they generally fell into urban, rural (or peri-urban), and previous homeland area categories. (Although this was in practice not always possible)

The rest of this section provides more detail on the methodology used.

### 6.2 Description of the interviews and geographical locations

Interviews were conducted in four provinces (Gauteng, KwaZulu-Natal, Eastern Cape, and Western Cape) generally with a mixture of urban, rural (or peri-urban), and previous homeland areas<sup>8</sup> and both high and low crime areas.<sup>9</sup>

Wherever possible, five role players were interviewed in every court selected (two judicial officers, one prosecutor, one defence attorney, and one lay assessor). At some centres interviews were also conducted with high court judges and state advocates. At the larger centres, more than five interviews were conducted. The project's researchers asked the interviewees a set of identical questions from an interview schedule (see Appendix A).

The courts at which interviews took place are set out in Table 1.

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<sup>7</sup> Dated 25 March 1999. 'Penal Sentencing Research: Report to SALC/GTZ on preliminary qualitative research practices of South African courts'.

<sup>8</sup> This was in practice not always possible for two reasons. Firstly, no regional courts or high courts within the province of Gauteng and the Western Cape, fall into areas that used to be situated in the homelands or TBVC states. Secondly, most regional courts and all seats of the high court are situated in urban areas.

<sup>9</sup> Again, this was not always possible in practice. Most populated urban areas have relatively high crime levels, while crime levels tend to be low in rural and more sparsely populated regions of the country. As has been pointed out, most regional courts are situated in the high crime urban areas.

Table 1: Courts where interviews took place. The province and town or city in which the court is located; whether it is a regional court (RC) or high court (HC); the degree of urbanisation; the crime rate; and the number of respondents from each court.

Province	Town or city	RC	HC	Urban / rural	Crime rate	Number of respondents
Eastern Cape	Port Elizabeth		•	urban	high	2
	Port Elizabeth	•		urban	high	10
	Umtata (former homeland)	•		urban/rural	high	3
	Tarka Stad (Queenstown)	•		urban/rural	low	3
Gauteng	Pretoria		•	urban	high	4
	Johannesburg		•	urban	high	5
	Pretoria	•		urban	high	17
	Vereeniging	•		some rural	medium	3
	Cullinan	•		urban /rural	low	2
	Krugersdorp	•		urban/peri-urban	medium	6
	Roodepoort	•		urban	high	8
KwaZulu-Natal	Durban		•	urban	high	2
	Durban	•		urban	high	13
	Newcastle	•		urban/peri-urban	medium	3
	Babanango (Eshowe)	•		rural	low	4
Western Cape	Cape Town		•	urban	high	4
	Cape Town	•		urban	high	4
	Wynberg	•		urban		7
	Calitzdorp (Oudtshoorn)	•		urban/rural	low	2
<b>TOTAL</b>					<b>102</b>	

### 6.3 Details of respondents

Various categories of people were interviewed. These categories were:

- Judicial Officers (judges of the high court and regional court magistrates)
- State Prosecutors (public prosecutors working in the regional courts and state advocates appearing in the high court)
- Defence lawyers (attorneys and advocates)
- Lay Assessors

The numbers of respondents in each category are provided in Table 2.

Table 2: Number of people interviews by category of respondent

Categories of respondents	Number interviewed	Proportion of total
Judges	7	6.9%
Regional court magistrates	35	34.3%
Public prosecutors	23	22.5%
State advocates	8	7.8%
Defence lawyers	19	18.6%
Lay assessors	10	9.8%
<b>TOTAL</b>	<b>102</b>	<b>100.0%</b>

As judicial officers play a crucial role in any sentencing decision 42% of all people interviewed were judicial officers. This was more than any other category of respondent.

Most judicial officers were aged either 46-55 years (36% of all judicial officers interviewed), or more than 55 years (33%), followed by those aged 36 to 45 years (21%). Most state prosecutors were aged 18 to 35 years (71%), followed by those aged 36 to 45 years (26%). Most defence lawyers were aged 18 to 35 years (53%), followed by those aged 36 to 45 years (32%).

Overall, almost four-fifths of the respondents (78%) were male, and 22% were female. Of the judicial officers interviewed 88% were male and 12% female. Among state prosecutors 58% were male and 42% female. For defence lawyers the ratio was 89% male and 11% female, while 80% of the lay assessors were male and 20% female.

Two thirds of respondents were white. This included 81% of judicial officers, 67% of prosecutors, 63% of defence lawyers and 10% of assessors. Blacks comprised the next largest racial group (judicial officers 14%; prosecutors 19%; defence lawyers 21%; and assessors 20%). Asians and coloured made up 9% and 7% of all respondents respectively.

#### **6.4 Qualitative nature of study and lack of representivity**

This report reflects the perceptions and opinions of the participants in the survey rather than objective facts. They are highly subjective and are intended to gauge the views of important role players in the sentencing process.

The opinions expressed in this survey are not necessarily representative of all judges, magistrates, prosecutors, defence lawyers and assessors. This is so for at least two reasons. First, these groups are not homogeneous. They do not have consensual views on all aspects of a controversial topic such as sentencing. Summarising their diverse opinions is thus inherently subjective and even includes significant views that are held by a minority or that were only expressed by one person. Second, the sample size of 102 was relatively small and thus where percentages are used to describe the prevalence of particular views in the sample, these may not accurately reflect the true balance of opinion among all judges, magistrates and members of other groups.

A further issue concerning representivity was the geographic distribution of the dataset. It should be noted that a substantial portion of the interviews were done in Gauteng. Some 44% of all respondents were from this province. This bias was due to difficulties experienced by the researchers in setting up and conducting interviews in other provinces, which reduced the numbers of respondents from areas outside Gauteng. Readers should be aware that this skew may cause the results to be influenced by the notoriously high fear of crime and associated harsher attitudes on criminal justice issues prevalent in Johannesburg and Pretoria.

## 7 Results

### 7.1 Pre-implementation sentencing practice

#### 7.1.1 Estimates of pre-implementation sentences<sup>10</sup>

Respondents were given details of five different crimes that are listed in schedule 2 of the Act and asked **what sentences were typically imposed for such crimes before the passing of the Act<sup>11</sup>**? Respondents chose from four different sentencing options (ten years imprisonment or more; five years or more but less than ten years imprisonment; less than five years imprisonment; or a non-custodial sentence).

The crimes and the most common estimated sentences are set out in Table 3. Details of the ranges of sentences chosen by the various categories of respondents are provided in Appendix B in Table 21 on page 56. Table 3 also contains the minimum years imprisonment prescribed by the Act. Note that these minima were not applicable to pre-implementation crimes and are only provided for comparison.

Table 3 Estimated typical pre-implementation sentences. The most common sentence ranges (chosen by generally more than 60% of respondents) for five crimes. For comparison, the minima prescribed by the Act are also given.

Crime	Estimated typical years imprisonment	Minimum years imprisonment prescribed by Act
Murder – (Part I) <sup>12</sup>	10 or more	Life
Murder – (Part II) <sup>13</sup>	5 or more up to 10	15
Rape – (Part I) <sup>14</sup>	10 or more	Life
Robbery (Part II) <sup>15</sup>	10 or more	15
Fraud (Part II) <sup>16</sup>	5 or more years up to 10	15

#### *Murder – (Part I)*

Most respondents, especially judicial officers, thought that the typical sentence for such a crime pre-implementation would have been ten or more years of imprisonment. Some 82% of all respondents and 89% of judicial officers selected this category. The estimate is consistent with the minimum sentence of life imprisonment that now applies to such crimes. However, it would have been interesting to see respondents' estimates had they been given the option to choose life imprisonment.

#### *Murder – (Part II)*

Most respondents, especially defence lawyers, thought that the typical sentence for such a crime pre-implementation would have been from five years up to ten years imprisonment. Almost two thirds of all respondents (66%), 61% of judicial officers and 78% of defence lawyers selected this category. The estimate of the typical past sentences for murder (Part II) is considerably lower than the minimum prescribed by the Act.

<sup>10</sup> Question 1A

<sup>11</sup> Throughout this report 'the Act' is the *Criminal Law Amendment Act no. 105 of 1997*.

<sup>12</sup> Question 1A (a)

<sup>13</sup> Question 1A (b)

<sup>14</sup> Question 1A (c)

<sup>15</sup> Question 1A (d)

<sup>16</sup> Question 1A (e)

However, four of the seven judges interviewed thought that the sentences would have been ten or more years of imprisonment. This higher estimate by judges is probably because sentences in the high courts are substantially higher than those seen in the lower courts.

Just under 6% of judicial officers did not choose one of the four sentencing options given, but argued that the sentence would have 'depended on the facts of the case'.

#### Rape – (Part I)

Most respondents, especially defence lawyers and judicial officers, thought that the typical pre-implementation sentence for such a crime would have been ten or more years of imprisonment. Some 63% of all respondents, 67% of judicial officers and 72% of defence lawyers selected this category. The minimum sentence under the Act for this category of rape is now life imprisonment, which is consistent with the estimate of past sentences. Note that only a minority of rape cases, committed under the most serious of circumstances, would fall into this Part.

#### Robbery – (Part II)

Generally, most respondents estimated that the typical pre-implementation sentence for such a crime would have been ten or more years of imprisonment. Just less than two-thirds of all respondents (62%) and 77% of judicial officers selected this sentence range. The minimum sentence under the Act for this category of rape is now 15 years imprisonment, which is consistent with these estimates.

#### Fraud – (Part II)

Most respondents estimated that the typical pre-implementation sentence for such a crime would have been from five years up to ten years imprisonment. More than two-thirds of all respondents (71%) and 81% of judicial officers selected this category. These estimates are less than the 15 years minimum sentences now applicable under the Act.

### 7.1.2 Opinions about pre-implementation sentencing of crimes covered by the Act<sup>17</sup>

Respondents were asked **what kind of sentencing practices existed before 1<sup>st</sup> May 1998 with regard to offences included in schedule 2 of the Act.**

There was a difference of opinion amongst all the role players interviewed on the kind of sentencing practices that existed prior to 1 May 1998. Judges generally thought that sentences should be individualised since they considered the nature of the crime, the circumstances of the accused, and the interests of the community, when passing sentence. By contrast, most magistrates and a few of the defence lawyers bemoaned the lack of consistency in pre-implementation sentencing practices. The majority of state prosecutors indicated that pre-implementation "direct imprisonment" was the punishment for crimes now covered by the Act, arguing that the impact of the Act revolved principally around the length of the prison sentence. More detail on the views of the various respondents is set out below.

#### Judicial officers

Judicial officers were almost evenly split between describing sentencing before the 1 May 1998 as harsh or lenient. One judge said of the offences in question "*as a rule long term imprisonment was imposed in those circumstances where the death sentence or life imprisonment was not handed down*". Others responded by saying

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<sup>17</sup> Question 1B

that sentencing depended on the “facts of the case” before them. Typical of the general response a judge stated that previously judicial officers retained the discretion to weigh factors mentioned in schedule 2 of the Act with all the other factors and reach a balanced sentence.

A minority of judicial officers thought that the pre-implementation sentences were far too lenient particularly with regard to rape. A magistrate felt that some of his colleagues had to be compelled to impose heavier sentences, independent of the individual circumstances. Moreover, he thought that regional court magistrates were appointed “*at too young an age*” and therefore they were not familiar with the principles of sentencing. This respondent was of the opinion that in light of this lack of experience the minimum sentencing legislation acted as an appropriate guideline.

Some magistrates claimed that their lack of jurisdiction prevented them from sentencing heavily in the past. The maximum sentence they could impose was limited by the jurisdiction of their court.<sup>18</sup>

#### State prosecutors

Some prosecutors said that pre-implementation, magistrates were restricted by the limitations on their jurisdiction. So instead of introducing minimum sentences, the legislature should have raised the penal jurisdiction of the regional court. For example, several state advocates revealed that sentences began to rise before the enactment of the Act. This indicated that the judicial officers were sensitive to societal demands.

#### Defence lawyers

Three attorneys said the relevant offences resulted in “direct imprisonment” of varying lengths. One qualified his remark by saying that sentencing was fairly consistent. He, however, acknowledged that the duration of sentences for certain crimes fluctuated from one magistrate to another. He, however, maintained that with the exception of fraud, the differences in sentence could be attributed to the severity of the crime.

#### Lay assessors

Lay assessors interviewed indicated that sentences were now harsher. According to a lay assessor sentences varied from case to case and each was considered individually. One assessor felt that pre-implementation sentencing was done humanely since a magistrate was compelled to weigh up the case before him. But now, because of the transformation of the legal system and the presence of lay assessors, magistrates were not inclined to hand down the maximum sentence. In his view, they do not want the courts to be too punitive and would like people to return to their communities.

### 7.1.3 Opinions about consistency in pre-implementation sentencing of crimes now covered by the Act<sup>19</sup>

Respondents were asked, ‘**To what extent were offences now covered by the Act dealt with consistently in the past?**’ Respondents chose from answers ranging from ‘always’ to ‘never’, and ‘don’t know’. The results are given in Table 4.

<sup>18</sup> Before the Act, the regional courts did not have the capacity to impose a sentence in excess of 10 years. However, this changed when its jurisdiction was increased in October 1998 when the maximum sentence this court could impose was increased to 15 years.

<sup>19</sup> Question 16(c)

Table 4: Opinions about pre-implementation consistency. Respondents' views about the extent to which offences now covered by the Act were dealt with consistently before the implementation of the Act. Results are expressed as a percentage of respondents in each category holding the respective views.

Categories of respondents	Always	Almost always	Sometimes	Almost never	Never	Don't know
Overall	5.2%	24.0%	29.2%	25.0%	8.3%	8.3%
Judicial officers	8.3%	22.2%	27.8%	22.2%	8.3%	11.1%
State prosecutors	3.2%	38.7%	29.0%	19.4%	6.5%	3.2%
Defence lawyers	5.3%	5.3%	42.1%	31.6%	15.8%	0.0%
Lay assessors	0.0%	20.0%	10.0%	40.0%	0.0%	30.0%

Respondents, including judicial officers, were equally divided on whether sentences for offences now covered by the Act were consistent or not pre-implementation. Equal numbers of respondent said that pre-implementation sentences were always / almost always consistent and never / almost never consistent while just under a third thought that such sentences were sometimes consistent. It appears that more state prosecutors (39%) believed that there was almost always consistency than defence lawyers (5%). Defence lawyers were the most ambivalent with 42% subscribing to the concept of 'sometimes consistency'.

#### Judicial officers

A particularly noteworthy judge stated there were not any established sentencing practices pre-implementation. According to him, the sentences given were those *"adopted in the corridors of the judiciary and as a result there was no consistency, although a broad tariff for sentencing developed over the years"*. Some pointed to rape as one crime where sentences were more likely to be inconsistent. An example given was that a perpetrator in the Northern Cape was seldom given a sentence of more than eight years for a "serious rape". But in the Cape Town Regional Court a perpetrator would be sentenced more severely for an "ordinary rape" (perhaps one in which violence was not a significantly aggravating factor).

Most magistrates interviewed were of the view that previously they had a wider discretion, but contended that there was no "consistency" in sentencing. The consequence of this, according to one respondent, was that it led to legal uncertainty and a lack of uniformity. But the advantage was that sentences could be individualised to suit the circumstances of the crime and the offender.

One magistrate thought that regional court magistrates were more consistent in sentencing than judges. In his opinion, judges did not sentence accused persons properly since they had not appeared in the criminal courts. In a dissenting opinion, only one magistrate differed from the above by saying that nothing had changed because in the past imprisonment was imposed wherever appropriate.

#### State prosecutors

Like magistrates, most prosecutors thought that pre-implementation sentences were inconsistent. These respondents viewed the discretion of judicial officers as problematic because sentencing depended on what the particular presiding officer viewed as serious. They appealed for greater consistency albeit at the expense of individual circumstances. One prosecutor said that previously magistrates were too afraid to impose "proper" sentences.

A few prosecutors thought that sentencing was consistent. They felt "direct imprisonment" was handed down to perpetrators of such crimes. One of these

prosecutors remarked that the test was not only the seriousness of the crime but also the persons involved, i.e. the individual circumstances. Another said that magistrates were bound by sentencing precedents.

#### Defence lawyers

Some defence lawyers said pre-implementation sentences were inconsistent. In their view, this denied the judicial system a much-needed predictability. Typically, defence lawyers said that sentencing practices varied considerably from one magistrate or judge to another, and from one court to another. Sentences also varied according to how the judicial officer felt on the day in question.

As a result of this one attorney said that he had seen “*a lot of imprisonment where it was not applicable*”. Another factor that influenced sentencing was the seniority and competence of the defence in presenting facts in mitigation of sentence. One attorney was of the opinion that many regional court magistrates were guided by the thinking of Justice College in Pretoria thus suggesting very little independence of thought.

#### 7.1.4 Victims’ interests and the use of compensation & restitution in sentencing<sup>20</sup>

Respondents were asked: ‘**To what extent are the interests of victims taken into account with regard to, for example, possible compensation and restitution?**’ Respondents’ were asked this in respect of crimes both covered and not covered by the Act. Respondents chose answers ranging from ‘always’, to ‘never’. The results are presented in Table 5.

Table 5: Opinions about the use of compensation. Respondents’ views about the extent to which victims’ interests are taken into account with regard to, for example, possible compensation and restitution in instances of crimes both covered and not covered by the Act. Results are expressed as a percentage of respondents in each category holding the respective views.

	Categories of respondents	Always	Almost always	Sometimes	Almost never	Never
Crimes covered by the Act	Overall	15.0%	5.0%	20.0%	51.0%	9.0%
	Judicial officers	31.7%	7.3%	9.8%	41.5%	9.8%
	Prosecutors	6.5%	3.2%	35.5%	48.4%	6.5%
	Defence lawyers	0.0%	5.6%	16.7%	61.1%	16.7%
	Lay assessors	0.0%	0.0%	20.0%	80.0%	0.0%
Crimes <u>not</u> covered by the Act	Overall	11.0%	5.0%	35.0%	42.0%	7.0%
	Judicial officers	22.0%	10.0%	29.0%	34.0%	5.0%
	Prosecutors	7.0%	0.0%	52.0%	39.0%	3.0%
	Defence lawyers	0.0%	6.0%	33.0%	39.0%	22.0%
	Lay assessors	0.0%	0.0%	10.0%	90.0%	0.0%

Overall, most respondents (60%) felt that the courts ‘almost never’ or ‘never’ take the interests of victims into account with regard to possible compensation and restitution when it comes to serious offences covered by the Act. This feeling was particularly pronounced among defence lawyers (78%) and lay assessors (80%). Judicial officers were divided in their opinions in respect of crimes covered by the Act. Just over half (51%) said that victims interests are ‘never’ or ‘almost never’ taken into account, a further 39% thought that courts either ‘always’ or ‘almost always’ take the interests of

<sup>20</sup> Question 10

the victim into account and 20% said that victim's interests are sometimes taken into account in this way.

On the whole, respondents appeared to be more ambivalent about compensation being used with offences not covered by the Act than with offences under the Act. For crimes not covered by the Act, 35% of all respondents thought that victims' interests were sometimes taken into account in this way. Compared with crimes covered by the Act, fewer respondents thought that victims' interests were always / almost always considered (16%) and fewer thought that they were never / almost never taken into account (49%) for crimes not covered by the Act.

An important point made by respondents in all four categories was that the majority of accused persons do not have the means to compensate their victims. In such cases, it is simply not possible for courts to order compensation. It is particularly difficult or inappropriate for an accused to be expected to pay compensation when they are imprisoned for an extended period. Compensation is more applicable where the court can suspend a sentence (but this is not possible under the Act).

#### Judicial officers

While some judicial officers thought that courts are very conscious of the victims and their interests, others believed that the courts do not give sufficient attention to the sentencing stage of a trial or to interests of victims.

Some respondents felt that compensation is not primarily the function of the criminal law. It is also often very difficult for the court to establish the monetary value of a victim's injuries – especially in rape cases. Some said that although it is a good thing to call victims and their family members to testify, it does not really put the court in a better position with regard to sentencing.

#### State prosecutors

Most prosecutors thought that too much is done for the accused and too little for the victims. Some said that this is caused by a lack of time by the prosecution and the fact that courts generally do not ask that evidence be given. Prosecutors thought that in the lower courts it is more of a problem to give attention to the interests of the victim, since the caseloads of these courts are very high.

#### Defence lawyers

Some defence lawyers also thought that prosecutors and judicial officers are not doing enough to promote the interests of the victim, many prosecutors lack the necessary experience and that victims are not involved enough.

Other defence lawyers opined that the interests of victims are almost always taken into account under the Act because prescribed minimum sentences ensure that the majority of victims would be satisfied that the perpetrator received his dues. In their view, "For serious offences the punishment is more important than compensation to the victim." Between the police and the prosecutors the interests of the victims are being taken care of sufficiently. Some said that keeping the accused out of prison and letting him compensate the victim can advantage both the victim and the accused.

#### Lay assessors

Most lay assessors believed that the accused person's interests dominate the court proceedings and that nothing constructive is done to assist victims.

#### 7.1.4.1 *Opinions about possible steps to improve the involvement of victims in the sentencing process*<sup>21</sup>

When respondents were asked what steps could be taken to improve the involvement of victims in the sentencing process, respondents from all categories said that victims should feature more prominently in the court process. A number of suggestions were made to improve victim involvement. These included the following:

- Victims should be treated with more respect and sympathy;
- Judicial officers and prosecutors should be educated with regard to compensatory orders;
- There should be publicity campaigns to encourage victims and their family members to get more involved in the case and give evidence to compound the seriousness of the crime;
- Make it obligatory for the prosecution to call the complainant;
- The information needed by the court for sentencing should be presented during evidence in chief because “it is traumatic to drag the complainant back to the witness stand when it comes to sentencing”;
- The prosecution should liaise more with the investigating officers who should investigate what damages the victim suffered and the prosecutor should be compelled to place such findings on record;
- Victim impact statements should be produced to the courts;
- Victims should be kept informed of their rights so that they have a greater interest in their case and apply for compensation;
- Social workers and court appointed legal representatives for the victims should assist the victims during sentencing to help them put their point across;
- Another forum should look after victims’ rights; and
- There should be a meeting with the judicial officer, the victim and the accused in a closed session so that the victim can tell his side of the story to the judicial officer.

#### 7.1.4.2 *Opinions about possible steps to facilitate compensation for victims*<sup>22</sup>

When respondents were asked what steps could be taken to facilitate compensation for victims, some of the interviewees said that compensation is not really part of the function the criminal courts. In their view, it is difficult to determine the quantum of damages in some instances. Other respondents suggested a number of ways to facilitate compensation for victims of crime. These included the following:

- A commission of enquiry would be necessary to determine the desirability of the state compensating victims of crime where the accused is poor and not worth suing.
- Prisoners should do work and the money from this work should be paid into a fund used to assist victims of crime.
- Judicial officers could be encouraged to mention compensation to victims as the victim seldom asks for it. “There should be a broader enquiry as in other countries - reparation and restitution as in restorative justice.”
- The assistance to victims should consist of counselling rather than compensation in the form of money. Legal aid, psychological and medical assistance should be available for the victims of crime on the same basis that it is available for alleged criminals.

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<sup>21</sup> Question 11(a)

<sup>22</sup> Question 11(b)

- There should be a person at every court that looks after the interests of the victims.

In relation to a state funded victims fund, some respondents expressed caution. They said that this could be too expensive, open to abuse and induce the laying of false charges. One respondent said, "If the social net of the community is wide enough then victims of crime, the poor, the sick, the elderly, etc. could be supported effectively, unlike the case presently. All of the above categories of people need assistance from the state, not only the victims of crime."

## 7.2 The Act and its impact on sentencing

### 7.2.1 Preference for the situation pre- or post-implementation<sup>23</sup>

The Act was implemented from 1 May 1998. Respondents were asked to say **which situation they preferred: that before 1<sup>st</sup> May 1998 or after 1<sup>st</sup> May 1998?**<sup>24</sup> Their responses are given in Table 6.

Table 6: Pre- or post-implementation preference. Respondents' opinions about which situation is preferable: before or after 1<sup>st</sup> May 1998. Results are expressed as a percentage of respondents in each category holding the respective views.

Categories of respondents	Preference for situation before 1 <sup>st</sup> May 1998	Preference for situation after 1 <sup>st</sup> May 1998	Don't know
Overall	47.5%	46.5%	6.1%
Judicial officers	65.0%	27.5%	7.5%
State prosecutors	29.0%	61.3%	9.7%
Defence lawyers	61.1%	38.9%	0.0%
Lay assessors	10.0%	90.0%	0.0%

Judicial officers and defence lawyers generally preferred the situation before the Act came into effect. This included 63% of those magistrates who expressed an opinion and all seven judges interviewed. By contrast, prosecutors and lay assessors tended to prefer the situation after the Act came into effect.

Reasons advanced for preferring the pre-implementation sentencing regime included:

- It is not possible to legislate for minima when prescribed sentences are so high;
- There are cases where convicted accused persons do not deserve the severe penalty prescribed by the Act, but the court is unable to find "substantial and compelling circumstances" that will allow a lesser sentence;
- The Act risks unconstitutionality and decontextualising sentencing;
- It was wrong to force courts to sentence to specific terms of imprisonment; and
- It was a piecemeal approach to spilt the trial in the regional court and require sentencing in the high court;

Reasons given for preferring the post-implementation situation included:

- Increased jurisdiction for the regional courts;
- Pre-implementation, regional courts had to impose lenient sentences to avoid being overturned on appeal;
- Justice was being done better now than in the past; and
- The Act would be a deterrent to criminals.

