

**SOUTH AFRICAN LAW COMMISSION**

**FOURTH INTERIM REPORT**

**PROJECT 73**

**SIMPLIFICATION OF CRIMINAL PROCEDURE  
(SENTENCE AGREEMENTS)**

**MAY 2001**

**TO DR PM MADUNA, MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's fourth interim report on the simplification of criminal procedure dealing with sentence agreements.

**JUSTICE Y MOKGORO**  
**CHAIRPERSON: SA LAW COMMISSION**  
**MAY 2001**

## INTRODUCTION

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

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## EXECUTIVE SUMMARY

1. During 1996 the Commission completed an interim report in its investigation dealing with the simplification of criminal procedure which, among others, recommended the introduction of legislation in terms of which provision should be made in the Criminal Procedure Act for the formal recognition of a process of plea negotiations.

2. During 1996, the Select Committee on Justice (Senate) considered a bill based upon the recommendations contained in the report and decided not to proceed with the recommendations in respect of the recommendation on plea negotiations because in South Africa the prosecution has limited authority to make concessions favourable to the accused in respect of the sentence to be imposed by the court. The matter was accordingly referred back to the Department of Justice for further investigation. During 1999 the Commission was requested to reconsider the issue of plea bargaining as part of its investigation into the simplification of criminal procedure. A discussion paper was published in December 2000.

3. The problem raised by the Select Committee, namely that the matter needs further investigation, was addressed by two major studies which have been published since the previous report of the Commission. They are a study by Prof Bekker on plea bargaining in the United States and South Africa and a study by Catherine Clarke on plea negotiations in South African Criminal courts. The Commission reconsidered its previous recommendations and now proposes a simpler procedure.

4. The Commission concluded that the Criminal Procedure Act, because it gives a wide discretion to the prosecution, directly and indirectly, does provide for plea agreements. What it does not cover, is sentence agreements. The studies referred to show that plea (and even sentence) negotiation does take place in South Africa and performs an important part in our criminal justice system.

5. There are two types of sentencing agreements. The one is where the prosecution, in exchange for a plea of guilty, undertakes to submit to the court a proposed sentence or agrees not to oppose the proposal of the defence. This type is known in our law. The agreement has no effect

on the court and does not require any particular action from the court. The court can ignore the agreement or implement it. If it ignores the agreement, the plea of guilty stands, so does the sentence. The Commission concluded that there is no reason why this procedure should be dealt with by way of legislation. The second type is the case where the accused agrees with the state to plead guilty provided an agreed sentence is imposed and in the Commission's view it is this type of agreement that should be legalised and regulated.

6. A procedure which provides for sentence agreements will have important advantages for the criminal justice system. A serious problem in the criminal justice system is the backlog in courts and the inability of the Legal Aid Board to finance the defence of the indigent. A system which formalises plea agreements and which makes the outcome of the case more predictable will make it easier for practitioners to permit their clients who are guilty to plead guilty. Protection of the victim against publicity and against having to be subjected to cross-examination has also become a sensitive issue. Plea agreements may limit such exposure. The practice of plea negotiation in South Africa could therefore make an important contribution to the acceleration of the process. Statutory measures are provided to meet legitimate objections so that the procedure could eventually be used to improve the effectiveness of the system of criminal law, while still maintaining established legal principles.

7. The Commission recommends that sentence agreements be statutorily recognised and that legislation provide for the following principles and procedure:

- \* the prosecutor, subject to the directives of the National Director of Public Prosecutions, and an accused may enter into an agreement in respect of a plea of guilty to the offence charged or to an offence of which the accused may be convicted on the charge and an appropriate sentence to be imposed by the court if the accused is convicted of that offence;
- \* the agreement must be reached before the plea;
- \* such an agreement will become binding on both the accused and the prosecution once accepted by the court;