Some respondents believed that despite problems with the Act, there should be legislation that would bring some sort of certainty as to what punishment is handed out. In their view, this would bring much needed security into the system.

<sup>23</sup> Question 3

<sup>24</sup> Sections 51 and 52 of the Act came into operation on that date.

### 7.2.2 Opinions impact of the Act on judicial independence<sup>25</sup>

Respondents were asked whether '**section 51 of the Act adversely affects judicial independence?**' Their responses are given in Table 7.

Table 7: Opinions about whether the Act adversely affects judicial independence. Results are expressed as a percentage of respondents in each category holding the respective views.

Categories of respondents	Adversely affects judicial independence	Does not adversely affect judicial independence
Overall	68.1%	31.9%
Judicial officers	68.4%	31.6%
State Prosecutors	60.7%	39.3%
Defence lawyers	94.4%	5.6%
Lay assessors	40.0%	60.0%

Overall, just over two-thirds (68%) of the respondents felt that the Act adversely affects judicial independence. Judicial officers' views were almost identical to the overall average. Defence lawyers were by a wide margin most likely to say that the Act adversely affects judicial independence, with 18 out of 19 defence lawyers saying so. A majority of state prosecutors (60%) also felt that the Act adversely affected judicial independence.

#### Judicial officers

Judicial officers who thought the Act adversely affected their independence raised the following concerns:

- the provisions of the Act were severe and not all serious offences warrant the minimum sentence;
- the Act would delay justice and restrict courts' sentencing abilities;
- the Act impinges on judicial discretion to impose a punishment appropriate in a particular case;
- there is a lack of individualising sentencing which is problematic since every case has its own merits;
- the Act prevents the court from adopting a sentence that will impact on the future behaviour of the accused;
- an appropriate sentence must be determined by the court. The role of parliament is to make laws and give expression to the will of the people, but the courts must be vigilant to prevent injustice. Consequently minimum sentences and strictly defined circumstances limiting a court's power not to impose them obviously affects judicial independence; and
- Harsher criticism was reflected in statements like "*our hands are chopped off with regard to sentencing*", and "*one is like a puppet on a string*".

Almost one third of judicial officers thought the Act does not adversely affect their judicial independence. Their reasons included that a "backdoor" existed in "substantial and compelling" circumstances. Nevertheless, they were of the opinion that any infringement of judicial independence was a "bad thing". They emphasised that judicial independence was paramount and the cornerstone of any democracy.

Only one judge asked what was meant by judicial independence and proceeded to give his interpretation of the phrase. He said that if it was interpreted to mean that judges are "free to do what they want to" then there are "lots of constraints". But if

<sup>25</sup> Question 8

judicial independence means judicial ability, then the Act does not adversely affect him because as a judge he is beholden to the law in any event.

#### Defence lawyers

Some defence lawyers regarded the Act as a prescription from parliament as to how the judiciary should work. Comments such as “*the legislature is in effect imposing a set sentence for prescribed offences allowing courts very little discretion*”, and “*the legislature is drastically interfering with something over which the courts should have unfettered discretion*” illustrate this point. Another attorney said that the “*whole portion of sentencing after conviction is redundant*”. The disadvantage would be that each case is not decided on its merits and even though “*there are such a lot of mitigating factors, the magistrate’s hands are cut off*”.

But another attorney commented, “*It is the price we have to pay for consistency and the courts’ previous bad track record [on sentencing]*”. He felt that more would be gained if there was more certainty and the effect would be more confidence in the system. An attorney said, “*The [Act] is a good thing because it forces judges to apply their minds and motivate a reason if they impose anything less than the prescribed minimum sentence*”. This kind of opinion was unusual for an attorney and out of step with the rest of the attorneys who felt that the new Act was unfair.

#### 7.2.3 Opinions about the impact of the Act on sentencing<sup>26</sup>

Respondents were asked **what impact the provisions of section 51 of the Act have on sentencing practices?**

Respondents in all categories thought that the Act would make sentences harsher but more rigid. Some judges thought that some sentences would be unjust and arbitrary while another said that the Act would not have any impact on sentencing practices. Some magistrates felt that the Act would militate against past leniency and send a positive message to society but another said that some sentences would be overly harsh. Prosecutors emphasised the more punitive aspects of the law.

#### Judicial officers

Most of the judicial officers said s51 has the effect of restricting the courts’ sentencing options and it introduces an element of rigidity in the sentencing process. In their view, the Act makes it more difficult to individualise sentencing and it removes the context of the case from sentencing. Normally, four variables (the victim, the offender, the crime and society) have to be considered when sentencing. Instead, they say, the Act requires that circumstances of the offence mentioned in schedule 2, has to be given greater importance and could be decisive. Most judges thought that as a result some sentences would be unjust and arbitrary. Some judicial officers went so far so to say that the Act makes it almost impossible to reach a just decision.

One dissenting judge pointed to what he described as the consistency between the new and old sentencing practices, and said that s51 would not have any impact on sentencing practices.

Most of the magistrates thought that the Act would produce consistency in sentencing practices and militate against what they saw as the leniency that characterised pre-implementation sentences. On the whole, they were more receptive than judges to the Act. Magistrates thought that the Act would assist them

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<sup>26</sup> Question 2

in sentencing because it will ensure more severe sentences and this would send out a positive message to society. In calling for harsher sentences, magistrates made the following comments: *“the judiciary must be feared by the criminals – retribution is the only option”*; and *“drastic measures are sometimes necessary”*. However, another magistrate commented that, *“although there would be more uniformity in sentencing, the sentences would be harsh but sometimes overly harsh.”*

Referring to the greater jurisdiction of regional courts, some magistrates stated that because of the increased jurisdiction under the Act they could sentence more heavily. For them, a reason for lenient pre-implementation sentences was the lower limitation on their sentencing jurisdiction to ten years (a statutory limitation). One magistrate believed that judges who in their words were “always intervening with sentences by lowering them” established the norm of ten years.

Magistrates expressed frustration at not being able to sentence cases that they have heard and believed that the court that tried the matter should be able to sentence.

#### State prosecutors

Not surprisingly, given the demand for heavier sentencing, most of the prosecutors were receptive to this section. State prosecutors are under pressure to secure convictions for serious offences and to demonstrate to the public that the criminal justice system is working effectively. Their enthusiasm for the Act is illustrated by comments such as *“it is an excellent way to provide a uniform approach to sentencing”*; *“it sends a message to the community that a life is worth more than ten years”*; *“it forces magistrates to give the minimum sentence of 15 years”*; and *“it’s about time because it is frustrating from where we sit”*.

One state advocate seemed pleased that the Act had taken away *“a large degree of judges’ discretion”*. One prosecutor said that in the past, magistrates were *“afraid of appeals and handed down ridiculously lenient sentences”* but the provisions of the Act would remedy this situation. Another prosecutor said, *“I prefer the Act when I prosecute before magistrates who are too scared to impose sentences. Some magistrates need the Act since it reflects the disapproval of the community”*.

There was a view that if accused persons were sentenced harshly this would have an effect on crime but not deter it altogether. Many state prosecutors interviewed acknowledged that s51 was tougher.

#### Defence lawyers

Most defence lawyers thought s51 would result in greater consistency but rigidity in sentencing. They also thought that sentences would be harsher. Some attorneys said that magistrates now had very little discretion in sentencing and one attorney said that in his experience judicial officers stick rigidly to minimum sentences. He cited an example of a recent case where an accused was convicted of armed robbery of R15 (fifteen Rand) and sentenced to 15 years imprisonment. In another example, an accused was given a 15-year prison sentence for possession of a 9mm pistol, yet there was no evidence before court that he had used it in the commission of a crime. According to the lawyer, before the Act came into operation, this accused would have been given a maximum of four or five years imprisonment.

A few defence lawyers felt that there will be *“an extensive artificial interpretation of ‘substantial and compelling circumstances’ to accommodate cases that require leniency”* and judicial officers *“will demonstrate a subjective non-scientific approach”*.

One attorney thought that the Act created awareness on sentencing and would stimulate some thinking about this issue amongst judicial officers. He said, “*presiding officers are now more aware of sentencing options – they have to apply their minds more*”. Another thought the courts would work better as a result of s51. In his view the community will be more positive about sentencing.

#### Lay assessors

One lay assessor said that as a member of the community he was concerned about the escalation of murders and rapes. Therefore, he thought that it was good that the law has made provision for mandatory minimum sentencing.

#### 7.2.4 Opinions about post-implementation consistency in sentencing<sup>27</sup>

Respondents were asked, ‘**To what extent is there consistency in sentencing practices in South African courts?**’ Respondents were asked this for crimes both covered and not covered by the Act. Respondents chose answers ranging from ‘always’ to ‘never’, and ‘don’t know’. Their responses are set out in Table 8.

Table 8: Opinions about post-implementation consistency in sentencing. Respondents’ views about the extent to which there is consistency in sentencing practices for crimes both covered and not covered by the Act. Results are expressed as a percentage of respondents in each category holding the respective views.

	Categories of respondents	Always	Almost always	Sometimes	Almost never	Never	Don't know
Crimes covered by the Act	Overall	12.1%	57.1%	7.7%	8.8%	1.1%	13.2%
	Judicial officers	6.1%	51.5%	9.1%	12.1%	3.0%	18.2%
	Prosecutors	13.8%	65.5%	6.9%	3.4%	0.0%	10.3%
	Defence lawyers	15.8%	57.9%	10.5%	15.8%	0.0%	0.0%
	Lay assessors	20.0%	50.0%	0.0%	0.0%	0.0%	30.0%
Crimes not covered by the Act	Overall	4.1%	20.6%	29.9%	26.8%	9.3%	9.3%
	Judicial officers	5.4%	16.2%	37.8%	24.3%	8.1%	8.1%
	Prosecutors	3.2%	38.7%	32.3%	12.9%	6.5%	6.5%
	Defence lawyers	0.0%	5.3%	26.3%	42.1%	21.1%	5.3%
	Lay assessors	10.0%	10.0%	0.0%	50.0%	0.0%	30.0%

Most respondents thought that the Act would result in greater consistency in sentencing. Almost 70% of all respondents thought that as a result of the prescribed minimum sentences there would be “consistency” in sentencing of crimes covered by the Act. However, for crimes not covered by the Act, opinions about consistency were more mixed and closer to those in respect of pre-implementation sentences for crimes now covered by the Act. More than a third of judicial officers (38%) said that such sentences would “sometimes” be consistent.

It is clear that the majority of respondents did not question the meaning of the term “consistency.” Most people interviewed used the word to compare sentence severity expressed as the number of years of imprisonment. However there were different views on the application and meaning of the term. A number of respondents indicated that length of the sentence is not the most appropriate criteria for judicial consistency since each case is different. One judge believed: “*it is important to emphasise that it is the sentencing practices which must be consistent since uniform sentences for the same crime ignore the facts of the case and can lead to grave*

<sup>27</sup> Question 16 (a) & (b)

*injustices*". For example, a premeditated murder of a policeman to facilitate a robbery must be dealt with differently from the premeditated murder of a child molester by his victim when about to rape her again.

The results from this question should be treated with caution. Many respondents may not yet have dealt with the Act and were not in a position to deliver an opinion based on their experience and practical knowledge. Some of their answers would thus have been speculative. Nonetheless, these results do reflect expectations of respondents about the effect of the Act and are important in as much as they record the perceptions prevailing at the time of the survey.

#### Judicial officers

Judicial officers generally believed that the Act would increase consistency in respect of crimes covered by the Act. Some 58% thought that this would always or almost always be the case. However, some stated that there is still no consistency in respect of crimes covered by the Act. The reasons forwarded for this were that *"some courts impose minimum sentences with very little enquiry – sometimes with reluctance, sometimes not."*

A third opinion was that it was too soon to tell whether or not consistency occurred in terms of the new Act. However, the proponents of this idea did speculate that there would be vast differences because s51 makes it much harder to individualise the process and for judges to reach a decision rationally.

Fewer judicial officers said there would be consistency in sentencing for crimes not covered by the Act compared with crimes under the Act. The largest group (38%) was ambivalent about post-implementation consistency of crimes not under the Act while a further 24% thought there would "almost never" be consistency for such crimes. The view was that the Act would not impact on crimes not covered by it.

A judge said that the courts over many years had defined the general approach to sentencing and the factors relevant thereto. He continued by saying that sentences that were too severe were dealt with on review and appeal. Furthermore, he reminded that the state could now appeal where sentences are too lenient. Some magistrates said there would "sometimes" be consistency because *"every judicial officer is different with a different value system and because the facts of every case are different as is the moral blameworthiness of the accused and the cruelty of the crime"*. One magistrate said that because individualisation of sentences was very important, consistency is never possible in all respects but similar cases must be treated on an equal footing.

A minority of judicial officers thought that there was already consistency in their courts. The reason given was that presiding officers discuss among themselves what kind of sentences are appropriate.

Some judicial officers thought that the degree of consistency would depend on the division concerned. For instance, there are differences between the 'platteland' (rural areas) and urban areas in terms of offences committed and accused sentenced. Some thought that more consistency would be found within a region than countrywide.

#### State prosecutors

Prosecutors were the group most likely to think that the Act would create greater consistency. Some 79% of prosecutors thought that sentences for crimes under the Act would "always" or "almost always" be consistent. In their view, the Act leaves the

courts in no doubt about what sentence should be imposed, “*the Act obliges judicial officers to be fairly consistent unless there are substantial and compelling circumstances*”.

However, others thought consistency in sentencing would only be achieved when there was certainty on what “substantial and compelling circumstances” meant and that various interpretations of the term perpetuated inconsistencies. They also feared that the courts would use the “substantial and compelling” clause to get around minimum sentences.

Pointing to what she considered the latitude still evident in sentencing, one prosecutor stated that she handpicked certain magistrates for specific cases secure in the knowledge that they impose harsher sentences in respect of certain crimes. Voicing a related concern, one prosecutor believed that “*attorneys actually try and appear in front of certain magistrates who are known for their leniency*”.

Prosecutors reported that the magistrates in a particular district are not well trained leading to greater leniency and inconsistencies and when a relief magistrate passes a sentence there are “substantial” differences between him and the regular magistrates with regard to sentencing.

Prosecutors were less confident about consistency in the sentencing of crimes not covered by the Act. Only 43% thought that there would always or almost always be consistency for crimes not covered by the Act compared with the almost 80% who thought so for crimes covered by the Act.

For example, a prosecutor gave race as a factor for inconsistency in sentencing. He continued by saying that, if a black person robbed a white person he would receive a harsh sentence.

#### Defence lawyers

Most defence lawyers believed that the Act would increase consistency in respect of crimes covered by the Act. Some 74% thought that this would always or almost always be the case with crimes covered by the Act. However, this dropped to 5% in respect of crimes not covered by the Act.

In respect of crimes not covered by the Act, the lawyers interviewed felt that because of the wide spectrum of judicial officers, their personal experiences and points of view consistency will not be achieved. One example proffered was that of a magistrate who may have had a drinking problem in the past and would consequently be more lenient towards a drunk driving charge.

#### 7.2.5 Opinions about the prohibition of suspended sentences<sup>28</sup>

Respondents were informed that ***subsection 51(5) of the Act prohibits the suspension of sentences imposed in terms section 51 of the Act***. They commented and chose from a number of possible responses ranging from ‘very good’ to ‘very bad’. Their replies are set out in Table 9.

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<sup>28</sup> Question 6

Table 9: Opinions about the provision that sentences imposed in terms of the Act may not be suspended. Results are expressed as a percentage of respondents in each category holding the respective views.

Categories of respondents	Very good	Good	Neither good nor bad	Bad	Very bad
Overall	20.8%	29.7%	9.9%	25.7%	13.9%
Judicial officers	19.0%	14.3%	11.9%	40.5%	14.3%
State prosecutors	35.5%	48.4%	3.2%	6.5%	6.5%
Defence lawyers	5.6%	5.6%	22.2%	33.3%	33.3%
Lay assessors	10.0%	80.0%	0.0%	10.0%	0.0%

Overall, respondents were divided as to whether the prohibition of suspended sentences in terms of the Act was good or bad. Nearly 55% of judicial officers generally (and five out of the seven judges in particular) thought that the prohibition on the suspension of sentences was either bad or very bad, while only a third were in favour of the provision. Even more defence lawyers (67%) thought the prohibition was bad. By contrast, the provision was well received by 84% of state prosecutors and 90% of lay assessors.

#### Judicial officers

Those judicial officers who thought that the prohibition of suspended sentences under the Act was bad gave a number of reasons for saying this. Most thought that the stipulation:

- takes away the discretion from a judicial officer regarding sentencing options;
- takes away the court's discretion in finding mitigating circumstances that could have an effect on a heavy sentence. There are circumstances that could warrant a suspended sentence;
- prevents the individualisation of sentences;
- ignores the wide range of circumstances that exists from one case to the next;
- negates the principles of mercy and hope; and
- creates a problem with regard to an accused who has been in detention for a lengthy period awaiting trial. Now such a person cannot be accommodated by a partly suspended sentence as the courts did pre-implementation.

In the opinion of one judge, "The legislature precludes the judiciary from dealing with the offender as a human being." One respondent said that this stipulation should not apply to all offences listed in the schedule to the Act: "In 95% of the offences listed in the Act, suspended sentences would be irrelevant, since suspended sentences would never be imposed anyhow. But for the other 5% of cases, the Act does not cater for the unusual."

A smaller group of judicial officers, consisting only of regional magistrates, felt that this stipulation is fitting in light of the fact that the Act deals with serious offences. According to them, removing this stipulation could negate the purpose of the Act – "mandatory sentences may lose their impact". The Act deals with the type of offences where a suspended sentence would be unusual. For serious crimes as listed in the schedule to the Act, the suspension of a sentence does not serve as a deterrent to the offender. The suspensions of sentences are more relevant in instances of minor offences.

#### State prosecutors

The majority of prosecutors were in support of the prohibition of suspended sentences and reasoned that:

- If a judicial officer could suspend a mandatory sentence it would negate the effect of the Act;
- The provision will have a deterrent and retributive effect;
- The provision sends a reassuring message to the community that criminals will be punished; and
- The offences covered by the Act are too serious to warrant any suspension.

Some prosecutors thought that the courts should be allowed to suspend sentences when the case warrants it. They argued that:

- A suspended sentence can act as a deterrent (to further crime) in suitable circumstances;
- The provision interferes with the discretion of presiding officers and this may lead to unfair results;
- The provision does not allow for the individualisation of sentences; and
- Judicial officers will now look for “substantial and compelling circumstances” as an escape route, since they are not allowed to suspend a sentence.

#### Defence lawyers

Over two-thirds of the defence lawyers (67%) interviewed were unhappy with the prohibition of suspended sentences. Reasons given by them for this view include:

- The provision prohibits innovative sentencing – the courts are not allowed to set conditions under a suspended sentence to help re-introduce an accused back into society;
- It prevents a sentence that encourages the accused to not commit further crimes and reform them self. It makes it impossible to incorporate rehabilitative elements into a sentence;
- The legislature should not dictate to the courts; and
- The provision negates the principle of mercy.

Reasons given by a minority of defence lawyers for supporting the provision include:

- This stipulation will have the effect of protecting the public and it will also lead to legal certainty; and
- The message of deterrence will come out clearly.

#### Lay assessors

Reasons given by lay assessors for supporting the provision were similar to those given by other respondents above. One assessor thought “convicted persons should not have any rights and should be removed permanently from the community”.

#### 7.2.6 Opinions on the possible impact of the Act on guilty pleas to lesser charge<sup>29</sup>

Respondents were asked: ‘**To what extent, if any, does section 51 of the Act encourage accused persons or their legal representatives to plead guilty to lesser charges so as to avoid a tougher sentence in terms of the Act?**’. Respondents chose answers ranging from ‘always’ to ‘never’ and ‘don’t know’. The results are presented in Table 10.

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<sup>29</sup> Question 7

Table 10: Opinions about the extent to which the Act encourages accused persons to plead guilty to a lesser charge to avoid a tougher sentence in terms of the Act. Results are expressed as a percentage of respondents in each category holding the respective views.

Categories of respondents	Always	Almost always	Sometimes	Almost never	Never	Don't know
Overall	15.8%	17.8%	18.8%	18.8%	8.9%	19.8%
Judicial officers	14.3%	14.3%	26.2%	16.7%	7.1%	21.4%
State prosecutors	16.1%	16.1%	16.1%	25.8%	9.7%	16.1%
Defence lawyers	26.3%	21.1%	10.5%	21.1%	15.8%	5.3%
Lay assessors	0.0%	33.3%	11.1%	0.0%	0.0%	55.6%

The results indicate that the respondents had to speculate in answering this question: one out of five respondents chose the 'don't know' category as an answer. One reason for this could be that, with the exception of defence lawyers, the other categories of respondents would rarely directly ask an accused about his motive for pleading guilty to a lesser charge.

#### Judicial officers

Judicial officers said that there is a strong incentive for accused persons to do this and speculated that they might succeed as prosecutors are inexperienced and overworked. One view was that prosecutors should however be obliged to consult with the victims before accepting any plea bargain.

Some respondents made it clear that it is unlikely that the prosecution will accept a plea on a lesser charge in respect of the serious crimes listed in the schedule to the Act. The charges are too serious to allow much scope for plea-bargaining – this will mostly happen when the prosecutor is inexperienced or overworked.

#### State prosecutors

All the state advocates that were interviewed agreed that this was a possibility and that legal advisors will normally do what is in the best interests of their clients and this could include offering a plea on a lesser charge. However, they contended that with such serious offences the prosecution would rarely entertain a plea on a lower charge.

#### Defence lawyers

Most defence lawyers said that they would do what is in the best interests of their clients and avoiding a prescribed minimum sentence amounts to just that. However, one respondent mentioned that he would rather advise his client to plead not guilty and to put all facts in dispute.

### 7.2.7 Opinions on the interpretation of "substantial and compelling circumstances"<sup>30</sup>

The Act stipulates that if the court is satisfied that "substantial and compelling circumstances" exist which justify the imposition of a lesser sentence than the prescribed sentence, then it may impose such lesser sentence.<sup>31</sup> The obvious question is, what are "substantial and compelling circumstances"? Respondents were asked "**are there clear guidelines on what 'substantial and compelling circumstances' mean?**" Their responses are given in Table 11. Respondents also commented on the interpretation of the phrase and suggested possible examples of substantial and compelling circumstances.

<sup>30</sup> Question 4

<sup>31</sup> Section 51(3)(a)

Table 11: Opinions on whether there are clear guidelines on what the term ‘substantial and compelling circumstances’ means. Results are expressed as a percentage of respondents in each category holding the respective views.

Categories of respondents	Clear guidelines	No clear guidelines
Overall	5.9%	94.1%
Judicial officers	0.0%	100.0%
State prosecutors	6.5%	93.5%
Defence lawyers	10.5%	89.5%
Lay assessors	20.0%	80.0%

Respondents were almost unanimous that there are no clear guidelines in the Act as to the meaning of “substantial and compelling circumstances”. This was the opinion of 94% of all respondents and 100% of judicial officers. However, there was a difference of opinion as to whether it would have been appropriate to include guidelines in the Act or leave this to the courts. Most respondents in all categories thought that the existence of such circumstances would depend largely on the merits of each case.

#### Judicial officers

All the judicial officers interviewed indicated that there are no clear guidelines on what “substantial and compelling circumstances” mean. However, many judicial officers were in favour of the legislature leaving room for discretion for the judicial officer, letting the courts shape the concept of “substantial and compelling circumstances”. In their view, clarity would only be achieved once the High Court and Supreme Court of Appeal provide further guidelines. But some of them also said that this section could lead to arbitrary decisions because it is not clear what the legislature had in mind. A concern was that judicial officers who disapprove of the Act could always find substantial and compelling circumstances.

Most judicial officers believed that the legislature was not referring to normal mitigating circumstances. Some said that these circumstances should only be found in rare circumstances – these are most unusual circumstances. They felt that the accused had to provide considerable and strong reasons, and the court must feel compelled to go against the provisions of the Act. Such circumstances can be found on rare occasions only. These respondents thought that the facts of a case must be so exceptional that an injustice would occur if the minimum sentence were imposed.

However, other judicial officers said that one should take into account that the combined effect of the ‘ordinary’ circumstances may in some cases amount to substantial and compelling circumstances. Accordingly, the court must look at all circumstances – mitigating and aggravating – and consider their cumulative effect. If the court concludes in a particular case that the minimum prescribed sentence is so disproportionate to the sentence that would have been appropriate, it is entitled to impose a lesser sentence (on the basis that there are substantial and compelling circumstances present). In this evaluation, the court would bear in mind that the legislature perceives the necessity for sentences emphasising the deterrent component but would equally bear in mind that this does not necessarily lead to an automatic increase of sentences previously imposed.

One judge said “If the legislature wants to prescribe minimum sentences they should go about it in a more scientific manner like the legislature has done in the United States of America. The categories should be refined even more. For each category of

crime there should be various factors listed. The presence of some factors will lead to a more severe sentence, whereas the presence of other factors should lead to a reduction of the sentence. However, the legislature should keep in mind that sentencing is not an exact science”.

#### State prosecutors

Some 94% of the state prosecutors interviewed thought that there are no clear guidelines on what “substantial and compelling circumstances” mean. Some respondents believed that the legislature should provide guidelines with regard to this concept. They said that the vagueness of the stipulation could lead to arbitrary decisions since it depends very much on the subjective opinion of a judicial officer. Accordingly, they believed that judicial officers who do not want to impose the minimum prescribed sentence could use this section as an escape route. However, others said that judges give guidelines through decided cases. This group of prosecutors felt strongly about that the legislature should not try to create categories.

Some respondents said that the court should consider the normal mitigating circumstances. Others differed, believing that it must be something extraordinary.

#### Defence lawyers

Almost 90% of defence lawyers thought that there are no clear guidelines on what “substantial and compelling circumstances” mean. Some wanted clearer guidelines to create greater certainty. For them, this concept is too vague and causes problems for the courts. For example, where one judicial officer might find substantial and compelling circumstances, others might not. Some suggested that the legislature should provide guidelines while others said that this must be left to the courts. However, most respondents were of the opinion that it would not be practical to create a rigid list of circumstances.

Some defence lawyers thought that the courts are currently negating the meaning of this phrase. According to these lawyers, some judicial officers do not want to be prescribed to and they are equating normal mitigating circumstances with substantial and compelling circumstances. A concern was that these judicial officers would use this section as a back door in looking for reasons not to impose the mandatory minimum sentences.

#### Lay assessors

Some lay assessors felt that this concept is too vague and that it can lead to arbitrary decisions, and that guidelines are therefore necessary. One said that assessors should be actively involved in the sentencing process.

#### 7.2.7.1 *Examples of substantial and compelling circumstances*

Some respondents from all categories provided examples of possible “substantial and compelling circumstances”. Although, most respondents concurred that there should not be a rigid list. Examples included:

- **Influence of alcohol;**
- **Circumstances of the crime**. Eg. when the crime is not serious, nobody was injured or euthanasia;
- **Provocation, duress or necessity** – but where the degree is not enough to negate intention or unlawfulness;
- **Self-defence** - where the bounds are exceeded only to a slight extent;

- **Entrapment or incitement** - where the accused was persuaded by someone else to commit the crime;
- **Lack of pre-meditation**;
- **Age of the accused** - especially when older co-perpetrators influenced a youthful accused;
- **Bad health of the accused** – for example where the accused person has a life threatening or a chronic disease, like HIV / Aids;
- **Background and circumstance of the accused** - the peculiar circumstances of the accused and how they got into the position where they committed the crime eg. commercial crimes committed by people in desperate financial circumstances;
- **Remorse** shown by the accused; and
- **Pre-trial detention** where an accused is detained for a very long period awaiting trial.

#### 7.2.8 Opinions on possible difficulties with interpretation of and classification under Schedule 2 of the Act<sup>32</sup>

Respondents were asked whether ***a court has difficulty determining into which part of schedule2 of the Act an offence fits. Specifically: (a) whether or not murder is planned or premeditated; and (b) whether or not there is common purpose or conspiracy?***

Overall, 86% of the respondents (and 83% of the judicial officers interviewed) felt that a court does not have difficulty in determining whether a murder was premeditated or not. Moreover, 88% of the respondents (and 86% of the judicial officers) felt that a court does not have difficulty in determining whether or not there was an element of common purpose or conspiracy in the commission of a crime.

Most respondents from all categories thought that the legal concepts are quite clear and simple and that this will normally be clear from the evidence adduced - provided the case is investigated well. The concepts themselves like, for example, common purpose are not new to the courts. If there is doubt the accused will get the benefit of the doubt.

One of the judges said: “although these categories referred to are clear, it is too simplistic.” “The concepts mentioned are well defined by previous judgements of the courts. However, both a brutal murder as well as euthanasia could be classified as premeditated murder, but they have nothing in common. These categories can enfold crimes that were never intended to be included. A whole lot of permutations are possible regarding each of these categories.”

A minority of defence lawyers thought that these concepts are not very clear and that a mistake made regarding the categorisation of a crime could make a big difference with regard to the length of the sentence. One respondent was of the opinion that there is no definition of “premeditated”, while another said that these concepts were always difficult to determine – “these are not easy aspects of the law.”

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<sup>32</sup> Question 9

### 7.3 Factors affecting sentencing

This section reports respondent's opinions on the extent to which **various factors do or should impact upon sentencing**. Respondents answered "yes" or "no" when asked whether a given factor played a role in sentencing. The factors are dealt with in three groups: First, those relating to the accused, second those relating to victims of crime, and third those relating to judicial officers.

#### 7.3.1 Opinions on factors relating to **the accused** which affect sentence<sup>33</sup>

Opinions on whether various factors relating to the accused play a role in sentencing are presented in Table 12.

Table 12 Opinions on the relevance to sentencing of various factors relating to **the accused**. Percentages are given of respondents in different categories and overall who thought that each of the listed factors did play a role in sentencing. Respondents not included in these figures thought that the listed factor did not play a role.<sup>34</sup>

Factor relating to accused	Judicial officers	State prosecutors	Defence lawyers	Lay assessors	Overall
lack of legal representation	16.7%	32.3%	63.2%	40.0%	32.4%
Social standing	40.5%	69.0%	63.2%	70.0%	56.0%
Poverty	50.0%	77.4%	57.9%	60.0%	61.0%
Culture	47.6%	45.2%	36.8%	30.0%	43.1%
Race	16.7%	29.0%	36.8%	40.0%	26.5%
Gender	47.6%	54.8%	63.2%	60.0%	53.9%

##### 7.3.1.1 Lack of legal representation of the accused<sup>35</sup>

Less than one third of respondents (32%) felt that an accused person's lack of legal representation does play a role determining the sentence. Perhaps not surprisingly, defence lawyers were the only group of respondents where a majority (63%) thought otherwise and stated that an accused person's lack of legal representation does affect their sentence.

Most defence lawyers argued that in more complicated cases where the accused person potentially had numerous mitigating factors, a trained legal professional would be in a better position to persuade a judicial officer to be lenient on their client, than the accused themselves. Moreover, in cases where the Act applied, an unrepresented accused would have an exceedingly difficult task in persuading a judicial officer that there were 'substantial and compelling circumstances' in their case allowing for the imposition of a lesser sentence than the prescribed minimum.

<sup>33</sup> Questions 18(a) – (f)

<sup>34</sup> For example, where 16.7% of judicial officers thought that that legal representation of the accused did play a role in sentencing, it follows that 83.3% thought that this factor did not play a role.

<sup>35</sup> Question 18(a)

### 7.3.1.2 *Social standing of the accused*<sup>36</sup>

Most respondents (56%) felt that an accused person's social standing plays a role determining their sentence. Judicial officers were least likely to think so (41%). Lay assessors were, however, most likely to think that an accused person's social standing could affect his sentence. (Under present law lay assessors cannot overrule a magistrate on his or her sentencing decision but their opinion could be persuasive.)

Some respondents felt that if an accused person is of a very high social standing then this might serve as an aggravating factor for the purpose of sentence. For example, a wealthy and respected community member, with a good education is arguable more morally blameworthy if he assaults someone, than a person who came from a broken home and who has frequently been assaulted himself.

Other respondents - notably judicial officers - argued that an accused person with a high social standing is punished by the mere fact of being convicted of a crime. If, for example, a major of a large city is convicted of shoplifting, then the ensuing publicity and public embarrassment (and likely loss of their job), will serve as a punishment for that person. A poor, unemployed person would not suffer these consequences for being convicted of shoplifting. Some judicial officers felt that the major should therefore receive a more lenient sentence than the unemployed person convicted of committing the same offence.

Some defence lawyers felt that accused persons with fixed incomes, stable families and steady jobs tend to be treated more leniently by the courts. This is because the courts are loath to punish the innocent families of such accused, and consequently hesitate to send them to prison. Such accused also make better candidates for non-custodial sentences such as correctional supervision as they have a fixed place of abode and can thus be easily monitored.

### 7.3.1.3 *Poverty of the accused*<sup>37</sup>

Most respondents (61%) thought an accused person's poverty played a role in determining their sentence. State prosecutors were most likely to think so (77%). Judicial officers were evenly split on the issue.

Many respondents argued that poor accused are unable to pay a fine. As a result, judicial officers' sentencing options are limited in respect of poor accused. Where a wealthy convicted accused might receive a fine, a poor accused could effectively receive a prison sentence, as he would not be able to pay the imposed fine. Moreover, a wealthy accused is in a better position to pay compensation to his victim (especially in theft and fraud cases), which could persuade a court to impose a wholly suspended sentence on such an accused on the condition that the compensation is paid within a certain period. A poor accused is not in a position to pay compensation, and thus cannot offer this as an enticement for a suspended sentence to be imposed on him.

Defence lawyers made the point that poor accused can rarely afford good lawyers, expensive psychiatric evaluations and other expert witnesses that could assist them to present mitigating factors in their behaviour to the court. Poor accused are left at the mercy of legal aid lawyers who work under time pressure and are frequently not as good as the better-paid lawyers in private practice.

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<sup>36</sup> Question 18(b)

<sup>37</sup> Question 18(c)

For certain property related crimes, an accused person's poverty might serve as a mitigating factor for the purposes of sentence. Many respondents, for example, thought that a starving man who shoplifts some bread or vegetables to feed himself and his family is unlikely to be punished harshly.

#### 7.3.1.4 *Culture of the accused*<sup>38</sup>

A minority of respondents (43%) thought that an accused person's culture played a role in determining their sentence. Judicial officers were the most likely to think that an accused person's culture could affect their sentence.

Many judicial officers who argued that an accused person's culture could affect his sentence used as an example some people's belief in witchcraft. Some judicial officers thought that people who murdered a person out of the sincere belief that the murdered person was a witch and a threat to the whole community should be treated more leniently than accused persons who murdered someone out of purely personal reasons.

Judicial officers in KwaZulu-Natal argued that in Zulu culture there is a form of abduction without sex, where the accused person abducts the woman he wants to marry against her parents' consent. The abducted woman usually consents to the kidnapping. In such a case the accused person should be treated more leniently as such an act is part of his cultural traditions.

One black magistrate in a small town in KwaZulu-Natal argued that many Zulu people cut away a part of a dog's tongue in the belief that this will make the dog more aggressive, and thereby a more effective guard dog. The action causes the dog a lot of pain and is cruel and illegal. However, because it is part of many Zulu's traditions the respondent said he would treat this crime more leniently than he would a 'normal' case of cruelty towards an animal.

#### 7.3.1.5 *Race of the accused*<sup>39</sup>

Just over a quarter of respondents (27%) thought that an accused person's race played a role in determining their sentence. Judicial officers were the least likely group to think so (17%). However, over a third of defence lawyers (37%) and lay assessors (40%) felt that an accused person's race has a bearing on the sentence they receive.

Most respondents who stated that an accused person's race affects the sentence they receive, said that generally an accused person's race would play a small and subtle role in a determination of his sentence. Respondents implied that some judicial officers are subtly – and probably subconsciously – affected by an accused person's race.

This observation is borne out by examining the views regarding the role played by other the factors discussed. Given South Africa's history, there is a very strong link between, on the one hand, race and, on the other hand, social standing, culture, poverty and consequently lack of legal representation. While relatively few respondents directly acknowledged the role of race as a factor, they were more ready

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<sup>38</sup> Question 18(d)

<sup>39</sup> Question 18(e)

to admit the role of these associated factors. Perhaps this reflects a lack of recognition or understanding by respondents of the *indirect* role of race.

Judicial officers, who argued that an accused person's race could affect his sentence, said this generally occurred only in racially motivated crimes. Thus, if a black person assaults an Indian person because of the latter's race, then the fact that the accused is black could serve as an aggravating factor in determining the accused person's sentence.

#### 7.3.1.6 Gender of the accused<sup>40</sup>

Just over half of the respondents (54%) thought that an accused person's gender played a role in determining their sentence. Judicial officers were the least likely group to think so (48%); defence lawyers were the most likely to think so (63%).

The most common example cited by the respondents was that of a male accused committing a violent crime against a female victim. Because of the latter's relative physical weakness, the attack by a male accused is seen in a particularly serious light. The accused is likely to receive a harsher sentence than if he had committed a violent crime against a male victim.

Many respondents also thought that the courts frequently treat female accused more leniently. Judicial officers are loath to send a woman to prison, especially if she has young children to support. It appeared that young mothers are very rarely sent to prison.

#### 7.3.1.7 Youth of the accused<sup>41</sup>

Respondents were asked, '**To what extent does the fact that the accused is aged between 16 and 18 years play a role in sentencing in terms of the Act?**' Respondents were then given the option to choose from a number of possible answers ranging from 'a very large extent', to 'a very small extent'. These results are presented in Table 13.

Table 13: Opinions about the extent to which the fact that the accused is aged between 16 and 18 years plays a role in sentencing in terms of the Act. Results are expressed as a percentage of respondents in each category holding the respective views.

Categories of respondents	Very large extent	Large extent	Neither large nor small extent	Small extent	Very small extent	Don't know
Overall	12.0%	48.0%	12.0%	13.0%	11.0%	4.0%
Judicial officers	11.9%	54.8%	2.4%	9.5%	11.9%	9.5%
State prosecutors	20.7%	34.5%	17.2%	20.7%	6.9%	0.0%
Defence lawyers	5.3%	47.4%	15.8%	15.8%	15.8%	0.0%
Lay assessors	0.0%	60.0%	30.0%	0.0%	10.0%	0.0%

A majority of all respondents (60%) including two thirds of judicial officers thought that the fact that an accused is between 16 and 18 years plays a role to either a 'large' or 'very large' extent in sentencing in terms of the Act. Almost a quarter (24%)

<sup>40</sup> Question 18(f)

<sup>41</sup> Question 5

felt that youthfulness plays a small or very small role when it comes to sentencing in terms of the Act.

Views by respondents on the role of youth in sentencing generally can be divided into three groups:

First, there were those who thought that persons of all ages should be treated the same with regard to sentencing. This view was predominant among prosecutors and lay assessors. They thought that if a youthful accused wants to commit offences that adults tend to commit, then they must be dealt with as an adult. Some believed that it is wrong for them to get away with crime because of their age. Most prosecutors felt that convicted juveniles know the difference between right and wrong. One prosecutor stated: "Juveniles are too often treated with 'kid gloves'." Quite a number of respondents believed that the majority of offenders (as much as 80%) who commit serious crimes are between the ages of 16 and 21 years and felt that the courts should consider this as an aggravating factor. They believed that if sentences for juveniles are too low, then they get out of prison fast and commit further crimes.

Second, other respondents thought that youthful accused persons should not be treated the same as adults when it comes to sentencing. Judicial officers and defence lawyers expressed this view more than the other two categories of respondents. In their view, age is always a mitigating factor. Juveniles tend to act more rashly than adults. Different sentencing norms should in their view apply for juveniles. Accordingly, the courts should try and keep children under the age of 18 out of prison, especially if the person is a first offender.

A third view was that the court must look at the circumstances of each offence, and the part the accused played in the crime. This was the opinion of most judicial officers and defence lawyers. Respondents in this group said that age must be considered in conjunction with other factors. The other factors mentioned by respondents include:

- the circumstances under which the crime was committed;
- the personal role the accused played in committing the crime;
- whether the accused was influenced in committing the crime;
- the accused's character & the nature of their personality;
- the possibility of rehabilitation;
- the accused's maturity and ability to foresee the consequences of actions;
- the accused person's background;
- the accused's previous convictions;
- the extent of the violence used in committing the crime; and
- the age of the victim.

One prosecutor had a preference for the system he said was being used in the USA, where the maturity of the juvenile is determined before the commencement of the trial. This enables the courts to decide whether the accused should be tried as an adult or child.

### 7.3.2 Opinions on factors relating to **crime victims** which affect sentence<sup>42</sup>

Opinions on whether various factors relating to crime victims play a role in sentencing are presented in Table 14.

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<sup>42</sup> Questions 18(g) – (k)

Table 14 Opinions on the relevance to sentencing of various factors relating to **crime victims**. Percentages are given of respondents in different categories and overall who thought that each of the listed factors did play a role in sentencing. Respondents not included in these figures thought that the listed factor did not play a role.<sup>43</sup>

Factor relating to victims	Judicial officers	State prosecutors	Defence lawyers	Lay assessors	Overall
social standing	23.8%	48.4%	52.6%	50.0%	39.2%
culture	21.4%	35.5%	15.8%	50.0%	27.5%
poverty	28.6%	48.4%	15.8%	50.0%	34.3%
race	19.0%	29.0%	21.1%	40.0%	24.5%
gender	45.2%	74.2%	78.9%	60.0%	61.8%

### 7.3.2.1 Social standing of the victim<sup>44</sup>

A minority of respondents (39%) felt that a victim's social standing played a role in determining the sentence. Only amongst defence lawyers did the majority of respondents (53%) think that a victim's social standing could affect the court's sentence.

Respondents thought that if a victim was targeted because they belonged to a particular class then this could be an aggravating factor on sentence. If, for example, a person murdered only wealthy people who had attended a private school then this could be an aggravating factor when the murderer's sentence is considered (provided their motive could be proven).

The example was also given of the rape of a prostitute versus the rape of a conservative and wealthy woman who had always lived a sheltered life. The latter would arguably be more traumatised by her rape than the former, in which case the rapist of the wealthy woman would receive a harsher sentence.

Some respondents used the example of a *crimen injuria* case where the victim is a person of high social standing in the community. Such a case would be seen as more serious (and result in a harsher sentence) than where the defamed person is themself a scoundrel who has very little of a reputation to protect.

### 7.3.2.2 Culture of the victim<sup>45</sup>

Just over a quarter of respondents (28%) thought that a victim's culture played a role in determining the sentence. Defence lawyers were the least likely to group to think so (16%), while state prosecutors were, as a group, most likely to think so (36%), after the lay assessors group (50%).

Respondents gave an example of a devoutly religious and conservative young woman (who was a virgin) who is raped. Some thought that in such a case the rapist is likely to receive a harsher sentence than if he had raped a promiscuous woman who was not a virgin. Respondents also thought that it would be an aggravating factor for an accused if the accused assaulted persons only of a particular culture because he did not like their culture.

<sup>43</sup> For example, where 23.8% of judicial officers thought that that the social standing of the victim did play a role in sentencing, it follows that 76.2% thought that this factor did not play a role.

<sup>44</sup> Question 18(g)

<sup>45</sup> Question 18(h)

### 7.3.2.3 *Poverty of the victim*<sup>46</sup>

Just over a third of the respondents (34%) thought that a victim's culture played a role in determining the sentence. Defence lawyers were, as a group, least likely to think so (16%), while lay assessors (50%) and state prosecutors (48%) were most likely to think that this was the case.

Generally, the respondents felt that it would be an aggravating factor where a criminal steals from, or robs, a poor person. For example, a poor person whose bicycle (which is his only mode of transport to get to work) is stolen suffers a greater loss than if the bicycle was stolen from a wealthy person. It is likely that the thief stealing from the poor cyclist would be sentenced more harshly.

It was also argued that wealthy victims could afford private investigators and lawyers who could assist the prosecution service in their quest for a harsher sentence. For example, a victim's private investigator might find hidden assets of an accused person that the court could use to impose a high fine on the accused, or compel them to pay compensation to their victim. Such private services would not be available to a poor victim.

### 7.3.2.4 *Race of the victim*<sup>47</sup>

A quarter of respondents (25%) thought that a victim's race played a role in determining the sentence. As a group, judicial officers were least likely to think so (19%), while lay assessors (40%) and state prosecutors (29%) were most likely to think that this was the case.

Judicial officers argued that crimes where the motive was one of race are frequently sentence more harshly than crimes where the motive was one of greed or lust.

Respondents who were not judicial officers felt that some judicial officers are subtly influenced in their sentencing decision by the victim's race. At least one respondent alleged that some judicial officers punish violent black on white crimes more harshly than violent black on black or white on white crimes.

### 7.3.2.5 *Gender of the victim*<sup>48</sup>

Respondents across all categories thought that the gender of the victim was more likely to play a role in sentencing than the other factors related to victims discussed above. Almost two-thirds of the respondents (62%) thought that a victim's gender played a role in determining the sentence. As a group, judicial officers were least likely to think so (45%), while defence lawyers (79%) and state prosecutors (74%) were most likely to think that this was the case.

Most respondents believed that in cases of violent crime, it is an aggravating factor where a physically strong male attacks a woman (especially where the woman is vulnerable because of old age). In such cases judicial officers are likely to impose a harsher sentence than if the victim had also been male. Moreover, it is likely to be an

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<sup>46</sup> Question 18(i)

<sup>47</sup> Question 18(j)

<sup>48</sup> Question 18(k)

aggravating factor where an accused person specifically sought out women to victimise because he had a dislike for women generally.

### 7.3.3 Opinions about factors relating to **judicial officers** which affect sentence<sup>49</sup>

Opinions on whether various factors relating to judicial officers play a role in sentencing are presented in Table 15.

Table 15 Opinions on the relevance to sentencing of various factors relating to **judicial officers**. Percentages are given of respondents in different categories and overall who thought that each of the listed factors did play a role in sentencing. Respondents not included in these figures thought that the listed factor did not play a role.<sup>50</sup>

Factor relating to judicial officers	Judicial officers	State prosecutors	Defence lawyers	Lay assessors	Overall
occupational background	66.7%	64.5%	84.2%	70.0%	69.6%
character	66.7%	67.7%	78.9%	80.0%	70.6%
outlook on life	66.7%	64.5%	94.7%	70.0%	71.6%
life experiences	76.2%	80.6%	84.2%	90.0%	80.4%
race	26.2%	41.9%	42.1%	70.0%	38.2%
gender	28.6%	51.6%	42.1%	60.0%	41.2%

Respondents tended to treat **occupational background**, **character** and **outlook on life** of the judicial officer in a similar way when stating whether these factors affected sentencing. Just over two-thirds (70 - 72%) of the respondents thought that these factors played a role in determining the sentence. As a group, state prosecutors were least likely to think so (65 - 68%), while defence lawyers were most likely to say so (79 - 94%). Comments made by some respondents on these factors are described below.

#### 7.3.3.1 Occupational background of the judicial officer<sup>51</sup>

There was a general feeling among respondents that judicial officers who previously practised as defence lawyers are somewhat more lenient when it comes to sentencing accused, than those who have a prosecutor's background. The former are likely to find more mitigating circumstances in an accused person's background, and place greater weight on the personal circumstances of an accused.

#### 7.3.3.2 Character of the judicial officer<sup>52</sup>

Generally, respondents felt that a judicial officer's character only very subtly affects their sentencing decision. Thus, impatient and confident magistrates might impose harsh sentences on accused persons with numerous criminal convictions (trusting their judgement that their sentence will not be overturned on review).

It was also argued that judicial officers with certain character traits might be influenced in their sentencing decisions. For example, a judicial officer who is an

<sup>49</sup> Question 19

<sup>50</sup> For example, where 23.8% of judicial officers thought that that the social standing of the victim did play a role in sentencing, it follows that 76.2% thought that this factor did not play a role.

<sup>51</sup> Question 19(a)

<sup>52</sup> Question 19(c)

ardent animal lover might sentence a person convicted for cruelty to an animal more harshly than a judicial officer who has no particular affinity to animals.

#### 7.3.3.3 *Outlook on life of the judicial officer*<sup>53</sup>

As with the previous question, respondents generally felt that a judicial officer's outlook on life only very subtly affects his sentencing decision. Thus, a positive and optimistic judicial officer might impose a relatively lenient sentence on an accused person with the hope that he has learnt his lesson and will be rehabilitated by a lenient sentence. The opposite might be the case with a judicial officer who has a negative view of people generally.

#### 7.3.3.4 *Life experiences of the judicial officer*<sup>54</sup>

Four-fifths of the respondents (80%) thought that a judicial officer's life experiences played a role in determining the sentence. As a group, judicial officers were least likely to think so (76%).

Many respondents felt that judicial officers who had been victims of crime (especially violent crime) are likely to impose harsher sentences on criminals convicted of similar crimes.

Judicial officers who for example come from poor backgrounds and broken homes might have less sympathy for accused persons who use such personal circumstances as an argument in mitigation for their sentence. Conversely, however, a judicial officer who grew up under poor conditions (and who was often without food and hungry as a child) might treat a juvenile who they convicted for stealing food more leniently than a judicial officer who has never had any practical experiences of poverty and hunger.

#### 7.3.3.5 *Race of the judicial officer*<sup>55</sup>

More than a third of all respondents (38%) felt that a judicial officer's race played a role in determining the sentence. As a group, judicial officers were the least likely to think so (26%), while lay assessors (70%), defence lawyers and state prosecutors were more likely to think so (both 42%).

Some respondents felt that certain of the older more conservatively minded white judicial officers still made a subtle distinction between accused persons of different races. Specifically, that they sentenced black accused more harshly than white accused. One respondent stated that black judges treat black complainants more sympathetically than white crime victims.

It was also argued that black and white judicial officers react differently to different crimes. Some respondents argued that black judicial officers hand down lighter sentences than their white counterparts. Other respondents, however, claimed that new black judicial officers are trying to prove themselves by handing down particularly harsh sentences. One respondent stated that black judicial officers impose harsh sentences for serious violent crimes (as many of them would have

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<sup>53</sup> Question 19(d)

<sup>54</sup> Question 19(b)

<sup>55</sup> Question 19(e)

suffered from this sort of crime while growing up in the townships), but would impose less severe sentences for white-collar type crimes.