- \* the agreement must be in writing and must state that, before conclusion of the agreement, the accused has been informed that he or she has the right to be presumed innocent and to put the State to task of proving his or her guilt beyond reasonable doubt; to remain silent and not to testify during the proceedings; and not to be compelled to give self incriminating evidence;
- \* the agreement must state fully the terms of the agreement, including the substantial facts of the matter, all other facts relevant to the agreed sentence and any admissions made;
- \* the presiding officer must ensure that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts, which rights have to be explained to the accused before the agreement is concluded;
- \* if an agreement is reached, the sentence agreement is disclosed to the court and once the court is satisfied that the agreed sentence is appropriate the accused is requested to plead;
- \* the court, before convicting the accused, has to question the accused to ascertain whether the accused understood his rights, that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts. In other words, a procedure similar to that provided for in section 112 (1) (b) and (2) of the Criminal Procedure Act comes into operation;
- \* if the court accepts the agreement, the accused is found guilty in terms of the plea and the agreed sentence is imposed;
- \* if the court is of the view that it would have imposed a lesser or heavier sentence than the agreed sentence, the court must inform the parties of the lesser or heavier sentence which it considers to be appropriate;
- \* where the parties have been informed of the lesser or heavier sentence, the prosecutor or the accused, as the case may be, may abide by the agreement or

withdraw from the agreement, and in the latter event the trial must proceed *de novo* before another presiding officer. In such a case the agreement is to be regarded *pro non scripto*; no admissions contained in the statements are admissible against the accused; the prosecutor and the accused may not enter into a similar agreement and the prosecutor may proceed on any charge against the accused;

- \* the judicial officer may not instigate or take part in any negotiations; and
- \* once a person is convicted and sentenced in terms of an agreement, he should not have a right of appeal against sentence. Review would be the proper remedy in the event of undue influence or the like.

## CHAPTER 1

### INTRODUCTORY REMARKS

1.1 During 1989, the then Minister of Justice requested the Commission to investigate the possibility of simplifying criminal procedure, with particular reference to a number of questions, two of which were:

- (a) Whether the existing provisions relating to the procedure of pleading are unnecessarily cumbersome and/or whether they give rise to abuse; (and)
- (h) Whether any other provisions relating to criminal procedure and the law of evidence should be amended in order to obviate unnecessary delays and abuse.

1.2 Owing to the extent of the investigation the Commission decided to publish several working papers dealing with different aspects of the investigation. In the first phase of the investigation the Commission published a working paper which addressed appeal procedures and related matters. This part of the investigation was completed and a report submitted to the Minister during 1994. In the next phase of the investigation the Commission published a working paper which addressed the reasons for delays in the completion of criminal trials, abuses of the process, specific provisions of the Criminal Procedure Act that cause delays and problems relating to the administration of the process. This investigation focussed on a possible simplification of the process aimed at the elimination of delays in the completion of criminal trials.

1.3 An interim report which, among others, recommended the introduction of legislation for the formal recognition of a process of plea negotiations was finalised and submitted to the Minister on 16 January 1996.

1.4 During 1996, the Select Committee on Justice (Senate) considered a Bill based upon the recommendations contained in the report and adopted the following resolution in respect of the recommendation on plea negotiations:

The Select Committee on Justice (Senate), having considered the Second Criminal Procedure Amendment Bill, begs to report the Bill with amendments:

The Committee wishes to report that:

- A. During its deliberations on the Bill its attention was drawn to the fact that with regard to plea bargaining, the prosecution has limited authority to make concessions favourable to the accused in respect of the sentence to be imposed by the court, and it therefore affects its ability to conclude a plea agreement with the defence. In foreign jurisdictions, where the process of plea bargaining has a significant impact on the ability of the courts to cope with heavy caseloads, for example in the United States, the role and ability of the prosecuting authority to influence the sentence to be considered by the court, differs significantly from the position in South Africa.

The Committee did not find it appropriate to deal with the matter in the Bill before the practicability of the provisions, which are complicated and in essence derived from foreign legislation, have been considered and debated more closely with due regard to the peculiar South African circumstances. The Committee recommends, however, that the Minister of Justice be requested to direct that the necessary attention be given to the possibility of enacting such a procedure in criminal proceedings be considered by the Department of Justice with a view to the submission to Parliament of such amending legislation, if necessary, at the beginning of the 1997 session of Parliament.