### 7.3.3.6 Gender of the judicial officer<sup>56</sup>

Less than half (41%) of the respondents felt that a judicial officer's gender played a role in determining the sentence. As a group, judicial officers were the least likely to think so (29%), while lay assessors (60%), and state prosecutors were more likely to think so (52%).

### 7.3.4 Opinions about prison capacity as factor effecting sentencing<sup>57</sup>

Respondents were asked, '**To what extent should the capacity of the correctional system to carry out sentences be considered when sentence is imposed?**' Respondents chose answers ranging from 'always' to 'never'. Responses to this question are reflected in Table 16.

Table 16: Opinions about the extent to which the capacity of the correctional system to carry out sentences should be considered when sentence is imposed. Results are expressed as a percentage of respondents in each category holding the respective views.

Categories of respondents	Always	Almost always	Sometimes	Almost never	Never
Overall	9.0%	6.0%	12.0%	22.0%	50.0%
Judicial officers	4.8%	4.8%	9.5%	21.4%	59.5%
State prosecutors	10.3%	10.3%	13.8%	6.9%	55.2%
Defence lawyers	21.1%	0.0%	15.8%	26.3%	36.8%
Lay assessors	0.0%	10.0%	10.0%	60.0%	20.0%

Overall, half of the respondents felt that the capacity of the correctional system to carry out sentences should 'never' be considered when sentence is imposed, and a further 22% felt that this should 'almost never' be considered. Judicial officers and state prosecutors felt most strongly about this, with more than half of the respondents in both groups stating that the capacity of the correctional system to carry out sentences should 'never' considered when sentence is imposed. The views of respondents from each group are dealt with in more detail below.

#### Judicial officers

Judicial officers felt that accommodating prisoners was the problem of the Department of Correctional Services (DCS) and therefore would not consider prison overcrowding when sentencing. Reasons given for this view include:

- the community would lose all confidence in the criminal justice system if sentences for serious offences do not involve direct imprisonment;
- judicial officers must impose a proper sentence - sentences must be based on the crime, the interests of society and not prison overcrowding levels;
- it is the state's concern what it does with the convicted accused after sentencing - DCS should build more prisons;
- it is not the function of the courts – otherwise one would be introducing a factor that has nothing to do with the accused; and
- there is judicial authority from the Appellate Division to the effect that this should never be taken into account ... they are all overcrowded.

<sup>56</sup> Question 19(f)

<sup>57</sup> Question 17

Even though judicial officers were dismissive of the DCS, some of them expressed concern about the lack of infrastructure of the correctional system and the fact that prisons in South Africa are acutely overcrowded. It appears some judges were suggesting that correctional supervision could alleviate some of the capacity problems experienced by DCS as well as have punitive value too. Yet another judge wondered where all the accused sentenced under the Act would go because “it is an institutional problem that has not been considered”.

#### State prosecutors

Most prosecutors (62%) thought that prison overcrowding should ‘never’ or ‘almost never’ be considered when the sentence is determined. In addition to the comments by judicial officers reported above, one prosecutor said that taking prison capacity into account would amount to allowing the prisons dictate sentencing policy.

#### Defence lawyers

A majority of defence lawyers (63%) thought that prison capacity should never or almost never be considered when setting the sentence. The reasons forwarded included that “*otherwise the judicial officers discretion would be affected by something as arbitrary as prison occupancy levels, the court should only be influenced by the facts of each case, with serious crimes imprisonment is the only option and criminals need to be punished for their crimes*”. Dissenting opinions by a minority included that “*they keep pumping people into prison but there is not enough manpower to cope*” and “*we are creating a community of criminals in our jails. There should be more community type sentences...*”.

## 7.4 Evidence used in sentencing

### 7.4.1 Opinions about the adequacy of evidence for sentencing<sup>58</sup>

Respondents were asked, 'In what percentage of cases is adequate evidence presented to enable sentencing decisions to be made?' This was asked in respect of evidence presented:

- (1) by the state for crimes covered by the Act;<sup>59</sup>
- (2) by the state for crimes **not** covered by the Act;<sup>60</sup>
- (3) by the defence for crimes covered by the Act;<sup>61</sup> and
- (4) by the defence for crimes **not** covered by the Act.<sup>62</sup>

Respondents chose answers ranging from 'always' to 'never'. Responses to these questions are presented in Table 17.

Table 17: Opinions about the adequacy of evidence for sentencing. Respondents' estimates are given for evidence presented by both the state and the defence and in respect of crimes both covered and not covered by the Act. Results are expressed as a percentage of respondents in each category giving the respective estimates.

		Categories of respondents	Always	Almost always	Sometimes	Almost never	Never
Adequate evidence by the <b>state</b>	Crimes covered by the Act	Overall	9.8%	16.7%	27.5%	42.2%	1.0%
		Judicial officers	11.9%	11.9%	28.6%	42.9%	2.4%
		Prosecutors	16.7%	23.3%	26.7%	33.3%	0.0%
		Defence lawyers	0.0%	15.8%	15.8%	63.2%	0.0%
		Lay assessors	0.0%	20.0%	50.0%	30.0%	0.0%
	Crimes <b>not</b> covered by the Act	Overall	7.8%	14.7%	29.4%	45.1%	1.0%
		Judicial officers	7.1%	11.9%	31.0%	47.6%	2.4%
		Prosecutors	13.3%	16.7%	33.3%	36.7%	0.0%
		Defence lawyers	0.0%	22.2%	11.1%	66.7%	0.0%
		Lay assessors	10.0%	10.0%	50.0%	30.0%	0%
Adequate evidence by the <b>defence</b>	Crimes covered by the Act	Overall	13.7%	26.5%	37.3%	15.7%	0.0%
		Judicial officers	7.7%	17.9%	51.3%	20.5%	0.0%
		Prosecutors	16.7%	40.0%	23.3%	20.0%	0.0%
		Defence lawyers	23.5%	41.2%	23.5%	11.8%	0.0%
		Lay assessors	20.0%	10.0%	70.0%	0.0%	0.0%
	Crimes <b>not</b> covered by the Act	Overall	9.8%	22.5%	38.2%	21.6%	0.0%
		Judicial officers	5.1%	23.1%	51.3%	20.5%	0.0%
		Prosecutors	7.1%	32.1%	25.0%	35.7%	0.0%
		Defence lawyers	23.5%	23.5%	29.4%	23.5%	0.0%
		Lay assessors	20.0%	10.0%	70.0%	0.0%	0.0%

Respondents were considerably more critical of the state's ability to present evidence on sentence than the ability of the defence to do so. Only 23% to 27% of respondents felt that the **state** almost always or always presents adequate evidence to enable sentencing decisions, while a further 28% to 29% said that prosecutors did so sometimes. Respondents were more positive about the ability of the **defence** to present adequate evidence on sentence. Between 32% and 40% of respondents

<sup>58</sup> Question 12

<sup>59</sup> Question 12 (a)

<sup>60</sup> Question 12 (c)

<sup>61</sup> Question 12 (b)

<sup>62</sup> Question 12 (d)

thought that the defence almost always or always presents adequate evidence to enable sentencing decisions, while a further 37% to 38% said that defence lawyers did so sometimes.

In the opinion of respondents, there was generally not much difference between crimes covered by the Act and for crimes not covered by the Act in respect of adequacy of evidence for sentencing. However, some respondents tended to regard evidence by both the state and defence for crimes covered by the Act as slightly more adequate than crimes not covered by the Act (see Table 17).

#### Judicial officers

Judicial officers generally welcomed the prosecutions' views on sentence. This is especially the case at high court level, where more experienced state advocates' views on the sentencing of convicted accused was highly valued by the judges interviewed. But at regional court level, where the court rolls are full and court time is at a premium, many magistrates stated that they discouraged prosecutors from taking up a lot of the court's time in arguing for a particular sentence and made up their own mind. According to some judicial officers, the prosecutors' views on sentencing were not as important in crimes covered by the Act compared with crimes not covered by the Act.

Those judicial officers who were critical of the adequacy of evidence on sentence by states' gave the following explanations for their views:

- prosecutors are frequently inexperienced and overworked;
- some prosecutors were '*lazy and incompetent, with a very low work ethic*'; and
- many prosecutors fail to call witnesses in aggravation of sentence, or neglect to argue forcefully for the imposition of a particular sentence.

By contrast, judicial officers generally felt that defence lawyers consult with their clients to present sufficient evidence to enable judicial officers to take the accused's circumstances and background into account when imposing sentence. This was especially so with the more experienced lawyers who appear in the regional and high courts. Some judicial officers pointed out that legal aid appointed lawyers are often less experienced and in their view less concerned about their clients' interests and more interested in completing the trial so as to be paid.

#### State prosecutors

A minority of prosecutors thought that the state presents adequate evidence to enable sentencing decisions to be made. Only 40% felt that the state did this 'always' or 'almost always'. Like judicial officers, prosecutors blamed the inadequacy of evidence presented by themselves on a lack of time, and a shortage of experienced prosecutors.

Prosecutors complained that they had insufficient time to prepare for all the trials on their court's roll. At times this constrained their ability to secure convictions, which they saw as their primary task - not the sentencing of convicted offenders. With this in mind, many prosecutors leave the sentencing stage of a trial in the hands of the judicial officer.

Other problems and views described by prosecutors included:

- investigating officers do not provide them with sufficient evidence of the impact of the crime on its victim(s) (eg. detailed victim impact statements);

- frequently the complainant in a case is no longer available to give evidence at the sentencing stage of a trial (especially in the high court with trials running over a number of days);
- judicial officers make up their own minds when it comes to the sentencing stage of a trial; and
- in respect of crimes covered by the Act, there is very little point for them to spend much time on the sentencing stage of a trial. The minimum sentences are laid down by the Act.

Almost all state prosecutors felt that, in contrast with them, defence lawyers had more time to collect and present evidence on sentence. A defence lawyer could also make the time to speak to psychologist and social workers to further develop their case.

#### Defence lawyers

Defence lawyers were critical of the state's ability to present adequate evidence to enable sentencing decisions to be made. They felt that too many regional court prosecutors lack the experience to argue competently and forcefully for the imposition of a specific sentence. In their view this is compounded by the fact that prosecutors generally work under considerable time pressures.

In respect of their own ability to present adequate evidence to enable sentencing decisions, defence lawyers were unsurprisingly the most favorable. However, they complained that unlike the state, their clients often had to pay for the services of a psychologist or other expert witness out of their own pockets. This was a problem for poor accused.

Some defence lawyers made the point that the Act had compelled them to devote more of their time on developing a persuasive argument for the purposes of sentence. Now they had to present an argument as to why 'substantial and compelling circumstances' exist. Some conceded that by contrast a minority of their colleagues - especially those working exclusively on behalf of the legal aid board - lacked the drive and commitment to 'go the extra mile' for their clients and present good evidence for the purposes of sentence.

#### Lay assessors

Lay assessors were slightly more positive than the average respondent of the state's ability to present adequate evidence while being slightly less positive than the average respondent of the defence's ability to present adequate evidence to enable sentencing decisions (see Table 17).

#### 7.4.2 Opinions about the availability of criminal records<sup>63</sup>

By law judicial officers are obliged to take into account relevant previous convictions of the accused they have to sentence (provided they are available). To assess availability, respondents were asked, '**In what percentage of cases is the criminal record of the accused available and submitted to the court when sentences are imposed in terms of the Act?**' The results are presented in Table 18.

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<sup>63</sup> Question 13

Table 18: Opinions about the availability of the criminal record. Respondent's estimates of the proportion of cases where the criminal record of the accused is available for the purpose of sentencing. Results are expressed as a percentage of respondents in each category giving the respective estimates.

Categories of respondents	0% - 19%	20%-39%	40% - 59%	60% - 79%	80% - 100%
Overall	4.9%	2.9%	4.9%	10.8%	74.5%
Judicial officers	11.9%	4.8%	4.8%	7.1%	71.4%
State prosecutors	0.0%	3.2%	6.5%	9.7%	80.6%
Defence lawyers	0.0%	0.0%	5.9%	23.5%	70.6%
Lay assessors	0.0%	0.0%	0.0%	10%	90%

There appeared to be a consensus that when sentence is imposed in terms of the Act, the criminal record of the accused is available and submitted to the court in 80% to 100% of cases. Three quarters of all respondents thought so.

A minority of judicial officers (22%) stated that accused persons' previous convictions are available for the purpose of sentence in fewer than 60% of cases. These respondents were magistrates in KwaZulu Natal and Gauteng. This may indicate a problem with previous record availability in magistrates' courts in these two provinces.

#### 7.4.3 Opinions about the role and prevalence of pre-sentencing reports<sup>64</sup>

##### 7.4.3.1 Opinions about the role played by pre-sentencing reports<sup>65</sup>

Respondents were asked, '**To what degree do pre-sentencing reports play a role in sentencing?**'. This was asked both in respect of crimes covered by the Act<sup>66</sup> and in respect of crimes **not** covered by the Act.<sup>67</sup> The results are presented in Table 19.

Table 19: Opinions about the role played by pre-sentencing reports. Respondents' assessments of the extent of the role played by pre-sentencing reports in the sentencing of crimes both covered and not covered by the Act. Results are expressed as a percentage of respondents in each category holding the respective views.

	Categories of respondents	Large role	Small role	No role	Don't know
Crimes covered by the Act	Overall	35.3%	39.2%	13.7%	7.8%
	Judicial officers	34.2%	44.7%	21.1%	0.0%
	State prosecutors	35.5%	48.4%	6.5%	9.7%
	Defence lawyers	31.6%	36.8%	21.1%	10.5%
	Lay assessors	60.0%	10.0%	0.0%	30.0%
Crimes <b>not</b> covered by the Act	Overall	52.9%	34.3%	2.0%	5.9%
	Judicial officers	47.4%	47.4%	5.3%	0.0%
	State prosecutors	63.3%	33.3%	0.0%	3.3%
	Defence lawyers	63.2%	26.3%	0.0%	10.5%
	Lay assessors	50.0%	20.0%	0.0%	30.0%

<sup>64</sup> Question 15

<sup>65</sup> Question 15 (a) & (b)

<sup>66</sup> Question 15 (a)

<sup>67</sup> Question 15 (b)

More respondents thought that pre-sentencing reports played a role in sentencing of crimes not covered by the Act, than for crimes covered by the Act. For crimes **covered by the Act**, 35% of the respondents thought that pre-sentencing reports play a large role and a further 39% thought they played a small role in sentencing. For crimes **not covered by the Act**, 53% of the respondents thought that pre-sentencing reports play a large role and a further 34% thought they played a small role in sentencing.

It is noteworthy that two-thirds of judicial officers felt that pre-sentencing reports play a small or no role in the sentencing process for crimes covered by the Act. As pre-sentencing reports are usually designed for judicial officers' benefits to provide them with more information about accused persons, it is somewhat surprising that judicial officers tend to pay little attention to their contents. It seems, however, that prosecutors and defence lawyers are under no illusion about this, as most of them also think that pre-sentencing reports play no role or only a small role in the sentencing process for crimes covered by the Act.

For crimes not covered by the Act, almost all judicial officers (95%) thought that pre-sentencing reports played some role in sentencing. Almost two-thirds of prosecutors and defence lawyers interviewed stated that pre-sentencing reports play 'a large role' in the sentencing process.

It is logical that pre-sentencing reports play a larger role in sentencing in respect of crimes not covered by the Act. Pre-sentencing reports are often obtained to ascertain the suitability of the accused for correctional supervision. However, a non-custodial sentence would generally be inappropriate for crimes covered by the Act and hence such reports are unlikely to play a role in determining the sentence.

#### 7.4.3.2 *Opinions about the impact of the Act on frequency of requests for pre-sentencing reports*<sup>68</sup>

Respondents were asked, '**Are legal representatives more or less likely to request pre-sentencing reports in cases where section 51 of the Act applies?**'. The results are presented in Table 20.

Table 20: Opinions about frequency of requests for pre-sentencing reports. Respondents' views on the likelihood of legal representatives requesting a pre-sentencing report in cases where the Act applies. Results are expressed as a percentage of respondents in each category holding the respective views.

Categories of respondents	More likely	Less likely	Don't know
Overall	61.8%	14.7%	20.6%
Judicial officers	56.4%	15.4%	28.2%
State prosecutors	74.2%	9.7%	16.1%
Defence lawyers	68.4%	31.6%	0.0%
Lay assessors	50.0%	0.0%	50.0%

Generally, respondents thought that legal representatives were more likely to request pre-sentencing reports in cases where the Act applies. Almost two-thirds of respondents (62%) thought so. This figure was higher for state prosecutors and defence attorneys than for judicial officers.

<sup>68</sup> Question 14

## 8 Appendix A: Questionnaire

The following list of questions was used during interviews with the respondents.

<b>1A</b>	What kind of sentences were typically imposed for each of these crimes before the passing of the Act? (Select from: 10 years imprisonment or higher; From 5 years up to less than 10 years imprisonment; Less than 5 years imprisonment; Other: Suspended sentence, fine, Correctional Supervision)
<b>(a)</b>	Murder as described in Schedule 2 Part 1 of the Act
<b>(b)</b>	Murder as described in Schedule 2 Part 2 of the Act
<b>(c)</b>	Rape as described in Schedule 2 Part 1 of the Act
<b>(d)</b>	Robbery as described in Schedule 2 Part 2 of the Act
<b>(e)</b>	Fraud of more than R500 000.00 as described in Schedule 2 Part 2 of the Act
<b>1B</b>	What kind of sentencing practices existed before 1 May 1998, with regard to offences now included in schedule 2 of the Act?
<b>2</b>	What impact do the provisions of section 51 of the Act have on sentencing practices?
<b>3</b>	In your opinion what situation is preferable- that before 1 May 1998 or after 1 May 1998? (Select from: Before 1/5/98; After 1/5/98)
<b>4 (a)</b>	Section 51(3) of the Act provides for discretion, to impose lesser sentences than the prescribed minimum sentence, in instances when the court is satisfied that "substantial and compelling circumstances exist". Are there clear guidelines on what "substantial and compelling circumstances" mean? (Select from: Yes; No)
<b>4 (b)</b>	What would you consider to be "substantial and compelling circumstances"?
<b>5</b>	To what extent does the fact that the accused is aged between 16 and 18 years play a role in sentencing in terms of the Act? Interviewer refer to the provisions of s51(3)(b) of the Act. (Select from: To a very large extent; To a large extent; To neither a large nor small extent; To a small extent; To a very small extent; Uncertain / Do not know) Why do you say that?
<b>6</b>	Subsection 51(5) of the Act prohibits the suspension of sentences imposed in terms of section 51. Is this: (Select from: Very good; Good; Neither good nor bad; Bad; Very bad) Why do you say that?
<b>7</b>	To what extent, if any, does section 51 of the Act encourage accused persons or their legal representatives to plead guilty to lesser charges so as to avoid a tougher sentence in terms of the Act? (Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%) Why do you say that?
<b>8</b>	Does section 51 of the Act adversely affect judicial independence? (Select from: Yes; No) If yes then ask.....
<b>8.1</b>	To what degree does section 51 of the Act adversely affect judicial independence? (Select from: To a large degree; To a small degree; Not at all; Uncertain / Do not know) Why do you say that?
<b>9</b>	Does the court have difficulty determining into which part of schedule 2 an offence fits? For example, whether or not murder is planned or premeditated or whether or not there was common purpose or a conspiracy? (Select from: Yes; No) Why do you say that?
<b>10 (a)</b>	To what extent are the interests of the victim taken into account with regard to e.g., possible compensation and restitution in instances of serious offences in terms of crimes covered by the Act? (Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%) Why do you say that?

- 
- 10 (b)** To what extent are the interests of the victim taken into account with regard to e.g., possible compensation and restitution in instances of serious offences generally?  
(Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%)  
Why do you say that?
- 
- 11** What steps could be taken to improve the involvement of victims in the sentencing process and to facilitate compensation for victims
- 
- 12 (a)** In what percentage of cases does the State present adequate evidence to enable sentencing decisions to be made in respect of crimes covered by the Act?  
(Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%)  
Why do you say that?
- 
- 12 (b)** In what percentage of cases does the defence present adequate evidence to enable sentencing decisions to be made in respect of crimes covered by the Act?  
(Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%)  
Why do you say that?
- 
- 12 (c)** In what percentage of cases does the State present adequate evidence to enable sentencing decisions to be made in respect of crimes **not** covered by the Act?  
(Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%)  
Why do you say that?
- 
- 12 (d)** In what percentage of cases does the State present adequate evidence to enable sentencing decisions to be made in respect of crimes **not** covered by the Act?  
(Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%)  
Why do you say that?
- 
- 13** In what percentage of cases is the criminal record of the accused available and submitted to the court when sentences are imposed in terms of the Act?  
(Select from: 0 - 20%; 20 - 40%; 40 - 60%; 60 - 80%; 80 - 100%)
- 
- 14** Are legal representatives more or less likely to request pre-sentencing reports in cases where section 51 of the Act applies?  
(Select from: More likely; Less likely)
- 
- 15 (a)** To what degree do: Pre-sentencing reports play a role in sentencing in terms of crimes covered by the Act  
(Select from: To a large degree; To a small degree; Not at all; Uncertain / Do not know)
- 
- 15 (b)** To what degree do: Pre-sentencing reports play a role in sentencing in terms of crimes **not** covered by the Act  
(Select from: To a large degree; To a small degree; Not at all; Uncertain / Do not know)
- 
- 15 (c)** To what degree do: Social workers put more effort into pre-sentencing reports in terms of crimes covered by the Act  
(Select from: To a large degree; To a small degree; Not at all; Uncertain / Do not know)
- 
- 15 (d)** To what degree do: Social workers put more effort into pre-sentencing reports in terms of crimes **not** covered by the Act  
(Select from: To a large degree; To a small degree; Not at all; Uncertain / Do not know)
- 
- 16 (a)** To what extent is there consistency in sentencing practices in South African courts in terms of offences covered by the Act  
(Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%)  
Why do you say that?
- 
- 16 (b)** To what extent is there consistency in sentencing practices in South African courts in terms of offences **not** covered by the Act.  
(Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%)  
Why do you say that?
- 
- 16 (c)** To what extent were offences now covered by the act dealt with consistently in the past?  
(Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%)  
Why do you say that?
-

- 
- 17** To what extent should the capacity of the correctional system to carry out sentences be considered when sentence is imposed?  
(Select from: Always - 100%; Almost always - 75%; Sometimes - 50%; Almost never - 25%; Never - 0%)  
Why do you say that?
- 

- 18** In your opinion, which of the following factors play a role when determining an appropriate sentence (Show all that apply)
- (a) Accused's lack of legal representation
  - (b) Accused's social standing
  - (c) Poverty of accused
  - (d) Accused's culture
  - (e) Accused's race
  - (f) Accused's gender
  - (g) Victim's social standing
  - (h) Victim's culture
  - (i) Poverty of victim
  - (j) Victim's race
  - (k) Victim's gender

For each of the above to which you responded **yes** please state why you say that.

---

- 19** In your opinion do the following factors play a role in sentencing practices?  
(Select from: Yes; No)
- (a) The judicial officers' occupational background
  - (b) The judicial officers' life experiences
  - (c) The judicial officers' character
  - (d) The judicial officers' outlook on life
  - (e) The judicial officers' race
  - (f) The judicial officers' gender

For each of the above to which you responded **yes** please state why you say that.

---

## 9 Appendix B: Supplementary results data

The following data was not used in the main results section of the report and is included here for additional information.

Table 21 Estimated typical pre-implementation sentences. The sentence ranges used to estimate typical pre-implementation sentences for five crimes. Results are expressed as a percentage of respondents in each category giving the respective estimates.

Crime	Categories of respondents	>10 years	5 & < 10 yrs.	< 5 years	Non-custodial
Murder – (Part I)	Overall	81.9%	16.0%	1.1%	1.1%
	Judicial officers	88.9%	11.1%	0.0%	0.0%
	State prosecutors	80.0%	16.7%	3.3%	0.0%
	Defence lawyers	77.8%	22.2%	0.0%	0.0%
	Lay assessors	70.0%	20.0%	0.0%	10.0%
Murder – (Part II)	Overall	22.8%	66.3%	7.6%	1.1%
	Judicial officers	27.8%	61.1%	5.6%	0.0%
	State prosecutors	28.6%	57.1%	14.3%	0.0%
	Defence lawyers	16.7%	77.8%	0.0%	5.6%
	Lay assessors	0.0%	90.0%	10.0%	0.0%
Rape – (Part I)	Overall	63.0%	32.6%	1.1%	1.1%
	Judicial officers	66.7%	27.8%	0.0%	0.0%
	State prosecutors	53.6%	42.9%	3.6%	0.0%
	Defence lawyers	72.2%	27.8%	0.0%	0.0%
	Lay assessors	60.0%	30.0%	0.0%	10.0%
Robbery (Part II)	Overall	62.4%	33.3%	3.2%	1.1%
	Judicial officers	77.1%	22.9%	0.0%	0.0%
	State prosecutors	56.7%	43.3%	0.0%	0.0%
	Defence lawyers	55.6%	38.9%	5.6%	0.0%
	Lay assessors	40.0%	30.0%	20.0%	0.0%
Fraud (Part II)	Overall	8.5%	71.3%	14.9%	2.1%
	Judicial officers	8.3%	80.6%	8.3%	0.0%
	State prosecutors	3.3%	66.7%	16.7%	6.7%
	Defence lawyers	11.1%	66.7%	22.2%	0.0%
	Lay assessors	20.0%	60.0%	20.0%	0.0%

# QUANTITATIVE RESEARCH REPORT ON SENTENCING

An empirical quantitative study on sentencing practices in South African courts and an assessment of the impact of the Criminal Law Amendment Act No. 105 of 1997 on behalf of the South African Law Commission

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2000-03-22



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# 1 Contents

1	Contents .....	2
2	Acknowledgements .....	3
3	Executive Summary .....	4
4	Introduction .....	12
5	Methodology .....	15
6	Results.....	25
6.1	Section 1: Pre-implementation sentencing practices.....	25
6.1.1	Offence.....	25
6.1.2	Pre-implementation sentences compared with minima in Act.....	30
6.1.3	Region.....	31
6.1.4	Pre-implementation regional sentences compared with minima in the Act.....	33
6.1.5	Accused age.....	33
6.1.6	Accused race.....	36
6.1.7	Accused gender.....	38
6.1.8	Previous convictions.....	38
6.1.9	Rape victim age.....	41
6.1.10	Court type.....	42
6.1.10.1	High court: regional comparisons.....	43
6.1.10.2	High court: pre-implementation sentences compared with minima in Act.....	44
6.1.11	Sentencing options used by the courts .....	45
6.1.12	Suspended sentences .....	46
6.1.13	Concurrent and cumulative sentences.....	47
6.2	Section 2: Impact of the Act on sentencing.....	49
6.2.1	All regions .....	49
6.2.2	Regional results .....	50
6.2.3	Rape victim age.....	52
6.2.4	High courts: pre- post comparisons .....	53
6.2.5	Life sentences .....	54
6.2.6	Post-implementation sentences compared with minima in Act.....	55
6.3	Section 3: Sentencing of juveniles .....	59
6.3.1	Proportions of juveniles convicted.....	59
6.3.2	Pre-implementation sentence types for juveniles .....	59
6.3.3	Pre-post comparison .....	61
7	Conclusions .....	63

## 2 Acknowledgements

The study was commissioned by the German Technical Co-operation/GTZ. On behalf of the German Government, GTZ is providing technical assistance to the Department of Justice and the South African Law Commission through the joint 'Legislative Drafting Project'.

The National Commissioner of the SAPS and Dr Chris De Kock of the police Crime Information Analysis Centre (CIAC) facilitated invaluable access to the police databases. Senior Superintendent Ters Ginter and his staff at the Cape Town office of CIAC provided excellent co-operation by making computers available and otherwise accommodating our researchers. Other SAPS personnel provided helpful technical assistance.

The registrars and their staff of the high courts in Cape Town, Port Elizabeth, Durban and Johannesburg greatly assisted us in gaining access to their records.

Alethea Percival did a significant amount of data collection and data entry in this study.

Thank you also to the many others who assisted in making this research possible.

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## 3 Executive Summary

### 3.1 Aims of study

The aims of this study were:

- to determine what sentences were given for various crimes in various regions;
- to determine some of the factors that affected those sentences;
- to determine the impact of the Criminal Law Amendment Act No. 105 of 1997 (the Act) on sentencing practices; and
- to compare sentencing practice with the requirements of the Act;

### 3.2 Methodology

Eight relatively high crime police areas were used in this study:

- Western Metropole (Western Cape urban)
- Boland (Western Cape rural)
- Port Elizabeth (Eastern Cape urban)
- Cradock (Eastern Cape rural)
- Durban (KwaZulu Natal urban)
- Midlands (KwaZulu Natal rural)
- Johannesburg (Gauteng urban)
- East Rand (Gauteng semi-rural)

The sample comprised every finalised case for the target crimes in each police area both pre-implementation of the Act (crimes committed during 1997 and the first four months of 1998) and post-implementation (crimes committed from May 1998). The data was collected during the period from August to December 1999. The target crimes pre-implementation were as follows:

- 1) Violent crimes
  - Murder
  - Rape
  - Robbery with aggravating circumstances
  - Culpable homicide

## 2) Economic crimes

- Fraud
- Stock theft
- Shoplifting

For post-implementation, only the violent crimes were studied.

In excess of 55 000 cases were randomly sampled using the South African Police Services (SAPS) CAS database. The sentence and crime were verified using the SAPS CRIM database (SAP 69 reports). After unverified data was excluded, this representative sample comprised 1 400 cases from both the magistrates' and high courts.

A finalisation study, conducted on a sub-sample of pre-implementation cases, found disturbingly low conviction rates. A median of only 5.5% of cases reported to police resulted in convictions.

A second sample comprised a further 295 high court cases. These were collected directly from the courts.

The relevant information that was collected on each case included the age, race and gender of the accused, the age of the victim in rape cases, the offence, date of commission and sentence.

## 3.3 Results

### 3.3.1 Pre-implementation sentencing practices

#### *3.3.1.1 Violent crime*

- Before the introduction of the Act, by far the majority of people convicted of serious violent crime were sent to prison by South African courts. The serious violent crimes of murder, rape and robbery with aggravating circumstances had very high levels of custodial sentences, each in excess of 90% of all accused convicted for those crimes.
- Both murder and rape had median effective prison terms of eight years while more than 50% of accused got between five and ten years imprisonment.

- Robbery with aggravating circumstance was intermediate in severity with a median effective imprisonment of six years and 50% of sentences from two to ten years.

#### 3.3.1.2 *Economic crime*

- For pre-implementation economic crimes, a far wider variety of sentence types were used than for violent crime. Custodial sentences were only used for 24% of economic crimes.
- Stock theft was treated considerably more harshly than fraud and shoplifting. Three-quarters of accused convicted of stock theft went to prison although economic crime in general had fewer prison sentences. It is also clear that many more accused were given custodial sentences when found guilty of stock theft (74.6%) compared to the violent crime of culpable homicide (41.6%).
- A fine was generally the most common sentence for economic crimes. Fines were used in 38% of fraud and 50% of shoplifting cases. Of those who got fines, the median for fraud was R1000 and for shoplifting it was R300.

### 3.3.2 Factors affecting sentencing

#### 3.3.2.1 *Region*

- There were significant differences in sentences given for the same crime in different regions.
- The differences appeared to be associated more with what province the crime was committed in rather than whether the police area was more rural or urban. Gauteng and KwaZulu Natal generally imposed higher sentences than the Eastern and Western Cape.

#### 3.3.2.2 *Age of accused*

- Age had a significant impact on sentences for juveniles and people over 49. Generally fewer people under the age of 18 got custodial sentences when compared to the over 18's and particularly the over 20's.
- Although there were relatively few accused aged 50 or older, they also tended to get fewer custodial and less severe sentences.

#### 3.3.2.3 *Race and gender of accused*

- From the available data it was not possible to make generalised conclusions about whether or not the race or gender of accused persons affects sentence type and severity.

This of course does **not** deny that race and gender may affect sentencing. Rather, there was insufficient data on all races and both genders to fully analyse the affect of these factors.

#### 3.3.2.4 *Previous convictions*

- Most adults (56%) convicted of murder, rape and robbery with aggravating circumstances were first offenders and had never been convicted of any other crime previously. An even higher percentage (93%) had never been convicted of those same crimes previously.
- Sentences for the more serious crimes (murder, rape and robbery with aggravating circumstances) where the accused had any kind of previous conviction did not show obviously higher use of custodial sentences or more severe sentences than those with no previous records.
- Previous convictions impacted more upon sentences for less serious offences.

### 3.3.3 Pre-post comparisons

#### 3.3.3.1 *Sentence severity*

- Sentence severity for both rape and robbery with aggravating circumstances committed post-implementation significantly increased when compared to pre-implementation sentences. The effective median years imprisonment for rape increased from eight to ten and for robbery from six to seven. The increases for murder and culpable homicide were not significant. (The latter offence was not subject to a minimum sentence under the Act.)

#### 3.3.3.2 *Rape victim age*

- The Act seems to have created a distinction in sentence severity for child rape which did not previously exist. Pre-implementation, there was no statistically significant difference in sentence severity for rape of women and girls of different ages. But after the introduction of the Act, people convicted of raping girls under 12 got significantly more severe sentences than those raping older victims.

#### 3.3.3.3 *Life sentences*

- There was a large increase in the percentage of life sentences given for rape and murder after implementation of the Act.

#### 3.3.3.4 *Regional inconsistency*

- The Act does not appear to have changed regional inconsistency in sentencing. As with pre-implementation sentences, there were also significant post-implementation sentencing differences among the police areas.
- There were also different levels of compliance with the prescribed minimum sentences across the police areas. Johannesburg and East Rand showed the greatest compliance with the Western Metropole and Boland the lowest. It must be noted, however, that sentences prior to the Act were more similar to the minima required by the Act in the Gauteng police areas than were sentences in the Western and Eastern Cape.
- The differences were particularly noticeable for murder and robbery with aggravating circumstances. The lowest post-implementation sentences were still recorded in Western Metropole generally followed by Boland and Cradock.

### 3.3.4 Sentencing compared with minimum sentences in the Act

#### 3.3.4.1 *Pre-implementation*

- When the Act was introduced, it imposed minimum sentences for murder, rape and robbery with aggravating circumstances that were in line with only a small proportion of sentencing practice. They were in accordance with the most severe sentences given by courts before its introduction.
- Pre-implementation, less than 20% of murder cases, 30% of rape cases and not a single case of robbery with aggravating circumstances used sentences equal to or greater than the new minimum sentences.
- The prescribed **minimum** sentences for murder, rape and robbery with aggravating circumstances were generally in excess of the **median** pre-implementation sentencing practices in all eight police areas studied.

#### 3.3.4.2 *Post implementation*

- Even post-implementation, not a single **median** sentence for murder, rape or robbery with aggravating circumstances in any of the eight regions exceeded the **minimum** sentence prescribed by the Act.
- There was generally compliance in a minority of cases (43%) with the minimum sentences in the post-implementation cases finalised thus far.

- Like the situation before the Act, the majority of sentences post-implementation, except for rape Part III, were below the prescribed minima.
- In Johannesburg and the East Rand the highest compliance was noted (64.5% and 72.5% respectively).
- The least compliance was found in the two Western Cape police areas of Western Metropole (8.8%) and Boland (27.7%).

### 3.3.5 High Court sentencing

- Magistrates' courts handed down the vast majority (96%) of sentences for murder, rape and robbery with aggravating circumstances. The results summarised thus far were representative of the proportions of magistrates' and high courts cases and therefore contained mostly magistrates' court cases. Some analysis was also done of high court sentences using the high court sample. This analysis is discussed below.
- The severity of pre-implementation high court sentences were more than double those of magistrates' courts. Murder in the high courts received a median of 20 years compared with 7 in the magistrates' courts. The median sentences for rape in the high courts was 17.5 years compared with 7.5 in the magistrates' courts. Robbery with aggravating circumstances in the high courts was sentenced to a median of 12.5 years compared with 6 years in the magistrates' courts. However, these differences are not surprising because the more serious cases go to the high court.
- The minimum sentences imposed by the Act were generally in accordance with high court sentencing practices before its introduction. Eighty-five percent of murder and seventy-nine percent of rape pre-implementation high court sentences were equal to or greater than the prescribed minima. Fewer than half of pre-implementation high court sentences for robbery with aggravating circumstances would have complied with the new statutory minimum sentence.
- A comparison of the high courts located in Cape Town, Port Elizabeth, Durban and Johannesburg showed consistency in pre-implementation sentencing for murder and robbery with aggravating circumstances. (There were insufficient rape cases to do a regional comparison.)
- There was no significant change in post-implementation high court sentences for murder, rape and robbery with aggravating circumstances compared with pre-implementation sentences for the same crimes.

### 3.3.6 Juveniles

#### *3.3.6.1 Proportions of juveniles versus adults*

- Adults committed the vast majority of crimes. Juveniles comprised only 8% of the sample.

#### *3.3.6.2 Sentence type and severity*

- A custodial sentence was the most common sentence (55%) for people under 18 convicted of murder, rape or robbery with aggravating circumstances.
- For economic crimes committed by juveniles, a fully suspended sentence was the most commonly used sentence (50 – 100%).
- The proportions of juveniles getting custodial sentences and the severity of their sentences were lower than for adults. Correctional supervision and reform schools were other commonly used sentences for juveniles.

#### *3.3.6.3 Pre-post comparison*

- The Act treats juveniles differently from adults. However, the Act significantly increased the median period of imprisonment for juveniles convicted of rape from 0 years pre-implementation to 5 years post-implementation.
- The median sentences for juveniles convicted of murder (6 years), robbery with aggravating circumstances (0 years) and culpable homicide (0 years) remained unchanged.

### 3.3.7 Conclusions

This study goes some way to creating a clearer picture of sentencing practices in South Africa. This is particularly so because of the representative nature of the sample.

It remains to be seen whether the minimum sentence approach prescribed by the Act will lead to a noticeable reduction in serious crime. However, one of the most telling findings of this study is that a mere 5.4% of more than 30 000 randomly sampled cases reported to the police resulted in a conviction. The question of sentencing therefore remains irrelevant to the vast majority of people who committed those crimes. Until the conviction rate improves dramatically, it is difficult to see how tough minimum sentences will be an effective deterrent to thousands of criminals who evidently do not get apprehended and successfully prosecuted.

What has become clear is that the Act introduced minimum sentences in our law that were out of line with prevailing penal norms in every region studied. While sentences have increased since the introduction of the Act, they generally remain below those prescribed as minimum sentences. Given the low conviction rates and the time taken for cases to be finalised, however, it perhaps too early to fully understand the impact of the Act.

The impact of this Act on the prison population remains to be assessed. However, given the lengthy prison terms involved, particularly life sentences, this impact is likely to be long term. The effect on prison populations will only be felt in a number of years when prisoners who would otherwise have been discharged (to make way for new admissions) will remain behind bars. The long-term impact on prison overcrowding in an already strained correctional system may be profound.

## 4 Introduction

The South African Law Commission (SALC) is considering reform of the sentencing law. In order to do this, it needs to determine what the current sentencing practices are. Of particular concern is the effect of the Criminal Law Amendment Act No. 105 of 1997 (hereinafter “the Act”) on sentencing practice. The Act prescribes qualified mandatory minimum sentences for various crimes, such as murder, rape and robbery with aggravating circumstances. The sentence prescribed varies depending upon the severity of the crime and the number of previous convictions of the convicted person. The Act applies to certain crimes committed on or after 1 May 1998.

### 4.1 Background

Although much has been said about sentencing law in South Africa, such writing was invariably based upon the relatively few judgments of the courts that are reported either in law reports or the popular press. The law reports only contain judgments of the superior courts. Although many of these reported cases concern appeals from the lower courts, the vast majority of cases go unreported. More than 95% of criminal cases in South Africa are heard in the magistrates’ courts (both district and regional), with high court trials reserved for the most serious of cases. Cases are generally only appealed from the magistrates’ court when the sentence is so “shockingly inappropriate” so as to meet the legal criterion for warranting the attention of the high court. In practice, appeals are also more accessible to wealthy accused. Press reports are inherently biased towards more sensational or, at least, unusual cases. These factors combine to provide an unrepresentative and anecdotal picture of sentencing practice in the country.

Statistics regarding sentencing that are available are of dubious quality. There are few, if any, scientifically valid, quantitative, empirical studies of sentencing in South African courts. The SALC therefore decided that to enable it to make informed recommendations on the reform of sentencing law it needed to commission a study on sentencing practices. After a tender process, the University of Cape Town’s Institute of Criminology was contracted to perform the quantitative aspects of the research.

The Institute of Security Studies and Technikon South Africa conducted a parallel qualitative investigation into the attitudes of judicial officers and other role players to the Act and sentencing in general.

## **4.2 Aims of this study**

The main aims of this study were to examine what factors affect sentences in South African courts and to determine the impact of the Act on sentencing. While an exhaustive study of all factors affecting sentencing was not possible in the time frame, the major factors such as offence, region, age, race and gender, amongst others, were considered. A comparison of sentences handed down pre- and post-implementation of the Act was done for a range of offences. This comparison shows how the Act has impacted on sentencing practices.

## **4.3 Structure of the report**

A methodology section outlines how the research was done. For ease of reading an outline of the methodology is presented first. This is sufficient to understand the work done. If a more detailed understanding of the methodology is required, then the details of exactly what was done follows this outline.

The results section of this report is divided into three parts. First is the sentencing practice of the courts before the Act was introduced. Second is the impact of the Act and thirdly, the sentencing of juveniles is reported. These three sections are described in more detail below.

### 4.3.1 Results section 1: Pre-implementation sentencing practices

Section 1 of the results gives pre-implementation sentences described according to a variety of factors possibly affecting sentencing. The factors possibly affecting sentencing analysed in this study are:

- offence
- region
- court type (magistrates' and high courts)
- accused age
- accused gender
- accused race

- previous convictions
- rape victim age

The section deals with cases before the Act came into operation to which the minimum sentences contained in the Act did not apply. The sample was representative of the proportions of cases between high courts and magistrates' courts and therefore generally contains a relatively small number of randomly selected high court decisions. However, where the sentences in the high courts are compared with those in the magistrates' courts a separate sample of high court decisions was used to ensure sufficient sample sizes. Section 1 only contains sentences given to adult accused (persons 18 or older).

Section 1 of the results also provides information on the use of multiple, suspended and concurrent sentences. It ends with a comparison of the pre-implementation sentences in relation to the minima prescribed by the Act.

#### 4.3.2 Results section 2: Impact of the Act on sentencing

This section focuses on the impact of the Act. It compares pre-implementation sentences with post-implementation sentences and deals with the extent to which courts have complied with the minimum sentences prescribed by the Act. The pre-post comparisons are done on a regional basis and test to what extent the Act has affected consistency in sentencing among different regions. These comparisons are done on a representative sample of court cases (comparatively few high court decisions) and only for adult accused.

#### 4.3.3 Results section 3: Sentencing of juveniles

Section 3 of the results deals with sentencing of juveniles. It provides the types of sentences imposed pre-implementation for persons under the age of 18 and examines the impact of the Act on juvenile sentences by comparing pre- and post-implementation sentences.

Finally some key findings and points of discussion are highlighted in the conclusions.

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## 5 Methodology

### 5.1 Overview of the methodology

- Eight police areas covering both urban and rural areas in four provinces were studied. Every case involving the sample offences reported to the police in the eight areas, during more than two years were investigated. In total, the study looked at more than 55 000 cases that had been reported to the police. The SAPS CAS database provided this initial random list of cases.
  - The police areas in the Western Cape were the Western Metropole (urban) & Boland (rural); in the Eastern Cape, Port Elizabeth (urban) & Cradock (rural); in KwaZulu Natal, Durban (urban) & Midlands (rural); and in Gauteng, Johannesburg (urban) & East Rand (semi-rural).
  - The pre-implementation sample period included crimes that occurred from January 1997 to April 1998, although in some relatively low-crime police areas certain crimes committed earlier than this were included to boost sample sizes. The Act applies to relevant offences committed on or after 1 May 1998 and the post-implementation sample therefore consisted of crimes committed from May 1998 to February 1999. The data was collected during the period from August to December 1999.
  - The pre-implementation sample offences were murder, rape, robbery (with aggravating circumstances), culpable homicide, fraud, stock theft and shoplifting. Post-implementation offences comprised murder, rape, robbery (with aggravating circumstances) and culpable homicide.
- From this initial list of cases reported to the police, those cases that, according to CAS, had resulted in a guilty verdict were identified.
- Every offence and sentence was verified against printouts of each accused's criminal record (SAP 69).<sup>1</sup> This information was obtained from the SAPS CRIM database. The final random, CAS-based sample comprised 1 400 cases.
- A second sample of 295 cases was obtained from four high courts: Cape Town, Port Elizabeth, Durban and Johannesburg. This consisted of all murder, rape and robbery with

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<sup>1</sup> This was necessary because an audit of the data from CAS showed that CAS did not accurately record the offence of which the accused was convicted. Nor did it reliably record the sentence. Where the criminal records were not available, the data was excluded from the analysis.

aggravating circumstances cases finalised during 1998 and 1999. This high court sample was only used in a few selected and clearly identified sections of the results.

- The data was entered on Microsoft Excel, sentences interpreted, codified and entered into relevant numerical fields and all data audited to eliminate data entry errors.
- Basic quantitative analysis was done using pivot tables while a statistical package called STATISTICA was used for the more complex statistics (t-tests, analysis of variance (ANOVA) and *A-posteriori* tests).

More detail on the methodology is provided below. If you want to go directly to the results, turn to page 25.

## 5.2 Sampling

### 5.2.1 Geographical areas and courts sampled

The study was conducted on sentences in four provinces: Western Cape, Eastern Cape, KwaZulu Natal and Gauteng. These provinces were further divided into rural and urban police areas. The police areas chosen for the study were as follows:

- Western Cape: Western Metropole (urban) & Boland (rural)
- Eastern Cape: Port Elizabeth (urban) & Cradock (rural)
- KwaZulu Natal: Durban (urban) & Midlands (rural)
- Gauteng: Johannesburg (urban) & East Rand (semi-rural)

South Africa is divided into 41 police areas which are geographical divisions consisting of roughly equal populations. We chose the above eight police areas based on the predominance of crime in those regions (and hence the likelihood of obtaining larger samples).

Within the four provinces, sentences imposed by both magistrates' courts (regional courts and where necessary district courts) and high courts were examined.

### 5.2.2 Data samples, sources and sample sizes

Three sources of data were considered: (1) the courts, (2) the prisons, and (3) the police. The courts were excluded from the large-scale study because they are not computerised, the filing systems are not amenable to identification of particular offences and the records lack information vital to this study.<sup>2</sup> The Department of Correctional Services (DCS), while computerised, was unsuitable because it only has records of persons currently in prison and therefore lacks data on non-custodial sentences. By contrast, it was possible to obtain a representative sample of sentences from the police databases, which contain the information needed by this study. A pilot study confirmed that it was feasible to use the police databases as the sources for this research. Using combinations of South African Police Services (SAPS) databases, it was possible to verify information and thereby maximise data integrity.

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<sup>2</sup> Physically visiting hundreds of courts countrywide would also have been costly and time consuming.

There were two separate samples in this study. The first sampling basis was the CAS database and this information was verified using SAP 69's, hereafter referred to as the CAS sample. The second was cases drawn directly from the high courts, hereafter referred to as the high court sample. These are each discussed in more detail below.

#### 5.2.2.1 CAS sample

The Criminal Administration System (CAS) database is a large database containing complaints reported to the police. The information on the CAS system is typed in from the police dockets. The CAS system is also used to track cases through the criminal justice process. Not all police stations are directly linked to the CAS system. This is particularly true in the rural areas. However, this is still the most comprehensive database of crimes reported in South Africa and it contains some information, such as the crime date, which is often unavailable on CRIM (another police database).

CAS was used to compile an initial list of cases resulting in convictions for the various offences in question. This involved manually searching through each reported case to find guilty verdicts. Due to low ratios of convictions to cases reported, this involved hunting through 30 000 cases pre-implementation and another 25 000 cases post implementation to find enough convictions to perform the required statistical tests. As a by-product of this process, we were able to calculate conviction rates because we could tell how many cases reported to the police resulted in a successful prosecution.

The study encountered disturbingly low conviction rates. Of the 30 000 pre-implementation cases reported to the police, only 5.4% resulted in a conviction. This report does not contain more detail about this finding, as determining conviction rates was not part of the aims of this study. Therefore, the conviction rate data will be published in a separate report.

An audit of the data from CAS data showed that CAS did not accurately record the offence of which the accused was convicted. Nor did it reliably record the sentence. Every offence and sentence was therefore verified against printouts of each accused's criminal record (SAP 69). This information was obtained from the SAPS CRIM database.

The CRIM database *inter alia* contains information about recent criminal convictions. It is used to produce a form known as the SAP 69 that informs the various parties about whether

the accused has a previous record and what that record is. The information in CRIM comes from a form (SAP 69) the information on which is confirmed and is signed by the judge or magistrate. The SAP 69 is then sent to Pretoria where the data is entered into CRIM and is subjected to rigorous auditing. These factors combine to ensure that the SAP 69 information is more reliable than that contained on CAS.

Where the criminal records were not available, the data was excluded from the analysis. Using this method, an initial sample of 2 333 finalised cases was reduced to 1 400 cases. Our attitude was that it was better to have a smaller, reliable sample than a larger sample of dubious quality. The result is a representative sample containing verified and reliable sentencing data.

#### 5.2.2.2 High court sample

A second sample was obtained from four high courts. For the sake of simplicity, these courts are referred to in the text by the name of their location rather than the name of the division. The four high courts comprising the high court sample are described in the following table.

	<b>Division of the high court</b>	<b>Location (reference used in text)</b>
1.	Cape of Good Hope Provincial Division	Cape Town
2.	South-Eastern Cape Local Division	Port Elizabeth
3.	Durban and Coast Local Division	Durban
4.	Witwatersrand Local Division	Johannesburg

A researcher visited these courts and personally collected the data from the court records in each court. The cases collected consisted of all murder, rape and robbery with aggravating circumstances cases finalised during 1998 and 1999. The sample included only cases where a SAP 69 was available. Information from the court register was not used as the sentence details were often inaccurate and the registers did not record the crime date, a vital piece of data for the purposes of this research.

The high court sample was only used in limited places in the analysis, for example to compare magistrates' and high court sentences. It was excluded from most of the analysis because it would have skewed the sample in favour of high court sentences and thus created a distorted picture of sentences generally. In the CAS sample of 1400, only 58 (4.1%) were high court matters. However, a further 295 cases were obtained directly from the high courts

in this second sample.<sup>3</sup> Four high court cases were duplicated in both the random sample (drawn from CAS) and the high court samples. These duplicates were removed from the high court sample.