1.5 The matter was, however, not referred back to the Commission by the Department. The researcher allocated to the Commission's investigation was requested to enquire as to what the current position in respect of the Commission's recommendation was, and after inquiries at the Department of Justice a request was received from the Department whereby the Commission was requested to reconsider the issue of plea bargaining as part of its investigation into the simplification of criminal procedure.

1.6 The project committee considered this request at its meeting on 3 September 1999 and resolved that the chapter dealing with plea bargaining should be extracted from the Interim Report, updated and an amended discussion paper should be prepared for distribution for general information and comment.

1.7 Since then the National Director of Public Prosecutions has, after discussion with the Ministers of Justice and of Safety and Security, expressed support for the introduction of a system of plea bargaining.

1.8 The problem raised by the Select Committee, namely that the matter needs further

investigation, was addressed by two major studies which have been published since the previous report of the Commission. They are Prof Bekker's *Plea Bargaining in the United States and South Africa* (29) 1996 CILSA 168 and Catherine T Clarke's *Message in a Bottle for Unknowing Defenders: Strategic Plea Negotiations persist in South African Criminal Courts* (32) 1999 CILSA 141. Furthermore, there is a recent judgment which expressly recognises the legality of plea bargaining in South Africa: *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)*. In addition, the Commission has taken the opportunity to reconsider its previous recommendation and to propose a simpler procedure. A discussion paper was published for general information and comment during December 2000. The closing date for comments was 31 January 2001 but it was extended to 28 February 2001 at the request of a number of interested parties.

## CHAPTER 2

### PLEA AGREEMENTS

#### BACKGROUND

2.1 Plea agreements (so-called plea bargaining) are a controversial topic and are often subjected to sharp criticism. Despite this, plea bargaining is an established procedure regulated by statute in the United States of America that plays an important part in reducing the number of cases which go to trial and a countermeasure against overburdened court rolls.<sup>1</sup> There its constitutionality is accepted.

2.2 Elements of plea bargaining are also to be found in many foreign legal systems, although not as clearly defined or often used as in the USA. Because of the wide discretion vested in the prosecution in South Africa, it cannot be doubted that particular forms of plea agreements are fairly common. The study of Clarke<sup>2</sup> provides irrefutable evidence in this regard. In this respect South Africa does not appear to be any different from other Commonwealth countries such as England and Canada.<sup>3</sup>

#### DEFINITION

2.3 Albert W Alschuler<sup>4</sup> defines plea bargaining as follows:

**Plea-bargaining consists of the exchange of official concessions for a defendant's act of self conviction.** Those concessions may relate to the sentence imposed by the court or

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<sup>1</sup> Compare D P van der Merwe *Die Leerstuk van Verminderde Strafbaarheid* unpublished LLD thesis Unisa 1980 186; Bekker op cit and the writers cited.

<sup>2</sup> Op cit.

<sup>3</sup> TH Weigend *Absprachen in auslaendichen Strafverfahren 1990*.

<sup>4</sup> "Plea-Bargaining and its History" *Columbia Law Review* (1979) 1.

recommended by the prosecutor, the offence charged, or a variety of other circumstances; .  
...

2.4 The Canadian Law Commission<sup>5</sup> initially defined plea bargaining as follows:

any agreement by the accused to plead guilty in return for the promise of some benefit.

2.5 In a subsequent working paper<sup>6</sup> that Commission used the more neutral expressions of "plea negotiations" or "plea discussions" since it was considered that the purpose of the process was to reach a satisfactory agreement and not to enable the accused to obtain a "bargain". They therefore substituted the expression "plea agreement" for "plea bargain", and the following definition was then given to the process:<sup>7</sup>

**. . . any agreement by the accused to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action.**

2.6 N M Isakov and Dirk van Zyl Smit<sup>8</sup>, on the other hand, refer to the process as:

**the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence.**

This definition is much narrower and equates plea bargaining with sentence bargaining.<sup>9</sup>

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<sup>5</sup> Law Reform Commission of Canada *Criminal Procedure: Control of the Process* Working Paper 15 (1975) at 45.

<sup>6</sup> Law Reform Commission of Canada *Criminal Law: Plea Discussions and Agreements* Working Paper 60 (1989) at 3.

<sup>7</sup> Ibid. Cf Bekker op cit 173.

<sup>8</sup> *Negotiated Justice and the Legal Context* (1985) *De Rebus* 173.

<sup>9</sup> Bekker 174 - 175.

## A COMPARATIVE OVERVIEW

### THE USA

2.7 The **US Federal Rules of Criminal Procedure**<sup>10</sup> give statutory effect in federal courts to the practice of plea negotiation and plea agreements on condition that they are disclosed in open court and can be accepted or rejected by the trial judge. Although there are no exact statistics, it is estimated that between 85% to 95% of all federal criminal cases in the USA are disposed of through pleas of guilty. Of these, most are the result of plea negotiations.<sup>11</sup> There is also increasing recognition of the continued existence and effectiveness of the process.

Most, but not all, states recognise the procedure, though often in a varied form.

2.8 In **Brady v United States**<sup>12</sup> the court stated:

(W)e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

2.9 Plea negotiation is regarded as an essential element of the criminal justice system and is encouraged.<sup>13</sup> The administration of the criminal system is also dependent on plea negotiation. Although the practice ensures the speedy conclusion of cases, the basis for its recognition is an

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<sup>10</sup> *Federal Rules of Criminal Procedure* rule 11(e).

<sup>11</sup> See Bekker op cit. *Federal Rules of Criminal Procedure* 42.

<sup>12</sup> 397 U S 742, 752-753, 90 S Ct 1463, 25 L Ed 2d 747 (1970) as cited in *Federal Rules of Criminal Procedure* 42.

<sup>13</sup> 22 *Corpus Juris Secundum* par 365: "While an accused has no constitutional right to plea bargain and the government has no duty to plea bargain, plea bargaining has become generally accepted, and is to be encouraged."

**effective and just administration of the system of criminal law.**<sup>14</sup> Legitimacy is given to the practice because the plea agreement is disclosed in open court and its propriety is reviewed by the trial judge.

2.10 It has the following advantages:<sup>15</sup>

- \* the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant;
- \* granting a charge reduction in return for a plea of guilty may give the sentencing judge needed discretion which he may not have under the sentencing guidelines, something which does not as yet form part of our legal system;
- \* a plea of guilty avoids the necessity of a public trial and may protect the innocent victim of a crime against the trauma of giving evidence;
- \* a plea agreement may also contribute to the successful prosecution of other more serious offenders.

2.11 There are objections, theoretical and practical, to the recognition of the process.<sup>16</sup> Some consider it a necessary evil.<sup>17</sup>

2.12 Because of the importance of the USA's experience to this investigation, the full text of the *Federal rules* which legitimised the case law approach to plea bargaining and codified the pre-

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<sup>14</sup> See *Federal Rules of Criminal Procedure* 43 and authorities cited therein.

<sup>15</sup> Ibid.

<sup>16</sup> For a full discussion, see the papers of the symposium on punishment published in [101] (number 8) (1992) *Yale Law Journal*.

<sup>17</sup> D P van der Merwe *Die Leerstuk van Verminderde Strafbaarheid* 188.

existing rules into an established set of guidelines, is quoted in full:<sup>18</sup>

**(e) Plea agreement procedure**

1. In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
  - (A) move for dismissal of other charges; or
  - (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
  - (C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussion.