### **5.3 Pre- & post-implementation**

Application of the Act is dependent upon the date that the offence was committed. Crimes committed before 1998-05-01 are described as “pre-implementation”. Whereas crimes committed on or after 1998-05-01 are “post-implementation” and therefore subject to minimum sentences.

### **5.4 Data collected and variables analysed**

The following data on each case were collected and analysed:<sup>4</sup>

- Offence
- Pre/post-implementation
- Urban/rural area
- Police area
- Police station
- Court name
- High court / Regional Court
- Race of the accused
- Gender of the accused
- Age of the accused
- Previous convictions
- Rape victim age
- Classification of the matter under the Schedule to the Act<sup>5</sup>
- Prescribed minimum sentence

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<sup>3</sup> The high court samples covered a larger number of cases than the first CAS-based sample because of three factors: (1) The geographic jurisdictions of the high courts are larger than those of the constituent police areas sampled; (2) the crimes in the high courts sample were committed over a longer time period; and (3) the cases involving crimes sampled directly from the high courts were not subject to the delay between the delivery of judgment and the capturing of the sentence information onto the CAS and CRIM databases.

<sup>4</sup> Certain additional information, such as the plea or whether the accused had legal representation at the time of sentencing, was not available from the sources used.

<sup>5</sup> Post-implementation cases were classified into the various Parts of Schedule 2 according to the Act. Offences may fall under Part I, II, III or IV depending on the crime and the circumstances under which it was committed. In many cases it was not possible to make a definitive classification where more than one Part could have applied and where insufficient information was available. So, for example, most rape cases are classified as “Part I or III”.

- Sentence handed down by the court
- Effective years sentence for the particular offence
- Total effective years imprisonment for accused
- Total cumulative years imprisonment for accused

## 5.5 Offences

### 5.5.1 Pre-implementation

Both violent and economic crimes were studied to determine factors affecting sentence for the pre-implementation study. The following offences comprised the pre-implementation study.

Violent crimes:

- murder
- rape
- robbery with use of a dangerous weapon (as a proxy for robbery with aggravating circumstances<sup>6</sup>). This crime is indicated merely as “robbery” in tables for the sake of brevity.
- culpable homicide

Economic crimes:

- fraud
- stock theft
- shoplifting

For serious cases of fraud, we obtained sentences for all the cases dealt with by the Office for Serious Economic Offences (OSEO). These were cases involving more than a million Rand.

The pre-implementation data was collected during the period from August to October 1999.

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<sup>6</sup> The CAS system does not have a classification of robbery with aggravating circumstances. However, it does have categories dealing with robbery involving the use of weapons (firearm or knife or other dangerous weapon). Because aggravating circumstances include the use of a dangerous weapon, these categories were used instead.

### 5.5.2 Post-implementation

For post-implementation only violent crimes were studied. Although economic crimes do fall under the Act, only those involving amounts greater than R500 000 are covered. It was impossible to determine amounts involved from either CAS or CRIM. Because it is unlikely that many would fall into this range, it was not feasible to study the impact of the Act on economic crimes. Although the cases dealt with by OSEO would fall under the Act, due to the long periods of time needed to investigate and prosecute these matters, none of these post-implementation cases were finalised yet.

Sentences in the following offences were examined post-implementation:

- murder
- rape
- robbery with aggravating circumstances
- culpable homicide

Of these, murder, rape and robbery with aggravating circumstances are included in Schedule 2 of the Act<sup>7</sup> and their sentences subject to the prescribed minima post-implementation.

Culpable homicide was used as a control. It is a violent crime that is not included in the Act. It was also interesting to test whether the Act may have had some seepage effect on sentencing in a crime that was not included in its Schedule. The culpable homicide convictions were cases that the CAS system had recorded as convictions for murder.<sup>8</sup>

The post-implementation data was collected during the period from November to December 1999.

## **5.6 Sentence**

Courts express sentences in a wide variety of ways. Because of this, certain conventions were used to provide a uniform way of interpreting and codifying these sentences to make them amenable to quantitative analysis. These conventions are described below.

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<sup>7</sup> It was not feasible to examine all of the Schedule 2 crimes in the time available. These three crimes were selected because, unlike other of the schedule 2 crimes, every post-implementation incidence of the crimes are subject to the Act irrespective of the circumstances in which they were committed. Note, however, that murder and rape are each split into different Parts.

<sup>8</sup> They therefore will tend to be violent crimes rather than motor vehicle accident cases and therefore referred to as "violent" culpable homicide cases.

- All sentences are reported as **effective years sentence** for the particular offence. The effective number of years of imprisonment or correctional supervision and the effective fine amount took into account the effect of suspended sentences<sup>9</sup>.
- When the court imposed more than one type of sentence on the accused for a single offence, only the **most onerous sentence type** was counted. Sentence types were ranked from most onerous to least onerous to establish which sentence to count.<sup>10</sup>
- Every sentence was assigned a number of effective years imprisonment to enable medians to be calculated and to test for significant differences on the means. For this purpose, non-custodial sentences were assigned a value of zero. Therefore, the median years imprisonment and tests for significant differences presented in this report used all sentences, both custodial and non-custodial. By contrast, median fine amounts took into account only those sentences involving fines.
- A **life sentence** was equated to an effective sentence of **40 years imprisonment**. We had to assign a finite number to life imprisonment for statistical analysis. The rationale for this number of years is based on the fact that an accused sentenced to a finite prison term in prison is eligible for parole after serving 50% of their sentence. A person sentenced to life is eligible for parole after 20 years. By analogy, the finite effective equivalent of a life sentence is 2 X 20 years.

In addition, the following sentencing information was recorded for each accused:

- Total effective years imprisonment for accused. This took into account both the effect of suspended sentences and whether sentences for multiple convictions are to run consecutively or concurrently.<sup>11</sup>
- Total cumulative years imprisonment for accused. This equals the sum of the effective years imprisonment for all the offences of which they were convicted. This ignores the effect of sentences running concurrently.

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<sup>9</sup> For example, a sentence of “five years imprisonment of which three years is suspended for five years” was recorded as an effective **two years**. For wholly suspended sentences, an effective sentence of zero years was recorded.

<sup>10</sup> The following order of ranking was used: (1) imprisonment - no suspension; (2) imprisonment - partial suspension; (3) committal to an institution; (4) reform school; (5) periodical imprisonment; (6) correctional supervision; (7) community service; (8) fine; (9) fine - partial suspension; (10) compensation; (11) sentencing postponed; (12) imprisonment fully suspended; (13) fine fully suspended; (14) declared unfit to possess a firearm; (15) caution and discharge; (16) other.

<sup>11</sup> For example, an accused sentenced “on count 1 to ten years and on count 2 to two years imprisonment, the two sentences to run concurrently” recorded a total effective sentence of **ten years**. Note that where the sentence of the court does not specifically state that sentences are to run concurrently, then the sentences operate consecutively by default. In such cases, the total effective imprisonment for the accused would equal the total cumulative years imprisonment for the accused.

- Prescribed minimum sentence. The applicable minimum sentence in each case depends partly upon which Part of Schedule 2 it falls and partly upon the number of previous convictions that the accused has for the same offence.

## **5.7 Juveniles**

Most analysis in this study was done using only adults, i.e. persons 18 or older. The reasons for this were (1) that there were relatively few juveniles in the representative CAS sample, particularly for the more serious offences; and (2) because persons under 18 may be excluded from the Act and hence their sentences may be less affected by the introduction of the Act.

However, juvenile justice is an important area of law reform and there is a paucity of scientifically valid research on sentencing of juveniles in South Africa. In addition the judicial officer has the discretion to use the Act on 16 and 17 year olds. For these reasons, we have included a separate section dealing with juvenile sentencing.

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## 6 Results

The results section is divided up as follows:

- Section 1 – pre-implementation sentencing practices
- Section 2 – the impact of the Act on sentencing
- Section 3 – sentencing of juveniles

Parts 1 and 2 (with the exception of the effect of age on sentencing) deal only with adult offenders. Adults are defined as people 18 and older. Unless otherwise stated, all analysis was done on the CAS sample.<sup>12</sup> Because the CAS sample was representative of the proportions of cases that are heard in the various courts, it contained mostly magistrates' court cases (96%).

Two measures can be used to describe the number of years of imprisonment or amount of fine: (1) mean (average) and (2) median (middle value). Where a great deal of variation exists, the median is a better description of the years of imprisonment or fine amounts. This is because the median is not influenced by a few abnormally large or small values. In most cases in this report medians are presented. Where statistical significance testing was done this was always done on the means. A statistically significant difference in this context means that there is a 95% or greater chance that the data is different.

### 6.1 Section 1: Pre-implementation sentencing practices

This section of the results examines pre-implementation sentencing practices and presents the findings according to various factors that could possibly affect sentences. Note that these were not subject to the Act and were for crimes committed during 1997 and the first four months of 1998.

#### 6.1.1 Offence

The first and most obvious factor that could affect the type of sentence is the offence involved. The offences studied in this report included both violent crimes<sup>13</sup> and economic

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<sup>12</sup> See section 5.2.2.1 on page 18 for a description.

<sup>13</sup> murder; rape; robbery with aggravating circumstances; and "violent" culpable homicide.

crimes<sup>14</sup>. There has been some speculation about whether economic crimes are given disproportionately harsher sentences compared with violent crimes. To examine this, the sentence types given for these two groups of crimes were compared.

Figure 1 compares the types of sentence for violent (Figure 1a) and economic crimes (Figure 1b). Where more than one type of sentence was imposed only the most serious sentence was considered.<sup>15</sup>

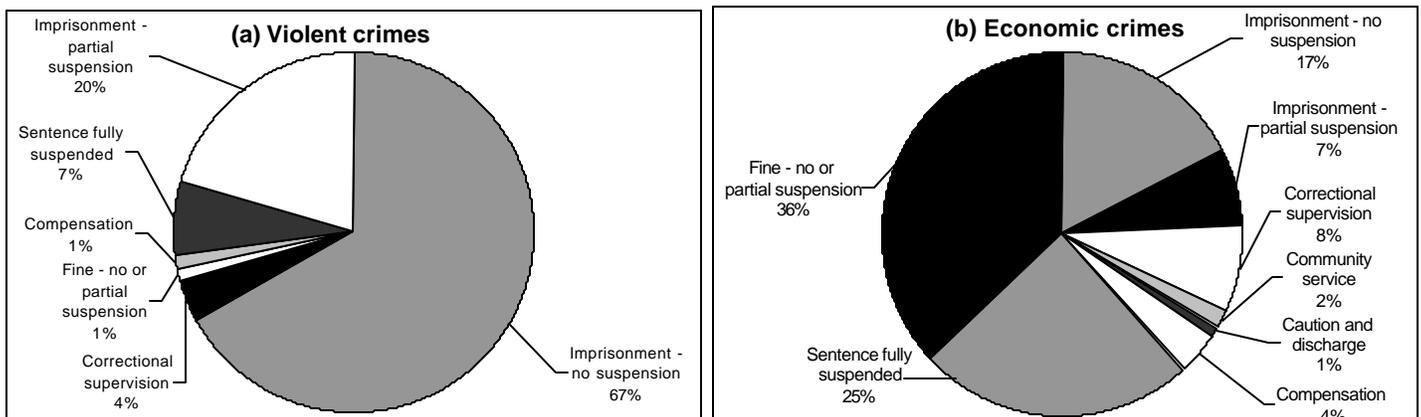


Figure 1: Pie diagrams showing the percentages of different sentence types for (a) violent and (b) economic crimes. This represents sentences for adults committing crimes pre-implementation.

#### Observations about Figure 1:

- By far the majority of people convicted of serious violent crime are sent to prison by South African courts. From Figure 1a it is clear that custodial sentences (prison sentences with no suspension or with partial suspension) were the most common type of sentence for the violent crimes (87%).
- By contrast, custodial sentences were only used for 24% of economic crimes (Figure 1b). For economic crimes, a far wider variety of sentence types were used. Here, no one sentence type constituted more than 50% of sentences. Fines were the most common (37%) for economic crimes and fully suspended prison sentences were used in 25% of such cases.

<sup>14</sup> fraud; stock theft; shoplifting.

<sup>15</sup> For combinations of sentence types, see Table 17 on page 46.

Within these two broad categories, there were naturally differences in sentence types for the constituent offences. Table 1 summarises the sentence types for the seven crimes studied.

Table 1: Sentence types for the seven crimes studied given as percentage of total. Custodial sentences comprise those sentences without suspension and those with partial suspension. When the court imposed more than one type of sentence on the accused, only the most onerous sentence was counted. Sentences are ranked in the table from the most onerous to the least. This represents sentences for adults committing crimes pre-implementation. "n" indicates the number of accused.

Sentence type		Murder (%)	Rape (%)	Robbery (%)	Culpable Homicide (%)	Fraud (%)	Stock-theft (%)	Shoplifting (%)
Custodial		94.4	95.2	93.1	41.6	16.2	74.6	6.7
Non-custodial	Committal to an Institution	0	0	0	0	0	0	0.7
	Correctional supervision	2.4	0.5	0.77	22.10	14.2	0	5.2
	Community service	0	0	0	0	0	1.5	3.7
	Fine	0	0.5	1.54	5.2	37.5	8.9	49.6
	Compensation	0	0.5	0	2.6	9.2	1.5	0
	Sentence postponed	0	0	0	1.3	0.7	0	0
	Imprisonment fully suspended	3.2	2.9	4.62	27.3	13.5	11.9	8.9
	Fine fully suspended	0	0.5	0	0	8.5	1.5	23.7
	Caution and discharged	0	0	0	0	0	0	1.5
Total		100%	100%	100%	100%	100%	100%	100%
n		164	207	130	77	141	67	135

Observations about Table 1:

- The serious violent crimes of murder, rape and robbery with aggravating circumstances had very high levels of custodial sentences, each in excess of 90%.
- The courts made use of correctional supervision for culpable homicide (22%) more than for any of the other crimes.
- Stock theft was treated considerably more harshly than the other two economic crimes. Three-quarters of accused convicted of stock theft went to prison although economic crime in general had fewer prison sentences.
- It is also clear that many more accused were given custodial sentences when found guilty of stock theft (74.6%) compared to culpable homicide (41.6%).

- Shoplifting and fraud had the fewest custodial sentences. For these two crime types fines and fully suspended prison sentences were common.

The severity or extent of the sentences is shown in Figure 2 and Table 2. Figure 2 shows the median years imprisonment (Figure 2a) and median fines in Rands (Figure 2b) for the individual crimes.

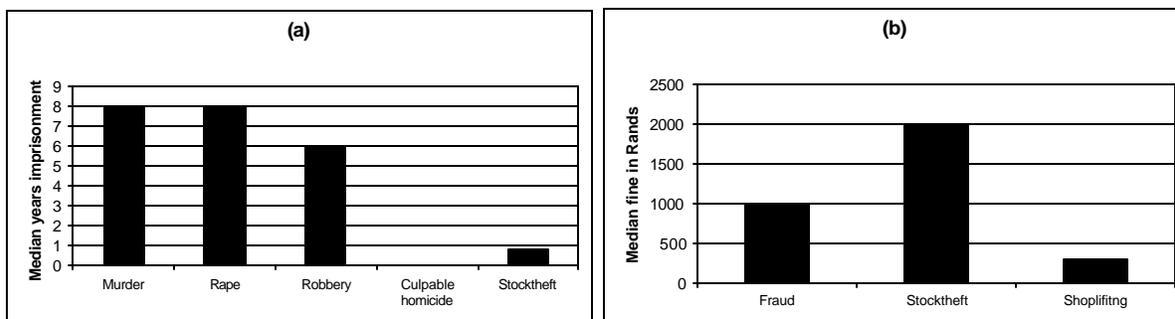


Figure 2: Pre-implementation median sentences for adults. Median years imprisonment (a) were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0). Median fines (b) were calculated using only those given a fine.

The range over which at least 50% of sentences occur and the significance of the differences among the crimes are shown in Table 2.

Table 2: Pre-implementation 50% ranges and significant differences in custodial sentences. The range of years imprisonment is shown for at least 50% of adult sentences. The lower-case letters show significant differences.<sup>16</sup> “n” indicates the number of accused.

Crime	50% range (years imprisonment)	Significant difference	n
Murder	5 – 10	a	164
Rape	5 – 10	a	207
Robbery	2 – 10	b	130
Culpable Homicide	0 – 3.8	c	77
Stock theft	0.13 – 1.38	d	67

Observations about Figure 2 and Table 2:

- Both murder and rape had the severest sentences in terms of years imprisonment. Each had a median of eight years while more than 50% of accused got effectively between five and ten years imprisonment.

<sup>16</sup> Crimes with the same letters indicate that there is no statistically significant difference among them while crimes with no letters in common are significantly different. Significant differences are measured on the means at the 95% confident level.

- There was no significant difference between sentences given to accused convicted of rape and those convicted of murder.
- Robbery with aggravating circumstances was intermediate in severity and culpable homicide and stock theft had statistically similar sentences although the median prison term for stock theft was higher than for culpable homicide, which had a median of zero.

The problem with trying to study sentence severity for the economic crimes, particularly fraud, is that sentence is dependent on the amounts involved in the theft or fraud. For example a person convicted of fraud involving millions of Rands should get a more severe sentence than one convicted of fraud involving a few hundred Rand. It is likely that most fraud reported and particularly most shoplifting would involve small amounts of money. The CAS and CRIM databases do not have the amounts of money involved so it was difficult to analyse these crimes in more detail. However, a sample of fraud and theft cases was obtained from the Office of Serious Economic Offences (OSEO). These all involved amounts of over a million Rand. The sentences given for these crimes are shown in Table 3. Note that this sample is very small and not necessarily representative.

Table 3: The type and severity of the sentences for accused guilty of committing serious economic offences. The amounts involved indicate the amount investigated not the amount the person was convicted of. There may be a difference between these two amounts. Unfortunately the amounts upon conviction were not available. This represents sentences for adults committing crimes pre-implementation.

Crime	Amount involved	Sentence
Fraud	R360 million	8 years imprisonment
Fraud	R3 million	19 years imprisonment
Fraud	R20 million	20 years imprisonment
Fraud	R50 million	7 years imprisonment of which 2 years are suspended
Fraud	R11 million	10 years imprisonment
Theft	R 9 million	12 years imprisonment of which 3 years are suspended
Fraud	R 3 million	R4 000 fine
Fraud	R1.2 billion	12 years imprisonment
Fraud	R 30.5 million	R30 000 fine
Theft	R 150 million	6 years imprisonment of which 1 year is suspended

Observations about Table 3:

- Sentences for more serious fraud and theft were far more severe than the random samples of fraud and shoplifting (a form of theft).<sup>17</sup>

<sup>17</sup> See Table 1 and Figure 2.

- The number of years imprisonment for serious economic offences were similar to those given to people convicted of murder and rape.

### 6.1.2 Pre-implementation sentences compared with minima in Act

Although the Act did not apply to pre-implementation sentences, it was interesting to see how the prescribed minimum sentences compared with sentencing practices prevailing at the time of its introduction. The percentage of pre-implementation sentences below the minima and those in compliance with the minima are set out in Table 4.

Table 4: Pre-implementation sentences in relation to the minimum sentences prescribed by the Act. The minimum sentence prescribed by the Act is given for murder, rape and robbery with aggravating circumstances. The percentage of adult sentences below the minimum is compared with those sentences that would have complied with the Act had it been applicable at that time. “n” indicates numbers of accused.

	Minimum sentence (years)	Sentences below minimum in Act (%)	Sentences equal to or greater than minimum in Act (%)	Total (%)	n
Murder	15	79.9	20.1	100	164
Rape	10	70.0	30.0	100	207
Robbery	15	100.0	0.0	100	130

#### Observations about Table 4:

- When the Act was introduced, it imposed minimum sentences for murder, rape and robbery with aggravating circumstances that were in line with only a small proportion of sentencing practice.
- Only 20% of murder cases, 30% of rape cases and not a single case of robbery with aggravating circumstances used sentences equal to or greater than the new minimum sentences.
- The minimum sentences laid down in the Act were in accordance with the most severe sentences given by courts before its introduction.
- The proportions of sentences equal to or greater than the prescribed minima for murder and rape may be, in reality, even lower than what are indicated here. This is because all cases in this table were measured against minimum sentences of 15 and 10 years respectively. However circumstances requiring life sentences may have applied in some of these cases. Sentences above 15 years for murder and above 10 years for rape but below life in such cases would also have been below the minimum sentence, and not in compliance as indicated here.

### 6.1.3 Region

Regional inconsistency in sentencing may be due to a host of factors. These include the local prevalence of crime, provincial judicial precedents that do not necessarily bind all courts nationally, variable social attitudes, and differing pressure from the media. These inconsistencies may manifest themselves in provincial differences and or rural / urban bias. The data presented thus far was combined data for all the police areas studied. However, to examine the manifestation and extent of regional differences in sentencing practices the findings were broken down for the eight police areas studied.

Table 5 shows the median years imprisonment, the range of years imprisonment over which 50% of cases occur and the significant differences of sentences given for murder, rape, robbery with aggravating circumstances and culpable homicide for the different police areas. These data are from the CAS based sample and therefore consists of 96% magistrates' court sentences.

Table 5: Pre-implementation sentences by region. The median years imprisonment<sup>18</sup>, range of years imprisonment over which at least 50% of adult sentences occur for murder, rape, robbery with aggravating circumstances and culpable homicide for the eight police areas. The lower-case letters show significant differences.<sup>19</sup> “n” indicates the number of accused.

Crime	Police area	Median years imprisonment	50% range (years imprisonment)	n	Significant difference
Murder	Western Metropole	8	4 – 10	16	ac
	Boland	8	5 – 10	23	ac
	Port Elizabeth	8.5	5.5 – 10	28	ac
	Cradock	6.8	5 – 9	27	c
	Durban	10	7 – 16	12	ab
	Midlands	10	8 – 22.5	20	b
	Johannesburg	11	7 – 20	26	b
	East Rand	10	7 – 15	15	ab
Rape	Western Metropole	7	3 – 10	19	abc
	Boland	6	5 – 8	33	b
	Port Elizabeth	7	5 – 10	23	abc
	Cradock	6	5 – 8	34	ab
	Durban	7	5 – 8	27	ab
	Midlands	8.5	5.5 – 10	12	abc
	Johannesburg	10	8 – 10	25	c
	East Rand	8.5	7 – 10	34	ac
Robbery	Western Metropole	1	0.3 – 5	11	a
	Boland	5	0.5 – 10	7	ab
	Port Elizabeth	6	1.3 – 10	17	ab
	Cradock	6	0.33 – 10	7	ab
	Durban	8	4 – 10	26	b
	Midlands	1	0.5 – 6	22	ab
	Johannesburg	9	6 – 10	23	b
	East Rand	8	6 – 10	17	b
Culpable Homicide	Western Metropole	0	0 – 4	15	a
	Boland	2.8	0 – 4	14	a
	Port Elizabeth	1	0 – 5	11	a
	Cradock	0	0 – 3	10	a
	Durban	0	0 – 3	5	a
	Midlands	1	0 – 4	7	a
	Johannesburg	0	0 – 3	6	a
	East Rand	0	0 – 0	9	a

#### Observations about Table 5:

- There were significant differences in sentences given for the same crime in different regions.

<sup>18</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

<sup>19</sup> Rows with the same letters indicate that there is no statistically significant difference among them while rows with no letters in common are significantly different. A new series of letters starts for each crime. Significant differences are measured on the means at the 95% confident level.

- The differences appeared to be associated more with what province the crime was committed in rather than whether the police area was more rural or urban. Gauteng and KwaZulu Natal generally imposed higher sentences than the Eastern and Western Cape.
- The police area of Johannesburg had the highest median number of years imprisonment for all four crimes. This was generally followed by the Midlands and East Rand.
- The lowest sentences were generally found in Boland and the Western Metropole police areas. These differences were significant in many instances.
- The upper quartile of the 50% range of sentences for murder was very high in Midlands, Johannesburg and the East Rand when compared with the other police areas. The 50% ranges were more similar for the other crime types.
- There were no significant differences in sentences handed down for culpable homicide among the eight police areas.

#### 6.1.4 Pre-implementation regional sentences compared with minima in the Act

Observations were made above about how the minimum sentences in the Act are excessive in relation to the national sentencing practice before the implementation of the Act. Table 5 indicates that these comments apply to all constituent regions studied. The prescribed **minimum** sentences for murder, rape and robbery with aggravating circumstances were generally in excess of the **median** sentencing practices in all eight police areas studied. The only exception was rape in the Johannesburg police area, which had a median sentence equal to the minimum 10 years prescribed.

#### 6.1.5 Accused age

Courts should always take into consideration the circumstances of the accused in passing sentence. Of these personal circumstances, age is particularly important when the accused is relatively young or old. The extent to which different sentences are given to juveniles compared with adults is shown in Table 6.

It must be noted that many juveniles did not get prison terms but other sentence types such as committal to a reformatory. This would have affected the median years imprisonment

presented below as these values are recorded as zero years imprisonment. More details of the sentences given to juveniles are discussed in the third section of the results<sup>20</sup>.

Table 6: Pre-implementation sentences of adults compared with juveniles. Differences in median years imprisonment<sup>21</sup> between juveniles (people under the age of 18) and adults for the crimes of murder rape robbery with aggravating circumstances and culpable homicide. Y indicates a significant difference while N indicated no significant difference between adults and juveniles.