- (2) Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the pre-sentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.
- (3) Acceptance of a Plea Agreement.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.
- (4) Rejection of a Plea Agreement.** If the court rejects the plea agreement, the court shall on the record inform the parties of this fact, advise the defendant

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<sup>18</sup>

*Federal Rules of Criminal Procedure 39-40 (rule 11 (e)-(h)).*

personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a plea of guilty or plea of nolo contendere the disposition of the case may be less favourable to the defendant than that contemplated by the plea agreement.

- (5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.
- (6) **Inadmissibility of Pleas, Plea Discussions, and Related Statements.** Except as otherwise provided in this paragraph, evidence of the following is not in any civil or criminal proceeding admissible against the defendant who made the plea or was a participant in the plea discussions:
- (A) a plea of guilty which was later withdrawn;
  - (B) a plea of nolo contendere;
  - (C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or
  - (D) any statement made- in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

- (f) **Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.
- (g) **Record of Proceedings.** A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.
- (h) **Harmless Error.** Any variance from the procedures required by this

rule which does not affect substantial rights shall be disregarded.

2.13 As pointed out, these rules do not necessarily apply to state and other lower courts. For instance, in some states the court may take part in the discussions, something expressly prohibited by the Federal provision. The relevant general rules are so summarized by the *Corpus Juris Secundum* (vol 22):

A guilty plea, arising out of a plea agreement, must stand unless induced by misrepresentations, improper promises, threats or coercion, or where the plea bargain is not kept.

A plea bargain is contractual in nature, and the constitutional right to fairness may mandate enforcement of the bargain where accused has detrimentally relied on a prosecutor's promise, even if the classic elements of contract law are not satisfied.

Although there is some authority to the contrary, the general rule is that a judge should not initiate, participate or influence plea agreement discussions or be a party to the negotiations but, to the contrary, he must remain in a position of complete neutrality.

Acceptance or rejection of a plea bargain is within the court's discretion. The terms of the bargain must be disclosed fully prior to acceptance.

Performance of a plea bargain must be mutual, and when executed is binding on both the government and the defendant.

2.14 In Alaska, plea bargaining was prohibited by an order of the Attorney-General during 1975, but it has returned incrementally. However, sentence bargaining is still not permitted. The circumstances in Alaska are somewhat special. It is a fairly rich state with about 0,5m people. Prosecutors are only permitted to prosecute if they are satisfied that they have a case beyond reasonable doubt. Last, in many instances sentences are prescriptive and do not allow for sentence bargaining.<sup>19</sup>

2.15 In California plea bargaining is described as an agreement between the prosecution and the defence to resolve the case.<sup>20</sup> It is clear from the various definitions that the following elements can be distilled:

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<sup>19</sup> See *A re-evaluation of Alaska's Ban on Plea Bargaining: Executive Summary* (Jan 1991).

<sup>20</sup> See E Snyman, S du Toit *Defining and evaluating plea bargaining* SACJ (2000) 13 at 190.

- \* a mutually satisfactory disposition;
- \* judicial review; and
- \* a concession of some kind, made by the prosecuting authority.

An important question that has to be answered is whether the plea agreement itself is a contract or not. The effect of the recognition of the agreement as a contract may have serious consequences for an accused. When an accused negotiates for a promise from the State such an accused has a right to expect the State to follow through on the agreement. In *Santobello v New York*<sup>21</sup> the Supreme Court in the USA clearly held as such. There is, however, an alternative interpretation in the USA, namely that the agreement be regarded as a combination of modified contract law and the due process concerns enunciated by the Court in *Mabry v Johnson*<sup>22</sup>. A due process-based approach to plea agreements focuses on the protection owed to an accused in exchange for the constitutional rights they bargain away.

## CANADA

2.16 Plea agreements in some form or other are part of the Canadian legal system.<sup>23</sup> However, the Canadian Criminal Code contains no provisions which explicitly deal with plea negotiations between the prosecution and the accused or his or her representative. One provision which is relevant to plea negotiations is section 606(4) of the Code, which provides that where an accused pleads not guilty of the offence charged but guilty of an included or other offence, the court may in its discretion with the consent of the prosecutor accept such plea and, if such plea is accepted, shall find the accused not guilty of the

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<sup>21</sup> 404 US 257 (1971).