Crime	Juveniles (median years imprisonment)	Adults (median years imprisonment)	Significant differences
Murder	6	8	N
Rape	0	8	Y
Robbery	0.3	6	Y
Culpable Homicide	0	0	N

Observations about Table 6:

- Juveniles sentenced to imprisonment for rape and robbery with aggravating circumstances received significantly fewer years imprisonment than adults.
- There were, however, no significant differences in the number of years imprisonment for murder and culpable homicide.

There were also differences between juveniles of different ages and between adults of different ages. Table 7 summarises the percentage of custodial versus non-custodial sentences for the crimes of murder, rape, robbery with aggravating circumstances, culpable homicide and stock theft for different age classes. The median number of years imprisonment is given for the relevant crimes as an indication of the severity of the sentence.

<sup>20</sup> Section 6.3 on page 59.

<sup>21</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

Table 7: Pre-implementation median years imprisonment by age class. Comparison of percentage custodial sentences and sentence severity (median years imprisonment<sup>22</sup>) for convicted people of various age groups. Only the crimes which commonly received custodial sentences are presented, i.e. murder, rape, robbery with aggravating circumstances, culpable homicide and stock theft. "n" indicates the number of accused.

Crime	Age class (years)	Percentage custodial sentences (%)	Median years imprisonment	n
Murder	0 – 15	0	0	2
	16 – 17	100	6.5	8
	18 – 20	95.2	9	21
	21 – 24	95.4	8	44
	25 – 29	92.5	8.5	40
	30 – 49	97.9	8	47
	50 & older	60	5	5
Rape	0 – 15	28.6	0	14
	16 – 17	61.5	3	13
	18 – 20	89.7	5	39
	21 – 24	94.4	7.8	54
	25 – 29	94.5	8	55
	30 – 49	100	8	50
	50 & older	100	6.5	4
Robbery	0 – 15	71.4	0.7	7
	16 – 17	44.4	0	9
	18 – 20	92.3	3	39
	21 – 24	97	6	34
	25 – 29	85.7	7	28
	30 – 49	95.8	8	24
	50 & older	-	-	0
Culpable Homicide	0 – 15	0	0	4
	16 – 17	28.7	0	7
	18 – 20	41.7	0	12
	21 – 24	35.7	0	14
	25 – 29	56.3	1	16
	30 – 49	42	0	31
	50 & older	0	0	4
Stock theft	0 – 15	-	-	0
	16 – 17	0	0	1
	18 – 20	50	0.37	6
	21 – 24	92.3	0.75	13
	25 – 29	87.5	1.25	16
	30 – 49	65.5	0.75	29
	50 & older	66.7	1.5	3

Table 8 summarises the percentage of custodial sentences for the different age classes for fraud and shoplifting as well as the median fine amount in Rands.

<sup>22</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

Table 8: Pre-implementation median fines by age class. Comparisons of percentage custodial sentences and sentence severity (median fine<sup>23</sup> in Rands) for adults convicted of fraud and shoplifting divided into various age groups. If no fines were given to accused in those age classes then “no fines” are recorded. “n” indicates the number of accused.

Crime	Age class (years)	Percentage custodial sentences (%)	Median fine (Rands)	n
Fraud	0 – 15	-	-	0
	16 – 17	0	No fines	3
	18 – 20	20	R3 500	10
	21 – 24	20	R900	30
	25 – 29	6.5	R1 000	31
	30 – 49	18.8	R1 000	69
	50 & older	0	No fines	1
Shoplifting	0 – 15	0	R260	5
	16 – 17	0	R200	5
	18 – 20	7.3	R275	41
	21 – 24	10.7	R300	28
	25 – 29	5.9	R500	17
	30 – 49	4.7	R400	42
	50 & older	0	R200	7

Observations about Table 7 and Table 8:

- People aged from 18 to 49 got more severe sentences than those younger or older than this range.
- Generally fewer people under the age of 18 got custodial sentences when compared to the over 18’s and particularly the over 20’s.
- It is not possible to distinguish clear patterns in the age classes from 18 to 49.
- The majority of people convicted for these crimes (90%) were aged 18 to 49.

#### 6.1.6 Accused race

The race of the accused is never likely to be a justifiable consideration in determining their sentence. However, this unfortunately does not preclude racial bias in sentencing. Racial discrimination may be direct, for example due to prejudices (conscious or sub-conscious) of individual presiding officers. It may also be indirect for example where, because of our history, there is a strong link between race and socio-economic status. Poor black accused are less likely to afford quality legal representation, have a secure job, high social standing or other factors which may have a more immediate impact on sentence. It is important to know about possible racial bias in sentencing so that it can be eliminated.

<sup>23</sup> Fine medians were calculated using only those accused who received fines.

Unfortunately however, there was insufficient data to compare all race groups. For example, the sample contained less than five white and indian persons for each of murder, rape, and robbery with aggravating circumstances. The only comparisons that could be made were between black (African) and coloured convicted persons. The percentage custodial sentences and the severity of the sentences (median years imprisonment) are presented for the violent crimes in Table 9.

Table 9: Pre-implementation sentences by race of accused. Percentage custodial sentences and median years imprisonment<sup>24</sup> for black and coloured adults convicted of murder, rape, robbery with aggravating circumstances and culpable homicide. "n" is the number of accused. The lower-case letters show significant differences.<sup>25</sup>

Crime	Race	Percentage custodial sentences (%)	Median years imprisonment	n	Significant difference
Murder	Black	95.9	9	99	a
	Coloured	94.7	8	57	a
Rape	Black	95.4	8	130	a
	Coloured	95.6	7	69	a
Robbery	Black	96	8	101	a
	Coloured	86	1	22	b
Culpable homicide	Black	39.4	0	33	c
	Coloured	45.2	0	42	c

Observations about Table 9:

- There were no significant differences in the severity of the sentences given to black and coloured people for murder and rape although the medians for coloured people were each one year lower.
- There was a significant difference in the number of years imprisonment for coloured people convicted of robbery with aggravating circumstances and the percentage of coloured people getting custodial sentences was lower than black people. However, this may be due to the fact that the two provinces with the lowest sentences, the Eastern Cape and the Western Cape, also had the most coloured accused. The provincial disparities were particularly severe for the crime of robbery with aggravating circumstances.
- For culpable homicide however, more coloured people got custodial sentences, although this difference was not significant.

<sup>24</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

<sup>25</sup> Rows with the same letters indicate that there is no statistically significant difference among them while rows with no letters in common are significantly different. A new series of letters start for each crime. Significant differences are measured on the means at the 95% confident level.

### 6.1.7 Accused gender

The accused gender may also affect the sentence type and severity. As was the case with race there was insufficient data to compare sentences given to men and women. By far the majority of accused were men. The only crimes where there were sufficient numbers of women to make meaningful comparisons were shoplifting and fraud. Table 10 compares the percentage custodial sentences and the severity of the sentences (median amount of fine in Rands) between men and women.

Table 10: Pre-implementation sentences by gender of accused. A comparison of the percentage custodial sentences and severity of the fines<sup>26</sup> for fraud and shoplifting between adult men and women. “n” refers to the number of accused. The lower-case letters show significant differences.<sup>27</sup>

Crime	Gender	Percentage custodial sentences (%)	Median fine (Rands)	n	Significant difference
Fraud	Male	16.1	R1 000	93	a
	Female	16.7	R800	48	a
Shoplifting	Male	10	R300	88	a
	Female	0	R300	47	a

Observations about Table 10:

- There was no statistically significant difference in the percentage of accused getting custodial sentences or median fine amounts between men and women for fraud.
- Fewer women than men were given custodial sentences for shoplifting, although there was no difference in the fine amount for those accused who were given fines.
- From the available data it is not possible to make generalised conclusions about whether or not gender affects sentence type and severity.

### 6.1.8 Previous convictions

A court usually considers the number and type of previous convictions before passing sentence. To test the effect of previous convictions on sentencing, previous convictions were

<sup>26</sup> The median fine amounts were calculated from those cases where fines were imposed.

<sup>27</sup> Rows with the same letters indicate that there is no statistically significant difference among them while rows with no letters in common are significantly different. A new series of letters start for each crime. Significant differences are measured on the means at the 95% confident level.

divided into two categories. First, we considered the number of previous convictions for the same offence<sup>28</sup> and second, we looked at the total number of previous convictions.

Table 11 shows data for the crimes of rape, robbery with aggravating circumstances and shoplifting for which there were sufficient previous conviction of the same crime to make some observations.<sup>29</sup>

Table 11: Previous convictions for the **same crime**. A comparison is given of pre-implementation sentences given to adults with none, one, two or three or more previous convictions for the same crime<sup>30</sup>. Results are shown as median years imprisonment<sup>31</sup> for rape and robbery with aggravating circumstances and median fines for shoplifting<sup>32</sup>. "n" indicates the number of accused.

Crime	Number of previous convictions (same crime)	Percentage custodial sentences (%)	Median years imprisonment	Median fines (Rands)	n
Rape	None	95	8	-	196
	1	90	7	-	10
	2	100	8	-	1
	3 or more	-	-	-	0
Robbery	None	93	6	-	109
	1	94	6.5	-	16
	2	100	8	-	4
	3 or more	100	7	-	1
Shoplifting	None	1	-	R300	49
	1	16	-	R300	13
	2	14	-	R250	3
	3 or more	33	-	R225	2

#### Observations about Table 11:

- It appears that there was a slight increase in the percentage of accused getting custodial sentences for rape and robbery with aggravating circumstances with increasing numbers of previous convictions for the same offence.
- Increasing use of custodial sentences for recidivistic<sup>33</sup> shoplifters was more apparent.
- 93% of adults convicted of murder, rape or robbery with aggravating circumstances had never been convicted of those crimes previously.

<sup>28</sup> For example if the accused was convicted for rape, we counted how many previous rape convictions they had.

<sup>29</sup> Only one person convicted of murder had a previous conviction for murder.

<sup>30</sup> Previous convictions for robbery with aggravating circumstances are listed as merely "robbery" on the SAP 69's. Therefore this would include both common robbery and robbery with aggravating circumstances.

<sup>31</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

<sup>32</sup> Fine medians were calculated using only those accused who received fines.

<sup>33</sup> repeat offenders

- Note that too few accused had previous convictions for the same offence to do any statistical tests.

There were larger numbers of accused who had previous convictions of any type. This data is shown in Table 12.

Table 12: Previous convictions for **any crime**. A comparison is given of pre-implementation sentences given to adults with none, one, two or three or more previous convictions. Results are shown as median years imprisonment<sup>34</sup> for rape and robbery with aggravating circumstances, culpable homicide and stock theft and median fines for fraud and shoplifting<sup>35</sup>. “n” indicates the number of accused.<sup>36</sup>

Crime	Number of previous convictions (any crime)	Percentage custodial sentences (%)	Median years imprisonment	Median fines (R)	n
Murder	None	92.8	8	-	98
	1	94	10	-	34
	2	100	9	-	15
	3 or more	100	8	-	17
Rape	None	93.1	8	-	116
	1	97	7	-	33
	2	100	7	-	21
	3 or more	97.3	8	-	37
Robbery	None	95.6	7.5	-	68
	1	87.5	8	-	24
	2	81.8	2	-	11
	3 or more	96.3	5	-	27
Culpable homicide	None	31.9	0	-	47
	1	46.7	0	-	15
	2	50	2.5	-	4
	3 or more	72.7	3	-	11
Stock theft	None	60.7	0.75	-	28
	1	91.7	1	-	12
	2	72.7	0.75	-	11
	3 or more	87.5	1.21	-	16
Fraud	None	11.3	-	R800	97
	1	20.8	-	R1 000	24
	2	37.5	-	R1 000	8
	3 or more	33.3	-	R1 650	12
Shoplifting	None	0	-	R325	86
	1	8	-	R300	25
	2	15.4	-	R250	13
	3 or more	45.5	-	R225	11

Observations about Table 12:

<sup>34</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

<sup>35</sup> Fine medians were calculated using only those accused who received fines.

<sup>36</sup> For fraud and shoplifting, only the numbers of accused with fines is given.

- Murder, rape and robbery with aggravating circumstances did not show any obvious increase in use of custodial sentences or severity of sentences with increasing numbers of previous convictions. This is possibly because most previous convictions were for minor offences in relation to these crimes.
- For culpable homicide, fraud and shoplifting, as the number of previous convictions increases so did the percentage custodial sentences. The severity of the sentences also appeared to increase with culpable homicide and fraud, however, this was not the case with shoplifting.
- Most adults (56%) convicted of murder, rape and robbery with aggravating circumstances were first offenders and had never been convicted of any other crime previously.

### 6.1.9 Rape victim age

The age of the victim may influence a magistrate or judge to impose a harsher sentence if the victim was particularly young. The age of the victim is only routinely recorded in the case of rape. Table 13 presents the sentence type and severity for accused convicted of raping (1) a girl under 12, (2) a girl aged 12 - 17 and (3) a woman 18 and over (these are the categories used by the SAPS).

Table 13: Pre-implementation sentences by age of rape victim. The table provides percentage of custodial sentences and the severity of the sentences (median years imprisonment<sup>37</sup>) given to those adults convicted of raping women of different ages. "n" indicates the number of accused and the lower-case "a" letters show that there are no significant differences.<sup>38</sup>

Victim age range (years)	Percentage custodial sentences (%)	Median years imprisonment	n	Significant difference
Under 12	96	8	45	a
12 – 17	89	8	35	a
18 and older	97	7	127	a

Observations about Table 13:

- There was no statistically significant difference in the number of years imprisonment given to persons convicted of raping women and girls in the three ages classes.
- The median years imprisonment of those convicted of raping girls under 18 were only one year higher than the median for rape of women 18 or older.

<sup>37</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

<sup>38</sup> Significant differences are measured on the means at the 95% confident level.

### 6.1.10 Court type

While regional magistrates' courts have the jurisdiction to try serious cases such as murder, rape and robbery with aggravating circumstances, their sentencing powers are less than those of the high courts.<sup>39</sup> Consequently, the more serious cases are reserved for trial and sentencing in the high court. However, the vast majority of cases are still heard in the magistrates' courts. For example, of all the cases involving murder, rape and robbery with aggravating circumstances in this study, 96% were heard in the magistrates' courts. However, magistrates' court sentences are reported less than those of the high courts. The result of these two facts is that the general perception of sentences for serious crimes is artificially inflated.

It should be noted, from a practical perspective, that because so many serious violent criminal cases occur in the magistrates courts, sentences from these lower courts carry far more weight in determining the actual national sentencing patterns than those of the high courts. This fact is important to consider when policy interventions in the field of sentencing are considered.

Table 14 illustrates the differences in sentences between the two types of courts. This comparison used both the CAS-based sample and the high court sample.

Table 14: Pre-implementation sentences by type of court. Median number of years<sup>40</sup> imprisonment imposed for murder, rape and robbery with aggravating circumstances by regional magistrates' court and high courts. The data is combined for all the regional magistrates' courts in the eight police areas and the high courts in Cape Town, Johannesburg, Port Elizabeth and Durban. At least 50% of adult accused were given effective years imprisonment within the "50% range". Y indicates a significant difference in the number of years imprisonment between regional magistrates' court and the high courts.

Crime	Regional magistrates' court		High court		Significant difference
	Median years imprisonment	50% Range (years imprisonment)	Median years imprisonment	50% Range (years imprisonment)	
Murder	7	5 – 7	20	16-25	Y
Rape	7.5	5 – 10	17.5	12-35	Y
Robbery	6	2 – 10	12.5	8-15	Y

<sup>39</sup> This was particularly the case before the case before the introduction of the Act.

<sup>40</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

Observations about Table 14:

- The median high court sentences were more than double the sentences in magistrates' courts for murder, rape and robbery with aggravating circumstances.
- Not surprisingly, sentences imposed by high courts were significantly higher than those imposed by the magistrates' courts.

#### 6.1.10.1 High court: regional comparisons

The regional comparison discussed above used a sample that contained 96% magistrates' court decisions as it was representative of the proportions of cases finalised in the superior and lower courts. A regional comparison of pre-implementation sentences handed down only by high courts for murder and robbery with aggravating circumstances is provided in Table 15. This used the high court sample<sup>41</sup> to achieve sufficient sample sizes. Unfortunately, there were insufficient pre-implementation rape convictions in the high courts to do any regional breakdown.

Table 15: Pre-implementation sentences by various high courts. The median years imprisonment,<sup>42</sup> range of years imprisonment over which at least 50% of adult sentences occur for murder and robbery with aggravating circumstances for four high courts. The lower-case letters show significant differences,<sup>43</sup> while "X" indicates that there was insufficient data to test for significance of difference. "n" indicates the number of accused.

Crime	High court location	Median years imprisonment	50% range (years imprisonment)	n	Significant difference
Murder	Cape Town	18	16 – 25	19	a
	Port Elizabeth	18	12.5 – 25	43	a
	Durban	20	16 – 30	55	a
	Johannesburg	20	18 – 28	47	a
Robbery	Cape Town	15	15 – 15.5	4	X
	Port Elizabeth	10	7 – 15	24	a
	Durban	10	8 – 15	36	a
	Johannesburg	15	8 – 15	27	a

Observations about Table 15:

<sup>41</sup> See section 5.2.2.2 on page 19 for a description of the sampling method.

<sup>42</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

<sup>43</sup> Rows with the same letters indicate that there is no statistically significant difference among them while rows with no letters in common are significantly different. A new series of letters start for each crime. Significant differences are measured on the means at the 95% confident level.

- All four high courts appeared to sentence consistently compared with each other. None of the high courts gave pre-implementation sentences for murder or robbery with aggravating circumstances that were significantly different to sentences given for the same crimes by other high courts, although there was insufficient data to test for significant difference for robbery in the Cape High Court.
- The median sentences for murder given by high courts located in Cape Town and Port Elizabeth were 18 years, and for high courts located in Durban and Johannesburg they were 20 years. The 50% quartile ranges were also similar for murder sentences in all four high courts.
- Median sentences for robbery with aggravating circumstances handed down by high courts in Port Elizabeth and Durban were 10 years while the high court in Johannesburg gave a median of 15 years for the same crime. The 50% quartile ranges were similar for these three courts. Sentences by the Cape High Court for robbery with aggravating circumstances shown in this table should be disregarded because of the small sample size (four cases).

#### 6.1.10.2 High court: pre-implementation sentences compared with minima in Act

Above comparisons of pre-implementation sentences with minima in the Act consisted mostly of magistrates' court sentences. A comparison using only high court cases is provided in Table 16.

Table 16: High court pre-implementation sentences in relation to the minimum sentences prescribed by the Act. The minimum sentence prescribed by the Act is given for murder, rape and robbery with aggravating circumstances. The percentage of adult sentences below the minimum is compared with those sentences that would have complied with the Act had it been applicable at that time. "n" indicates numbers of accused.

	<b>Minimum sentence (years)</b>	<b>Sentences below minimum in Act (%)</b>	<b>Sentences equal to or greater than minimum in Act (%)</b>	<b>Total (%)</b>	<b>n</b>
Murder	15	14.6	85.4	100	213
Rape	10	21.1	78.9	100	38
Robbery	15	55.6	44.4	100	99

Observations about Table 16:

- The minimum sentences in the Act was in accordance with most pre-implementation murder (85%) and rape (79%) sentences given by the high courts.

- The minimum sentence for robbery with aggravating circumstances was in accordance with fewer than half of the pre-implementation high court sentences for this crime.
- The proportions of sentences equal to or greater than the prescribed minima for murder and rape may be, in reality, lower than what are indicated here. This is because all cases in this table were measured against minimum sentences of 15 and 10 years respectively. However circumstances requiring life sentences may have applied in many of these high court cases. Sentences above 15 years for murder and above 10 years for rape but below life in such cases would also have been below the minimum sentence, and not in compliance as indicated here.

#### 6.1.11 Sentencing options used by the courts

Courts often impose more than one sentence type on an accused for a single conviction. Everywhere else in this document, only the primary sentence (the most onerous upon the accused) is reported.<sup>44</sup> To provide a complete picture of the use by the courts of various sentencing options, the most common combinations of sentences are shown in Table 17.

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<sup>44</sup> The ranking of sentences is given in footnote number 10 on page 15.

Table 17: The most common sentence combinations used by the courts. Sentence type 1 in all cases was more onerous than sentence type 2 and thus is the one reported elsewhere in this report. This represents sentences for adults committing crimes pre-implementation.

Sentence type 1	n	Sentence type 2	Percentage of type 1 (%)
Imprisonment no or partial suspension (custodial sentence)	587	None	90
		Compensation	0.3
		Declared unfit to possess firearm	9.5
		Imprisonment fully suspended	0.2
Correctional supervision	50	None	20
		Community service	66
		Fine- partial suspension	2
		Imprisonment fully suspended	12
Community service	6	None	0
		Fine fully suspended	50
		Imprisonment fully suspended	50
Fine – no or partial suspension	133	None	69.3
		Compensation	4.5
		Declared unfit to possess firearm	0.7
		Imprisonment fully suspended	25.5
Compensation	17	None	0
		Fine fully suspended	17
		Imprisonment fully suspended	76
		Sentence postponed	7
Sentence fully suspended	123	None	99
		Declared unfit to possess firearm	1
Total	916		

#### Observations about Table 17:

- For 18% of adults convicted of pre-implementation crimes, more than one sentence type was used.
- The sentence most commonly used in conjunction with imprisonment was a declaration that the accused was unfit to possess a firearm.
- Community service was commonly used with correctional supervision and fully suspended prison sentences were the most commonly used second sentence types in combination with fines.

#### 6.1.12 Suspended sentences

Thus far the custodial prison sentences reported combined both sentences without suspension and sentences with partial suspension. Table 18 shows what percentage of these custodial sentences contain a period that is partially suspended. Sentences that were partially suspended were generally done so for periods of 3 to 5 years.

Table 18: Suspended sentences. Adults that got imprisonment with no suspension and those that got partial suspension are reported as a percentage of the cases where custodial sentences were imposed for various crimes. “n” indicates numbers of accused. This represents pre-implementation crimes.

Crime	Percentage with no suspension (%)	Percentage with partial suspension (%)	n
Murder	78	22	155
Rape	78	22	197
Robbery	85	15	121
Culpable Homicide	31	69	32
Theft of Livestock	72	28	50
Shoplifting	89	11	9
Fraud	65	35	23

Observations about Table 18:

- More than three-quarters of adults sent to prison for murder, rape and robbery with aggravating circumstances received prison sentences with no suspension.
- Partially suspended sentences were more common for accused sentenced to an effective prison term for culpable homicide where the majority had some part of their prison sentence suspended.
- Stock theft showed similar patterns to the three more serious crimes with 72% receiving no suspension.
- Very few people convicted of shoplifting received prison terms but of those that did (9 in total) they mostly received sentences with no suspension.

#### 6.1.13 Concurrent and cumulative sentences

Persons convicted of more than one crime for a particular incident, for example rape and robbery with aggravating circumstances, often received sentences which ran concurrently either fully or partially. This in effect results in a discount in prison term for those convicted of multiple crimes. The extent of this discounting is shown in Table 19.

Table 19: The average total effective years imprisonment, i.e. time to be served, and average total cumulative years for people convicted of one, two, three, and four or more crimes at one time. Cumulative years are calculated by adding the sentences together for the different crimes ignoring any concurrency. This represents sentences for adults committing crimes pre-implementation.

Number of concurrent convictions	Average of total effective years imprisonment	Average of total cumulative years imprisonment	Difference (years)	“discount” as % of cumulative years	n
1	6.1	6.1	0	0	455
2	11.74	13.5	1.76	13.0	67
3	14.7	16.5	1.8	10.9	30
4 or more	19.7	38.8	19.1	49.2	35

Observations about Table 19:

- The more concurrent convictions the greater the difference was between the total number of years imposed and the effective years imprisonment as a result of sentences running concurrently.
- For persons convicted of 4 or more crimes, their average sentence was “discounted” by almost half. Their effective sentence was 49% less than what their sentence would have been if their sentences did not run concurrently.
- Despite this discounting, sentences for people convicted of multiple crimes still tend to be higher than those convicted of one crime. This is because for most multiple convictions (62%), sentences do not run concurrently. Others run only partially concurrently.

## 6.2 Section 2: Impact of the Act on sentencing

The sentences discussed this far in the report are all pre-implementation. After the introduction of the Act, minimum sentences were prescribed for the crimes of murder, rape and robbery with aggravating circumstances amongst other crimes. To assess the impact of the Act, sentences passed for pre-implementation cases (crimes committed during 1997 and before May 1998) were compared with the post implementation sentences (crimes committed on or after 1 May 1998). Unless otherwise stated, all analysis was done on the CAS sample.<sup>45</sup> Because the CAS sample was representative of the proportions of cases that are heard in the various courts, it contained mostly magistrates' court cases (96%).

### 6.2.1 All regions

Table 20 summarises the number of years imprisonment given to accused persons pre- and post-implementation of the Act for murder, rape, robbery with aggravating circumstances and violent culpable homicide. While culpable homicide does not fall under the Act it was studied as a control to determine if sentences for violent crimes other than those covered by the Act changed in any way.

Table 20: Pre-post comparison of sentence severity. The median number of years<sup>46</sup> imprisonment is given for adults convicted of murder, rape, robbery with aggravating circumstances and culpable homicide before and after the implementation of the Act. "n" indicates the number of accused. Y indicates a significant difference between pre- and post-implementation while N indicates no significant difference. At least 50% of accused were given effective years imprisonment within the "50% range".

Crime	Pre-implementation			Post-implementation			Significant differences
	Median years imprisonment	50% range (years imprisonment)	n	Median years imprisonment	50% range (years imprisonment)	n	
Murder	8	6-12	167	10	6-15	64	N
Rape	8	5-10	207	10	8-12	80	Y
Robbery	6	2-10	130	7	2-15	117	Y
Culpable homicide	0	0-4	77	1	0-4	49	N

Observations about Table 20:

<sup>45</sup> See section 5.2.2.1 on page 18 for a description.

<sup>46</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

- While the median number of years imprisonment for all four crimes increased post-implementation, this increase in years imprisonment was only statistically significant for rape and robbery with aggravating circumstances.
- The upper end of the range in which at least 50% of the cases fell for murder rape and robbery with aggravating circumstances increased, while the lower end of the range for rape also increased from 5 to 8 years.
- There was no statistically significant increase in sentences for culpable homicide, indicating that the Act did not affect this crime (which was outside its ambit).

### 6.2.2 Regional results

The data discussed in the first section for pre-implementation cases showed that there were significant differences in number of years imprisonment amongst the police areas studied. We thus tested differences in sentences between pre- and post-implementation for the eight police areas.

Figure 3 shows the median years imprisonment for the four crimes in the eight different police areas and the areas where significant increases in prison sentences occurred.

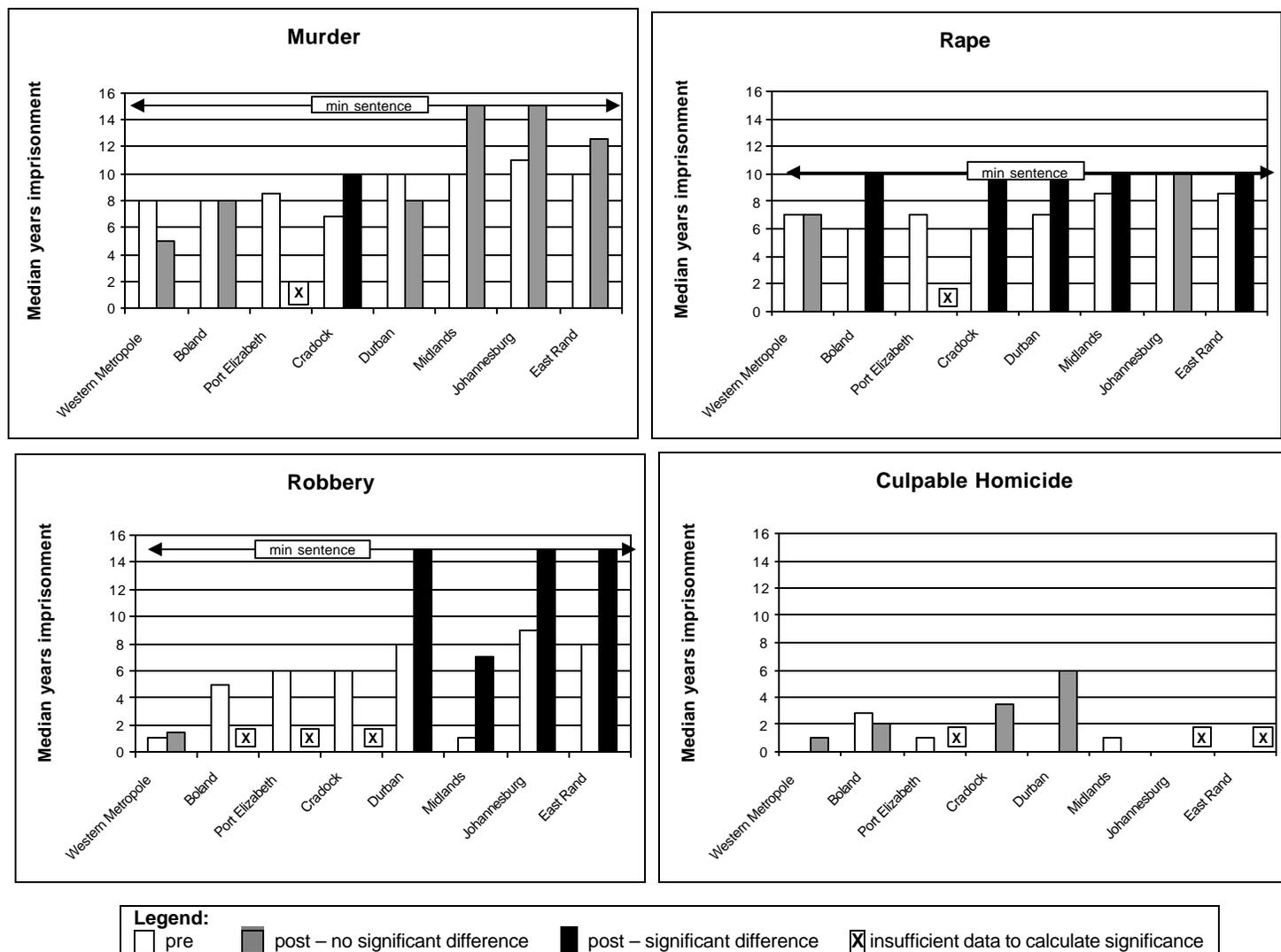


Figure 3: Pre- and post-implementation median sentences by region. The graphs for murder, rape robbery with aggravating circumstances and culpable homicide compare the median years of imprisonment<sup>47</sup> pre- and post implementation for adults in eight police areas. Significant differences (calculated using means) are indicated. For murder, rape and robbery with aggravating circumstances the minimum sentences prescribed by the Act are indicated.

#### Observations about Figure 3:

- Even post-implementation, not a single **median** sentence for murder, rape or robbery with aggravating circumstances in any of the eight regions exceeded the **minimum** sentence prescribed by the Act.

<sup>47</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

- As with pre-implementation sentences, there were significant sentencing differences among the police areas and the Act does not appear to have improved regional consistency in sentencing.
- The differences were particularly noticeable for murder and robbery with aggravating circumstances. The lowest sentences were still recorded in Western Metropole generally followed by Boland and Cradock.
- The only police area that showed no significant increase in prison term for any crime was Western Metropole. Pre-implementation Western Metropole tended to have some of the lowest prison sentences for the four crimes studied and this did not change with the implementation of the Act. The medians of the sentences for all four crimes were lower for Western Metropole than the other areas, and lower than the prescribed minima.
- Johannesburg showed a significant increase in prison terms for robbery with aggravating circumstances only. However it must be noted that prison terms pre-implementation were already relatively high and thus no increase is not surprising.

### 6.2.3 Rape victim age

Rape sentences were not affected by age of victim for the pre-implementation cases.<sup>48</sup> The Act now prescribes life sentences for rape of a girl under 16 compared to a sentence of generally 10 years<sup>49</sup> for rape of a woman 16 years and over. We again examined sentences for rape committed post-implementation by age of victim to assess whether the Act has introduced significant differences.

Unfortunately the police divide rape victims into three age classes which are not consistent with the Act so we are limited to describing victim age by these age classes. While the age class of under 12 clearly falls into Part I of the Act (i.e. life sentences) the 12-17 year olds could fall into either Part I or Part III (10 years minimum). This data is shown in Table 21.

Table 21: Post-implementation comparisons of the mean and median number of years<sup>50</sup> imprisonment for adults convicted of raping women and girls of different ages.

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<sup>48</sup> See Table 13 on page 41.

<sup>49</sup> This may be higher in some case depending on other circumstances of the crime or previous convictions of the accused.

<sup>50</sup> Median and mean years imprisonment were calculated using all adult accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

“n” refers to the number of accused. The lower-case letters show significant differences.<sup>51</sup>

Age of victim (years)	Median years imprisonment	Mean years imprisonment	n	Significant difference
Under 12	10	17.8	7	a
12 – 17	10	10.7	15	b
18 and older	10	10.2	58	b

Observations about Table 21:

- Unlike before the Act, people convicted of raping girls under 12 post-implementation got more severe sentences than those raping older victims. Although the number of cases was low, there is a statistically significant difference in the number of years imprisonment given to people convicted of raping girls under the age of 12 compared to older victims.
- This is different to the pre-implementation case where there was no significant difference based on age of victim. Although the medians were the same (10 years) there was still a statistical difference between the means.<sup>52</sup>
- Like the pre-implementation sample, there was no significant difference between the two older age classes (12-17 compared with 18 & older).
- The medians of 10 years in each age class were also higher than those in the pre-implementation sample. This reflects the significantly higher sentences for rape post-implementation.

#### 6.2.4 High courts: pre- post comparisons

The pre-post comparisons thus far have involved mainly magistrates' court cases. This is because the data elsewhere was drawn from the CAS sample which was representative of the proportions of the court types and thus contained 96% magistrates' court cases. It is important to assess the impact of the Act on high court sentencing and therefore a pre-post comparison was made using the high court sample. This data is presented in Table 22.

<sup>51</sup> Ages with same letters indicate that there is no statistically significant difference among them while ages with no letters in common are significantly different. Significant differences are measured on the means at the 95% confident level.

<sup>52</sup> This anomaly is created by the small number of life sentences (recorded as 40 years imprisonment) given to rapists of women under 12 compared to the larger number been given 10 or fewer years.

Table 22: High court pre-post comparison of sentence severity. The median number of years<sup>53</sup> imprisonment is given for adults convicted of murder, rape, robbery with aggravating circumstances before and after the implementation of the Act. This data comes from the high courts in Cape Town, Port Elizabeth, Durban and Johannesburg. “n” indicates the number of accused. “N” indicates no significant difference between pre- and post-implementation based on the means. At least 50% of accused were given effective years imprisonment within the “50% range”.

Crime	Pre-implementation			Post-implementation			Significant differences
	Median years imprisonment	50% range (years imprisonment)	n	Median years imprisonment	50% range (years imprisonment)	n	
Murder	20	16-25	153	21	12.5-40	16	N
Rape	17.5	12-35	8	15	7-20	23	N
Robbery	12.5	8-15	85	10	10-15	7	N

Observations about Table 23:

- Despite the medians being slightly lower for rape and robbery with aggravating circumstances, there were no significant differences between pre- and post-implementation high court sentences for any of the three crimes.
- Note the increased numbers of post-implementation rape cases, relative to the other two crimes, being sentenced in the high courts. Pre-implementation, rape constituted 3% of the high court sample whereas the same crime counted for 50% of the post-implementation sample.

### 6.2.5 Life sentences

Although the sample sizes were different, the percentage of life sentences given pre-implementation can be compared to post-implementation. This comparison uses the random CAS sample as well as the high court samples in order to obtain a larger sample size. Only rape and murder were given life sentences in our sample. Table 23 presents this data.

Note that by including the high court samples, the data was skewed towards the high court.<sup>54</sup> This means that this particular portion of the results was not representative of sentences generally. The absolute numbers given therefore do not truly reflect the overall percentage of rape and murder convicts given life sentences. However, the point of this is to compare the use of life sentences pre- and post-implementation. Because the pre- and post-

<sup>53</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

<sup>54</sup> See the explanation given for this in the methodology in section 5.2.2.2 on page 19.

implementation data was equally skewed, the comparison of these two sets of data is thus valid.

Table 23: Pre- and post-implementation life sentences. The number and percentage of adults that got life sentences for murder and rape pre- and post-implementation of the Act. “n” refers to the numbers of accused.

Crime	Percentage life sentences pre-implementation	n pre-implementation	Percentage of life sentences post-implementation	n post-implementation
Murder	7%	300	11%	64
Rape	0.5%	435	12.5%	80

Observation about Table 23:

- There has been a large increase in the percentage of life sentences given for rape and murder. This is probably due to the fact that certain murder and certain rape fall into Part I of the Act, which prescribes a life sentence.

Before the Act, very few rape cases were tried in the high courts. Rape charges that did appear in the high court were usually in combination with murder. However many more post-implementation rape cases are now being sentenced in the high court. This is particularly so for those cases referred from the regional magistrates’ court for sentencing in the high court.

#### 6.2.6 Post-implementation sentences compared with minima in Act

It is clear that the Act introduced minimum sentences that were very high in relation to sentencing practises at the time of its introduction.<sup>55</sup> The section examines to what extent have courts increased their sentences post-implementation to comply with the prescribed minima.

The Act prescribes qualified mandatory minimum sentences for certain crimes. The mandatory nature of the sentences is qualified by the provision in the Act that permits a court to depart from the minimum sentence if it finds “substantial and compelling circumstances”. The results below indicate the extent to which courts have complied *with the prescribed minimum sentences*. “Compliance” in this context only refers use of minimum sentences. It does not imply that sentences less than the prescribed minimum were not in compliance *with the Act as a whole* as the courts may have found substantial and compelling circumstances

for deviating from the minimum sentences. The information available however did not indicate the reasons for non-compliance with the minimum sentences.

Table 24 shows the percentage of sentences that complied with the minimum sentences prescribed by the Act. Compliance is given overall as well as for each of the eight police areas studied.

Table 24: Post-implementation compliance with minimum sentences. The percentage of sentences for adults complying with the minimum sentences prescribed by the Act. Where a crime could not be definitively classified into a Part the sentence for the lesser Part was used. Minimum sentences applicable to these parts are provided.<sup>56</sup>

Police area	Murder Part I	n	Murder Part II	n	Rape Part I	n	Rape Part III	n	Robbery Part II	n	Total	n
All police areas combined	0%	4	35.6%	59	17.7%	17	70%	63	37.6%	117	43%	260
Western Metropole	-	0	0%	3	-	0	20%	5	7.7%	26	8.8%	34
Boland	-	0	26.3%	19	-	0	61.5%	13	0%	15	27.7%	47
PE	-	0	80%	5	0%	1	-	0	40%	5	54.5%	11
Cradock	-	0	36.4%	11	25%	4	72.7%	11	0%	3	44.8%	29
Durban	0%	1	0%	6	0%	4	71.4%	7	55.5%	27	44.4%	45
Midlands	0%	3	33.3%	6	40%	5	50%	2	42.8%	7	34.8%	23
Johannesburg	-	0	80%	5	0%	1	85.7%	7	55.5%	18	64.5%	31
East Rand	-	0	50%	4	0%	2	83.3%	18	75%	16	72.5%	40
<b>Minimum sentence</b>	40 years <sup>57</sup>		15 years		40 years		10 years		15 years		-	

Observations about Table 24:

- There was generally compliance in a minority of cases (43%) with the minimum sentences of the post-implementation cases finalised at the time of the study.
- Like the situation before the Act, most sentences post-implementation, except for rape Part III, were below the prescribed minima.
- In Johannesburg and the East Rand the highest compliance was noted (64.5% and 72.5% respectively). Port Elizabeth also had compliance of over 50% although only 11 cases had been finalised by the end of December 1999.
- The least compliance was found in the two Western Cape police areas of Western Metropole (8.8%) and Boland (27.7%).

<sup>55</sup> See section 6.1.2 on page 30 and section 6.1.4 on page 33.

<sup>56</sup> The minimum sentences indicated are for first offenders. The vast majority of accused did not have previous convictions for the same offence and thus the minimum sentences indicated would have been applicable to them. However, where accused had previous convictions for the same offence then the increased minimum sentence applicable in terms of the Act was used to measure compliance with the Act.

<sup>57</sup> For an explanation of the use of this number, see the point concerning life sentences in section 5.6 of the methodology which starts on page 22.

Table 25 examines the actual sentences imposed in relation to the prescribed minimum sentences in more detail. The actual years imprisonment are described in terms of percentage of the minimum. For example, a sentence of 5 years when a 10 year sentence is prescribed was recorded as 50% of the prescribed sentence.

Table 25: Post-implementation sentence severity in relation to minimum sentences. The percentage of adult sentences falling below 50% of the prescribed minimum, those falling from 50% to 99% and those complying to the minimum or more. A dash implies that there were no convictions in this range. Minimum sentences applicable to these parts are provided.<sup>58</sup>

Actual years imprisonment as a % of prescribed minimum	Murder Part I	Murder Part II	Rape Part I	Rape Part III	Robbery
0 – 49%	-	35.6%	76.6%	3.2%	53%
50% - 99%	100%	28.8%	5.7%	27%	9.4%
100% and more	-	35.6%	17.7%	69.8%	37.6%
<b>Prescribed minimum</b>	100% = 40 yrs	100% = 15 yrs	100% = 40 yrs	100% = 10 yrs	100% = 15 yrs

#### Observations about Table 25:

- For murder Part I all of the sentences given were 50% or more of the prescribed minimum but less than the prescribed minimum (20 years or more but less than 40 years).
- For Murder Part II there was a greater spread of sentences with more than a third below 50% of the prescribed minimum (7.5 years) and more than a third either the minimum or above it (15 years or more).
- Rape Part I showed very little compliance with the Act (17.7% at 40 years or more) with more than 75% of convictions getting sentences below half of the prescribed minimum sentence (less than 20 years).
- Rape Part III was the opposite to rape Part I. Most of the sentences under Part III complied with the minimum or were above it (10 years or more).
- It is probable that some rape which we recorded as Part III and murder recorded as Part II were actually Part I. However we could not tell without doubt so we erred on the side of caution using the lesser Parts. This means that the actual level of compliance was probably less than what is reflected here.

<sup>58</sup> The minimum sentences indicated are for first offenders. The vast majority of accused did not have previous convictions for the same offence and thus the minimum sentences indicated would have been applicable to them. However, where accused

- More than 50% of robbery with aggravating circumstances sentences were also below 50% of the prescribed minimum (7.5 years). A problem with robbery is that the Act prescribes minimum sentences for robbery with aggravating circumstances. On the CRIM database robbery with aggravating circumstance is not distinguished from common robbery. However, based on CAS and our sample methods we only collected robberies in which firearms, knives or other dangerous weapons were **reported** to the police. This should have resulted in all robbery in the sample being robbery with aggravating circumstances but there may be some that were not **convicted** of that charge.

### **6.3 Section 3: Sentencing of juveniles**

All the data mentioned in the first two sections (except for the age comparisons in the first section) were only for adult convicted persons. Juveniles were analysed separately as they are treated differently under the Act. Juveniles younger than 16 do not fall under the Act. Juveniles of 16 and 17 years of age are covered by the Act and can have minimum sentences imposed but reasons for this must be given. Unless otherwise stated, all analysis was done on the CAS sample.<sup>59</sup> Because the CAS sample was representative of the proportions of cases that are heard in the various courts, it contained mostly magistrates' court cases (96%).

#### 6.3.1 Proportions of juveniles convicted

Juveniles comprised a small proportion of the overall numbers of accused convicted for the crimes studied. Juveniles (under 18 year olds) comprised only 8% of the sample.<sup>60</sup>

#### 6.3.2 Pre-implementation sentence types for juveniles

Relatively few convictions in the sample were for juveniles. Thus there was insufficient data on juveniles to report their sentences separately in each police area so the data for all police areas has been combined. Figure 4 shows the breakdown of sentence type for all crimes for person under the age of 18.

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<sup>59</sup> See section 5.2.2.1 on page 18 for a description.

<sup>60</sup> It is possible to comment on the number of convictions per age class as the data was taken from a random sample.

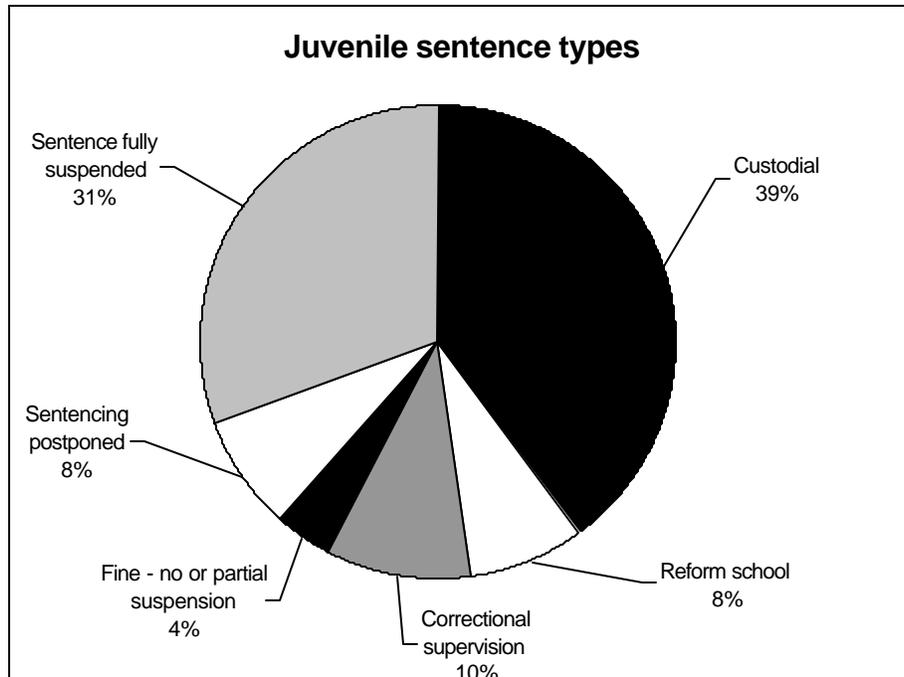


Figure 4: Juvenile sentence types pre-implementation for all crimes. Where more than one sentence was given for a single offence, the most onerous sentence was selected.<sup>61</sup>

Observations about Figure 4:

- The most common sentence given to juveniles was custodial sentences (imprisonment with no suspension or with partial suspension) (39.7% of cases)
- Fully suspended prison sentences was the next most common sentence type (30.8% of cases).
- These do not necessarily reflect typical sentences for juveniles convicted of all offences as only seven crimes were studied.

As with adults, however, there are differences in sentence type depending on crime type. This data is shown in Table 26.

<sup>61</sup> For a ranking of the sentences from most onerous to least, see Table 1. Here the ranking can be seen clockwise from custodial.

Table 26: Pre-implementation sentence types for juveniles convicted of various crimes and the severity of the sentence as depicted by the median years<sup>62</sup> imprisonment for custodial sentences or amount of fine. “n” refers to the number of accused.

	<b>Murder</b>	<b>Rape</b>	<b>Robbery</b>	<b>Culpable homicide</b>	<b>Fraud</b>	<b>Stock theft</b>	<b>Shoplifting</b>
Custodial	80%	44%	56%	18%			
Reform school	10%	11%	13%				
Correctional supervision	10%	19%	6%				10%
Fine							30%
Sentencing postponed		15%	25%	9%			10%
Sentence fully suspended		11%		73%	100%	100%	50%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>
<b>n</b>	<b>10</b>	<b>27</b>	<b>16</b>	<b>11</b>	<b>3</b>	<b>1</b>	<b>9</b>
median years imprisonment	6	2.2	1.7	0.3	-	-	-
median fine (Rand)	-	-	-	-	-	-	200

#### Observations about Table 26:

- Most juveniles convicted of pre-implementation murder faced a prison term, while slightly less than half of those convicted of rape went to prison and just over half of those convicted of robbery with aggravating circumstances went to prison.
- Fully suspended prison sentences were the most common sentence next to imprisonment (no or partial suspension).
- Correctional supervision and committal to a reform school were also commonly used.

#### 6.3.3 Pre-post comparison

The data presented above is for pre-implementation only. A comparison of the number of years imprisonment for juveniles pre- and post-implementation is shown in Table 27.

<sup>62</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

Table 27: Pre- post-implementation comparison of sentence severity for juveniles. Sentence severity is indicated by the median number of years imprisonment.<sup>63</sup> Y indicates a significant difference while N indicates no significant difference between pre-and post. X indicates that there was insufficient data to make statistical comparisons. “n” represents the numbers of accused.

Crime	Pre-implementation (median years imprisonment)	n	Post-implementation (median years imprisonment)	n	Significant difference
Murder	6	10	6	5	X
Rape	0	27	5	15	Y
Robbery	0.3	16	0	29	N
Culpable Homicide	0	11	0	3	X

Observation about Table 27:

- The median sentence for juveniles convicted of rape increased from 0 to 5 years. This was the only statistically significant change in sentence severity.

<sup>63</sup> Median years imprisonment were calculated using all accused guilty of that crime, both those receiving custodial and non-custodial sentences (the latter assigned a value of 0).

## 7 Conclusions

This study goes some way to creating a clearer picture of sentencing practices in South Africa. This is particularly so because of the representative nature of the sample.

It remains to be seen whether the minimum sentence approach prescribed by the Act will lead to a noticeable reduction in serious crime. However, one of the most telling findings of this study is that a mere 5.4% of more than 30 000 randomly sampled cases reported to the police resulted in a conviction. The question of sentencing therefore remains irrelevant to the vast majority of people who committed those crimes. Until the conviction rate improves dramatically, it is difficult to see how tough minimum sentences will be an effective deterrent to thousands of criminals who evidently do not get apprehended and successfully prosecuted.

What has become clear is that the Act introduced minimum sentences in our law that were out of line with prevailing penal norms in every region studied. While sentences have increased since the introduction of the Act, they generally remain below those prescribed as minimum sentences. Given the low conviction rates and the time taken for cases to be finalised, however, it perhaps too early to fully understand the impact of the Act.

The impact of this Act on the prison population remains to be assessed. However, given the lengthy prison terms involved, particularly life sentences, this impact is likely to be long term. The effect on prison populations will only be felt in a number of years when prisoners who would otherwise have been discharged (to make way for new admissions) will remain behind bars. The long-term impact on prison overcrowding in an already strained correctional system may be profound.