<sup>22</sup> 467 US 504 (1984).

<sup>23</sup> TH Weigend op cit p 80.

offence charged. This provision provides for a mechanism for plea negotiations, but only informal guidelines are to be found on the topic.<sup>24</sup> In 1972, two years after Rule 11(e) was adopted in the United States, the Ontario Attorney-General sent a memorandum to all Crown attorneys concerning conduct of plea negotiations. In doing so the Attorney-General informally established certain principles applicable to plea discussions similar to those in Rule 11(e).<sup>25</sup> These principles *inter alia* provide that the proper administration of justice is the paramount consideration in all plea discussions, and due regard must be had to the rights of the accused; the Crown Attorney should do nothing to compel a plea of guilty to a lesser number of charges; the Crown Attorney should indict only on those charges on which he intends to proceed to trial; he should not consent to the acceptance of a plea of guilty to an offence which has not been committed; in all discussions the Crown Attorney must maintain his freedom to do his duty; he may state to defence counsel the views he may give if asked by the presiding judge to comment on the matter of sentence; and neither the Crown Attorney nor defence counsel should discuss with the judge matters bearing on the exercise of the judge's discretion. After an investigation of the practice in 1989, the Canadian Law Commission<sup>26</sup> recommended that the procedure be regulated by means of legislation. The recommendations contain detailed guidelines and directives which must be complied with before an agreement may be accepted. These include that:

- (a) no accused may be improperly induced to conclude a plea agreement and a plea of guilty may be withdrawn if there was improper inducement;
- (b) the judicial officer may not take part therein but may initiate and preside over plea

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<sup>24</sup> H Nasheri *Betrayal of Due Process: A comparative Assessment of Plea Bargaining in the United States and Canada* (1998) at 52.

<sup>25</sup> See op cit at 159.

<sup>26</sup> Law Reform Commission of Canada *Plea Discussions and Agreements* Working Paper 60 (1989) at 42 et seq.

discussions. He may also inform the parties of the advantages of plea discussions;

- (c) if the accused has legal representation, the prosecutor must negotiate with the legal representative, and if the accused is unrepresented the prosecutor must comply with specific rules such as informing the accused of the advantages of legal representation.
- (d) all accused must receive equal treatment;
- (e) plea agreements must accurately reflect the accused's criminal behaviour and facts must not be distorted or evidence withheld from the court;
- (f) the complainant or victim in the case must be consulted in the conclusion of the agreement.
- (g) the contents of the agreement must be disclosed in open court, and the court must satisfy itself that the accused was not improperly influenced;
- (h) the presiding officer may accept or reject an agreement, and must reject it if he has reason to believe that the accused was induced improperly or that the agreement does not reflect the criminal behaviour which can be proved.

These proposals have either been rejected or not acted upon by the Canadian government.

2.17 In 1993 the Ontario Ministry of the Attorney-General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions, chaired by the Honourable G Arthur Martin, proposed a number of recommendations for the improvement of the criminal justice system in the province of Ontario.<sup>27</sup> The final set of recommendations stated that resolution discussions (that is plea bargaining) are an essential part of the criminal justice system in Ontario and, when properly

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Op cit at 55.

conducted, benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice. The Martin Committee recommended that Crown counsel should not accept a plea of guilty where he or she knows that the accused is innocent; that where the Crown knows that the prosecution will never be able to prove a material element of the case it has a duty to disclose this to the defence; the Attorney-General should require his or her agents conducting resolution discussions to consider the interests of victims; and, as a general rule, counsel must honour all agreements reached after resolution discussions. The Committee also stated that a presiding judge at a pre-hearing conference should not be involved in plea bargaining except by expressing an opinion as to whether a proposed sentence is too high, too low, or within an appropriate range, and that it is inappropriate to engage in resolution discussions with the trial judge in chambers. These guidelines represent the most thorough set of recommendations governing plea bargaining in Canada.

2.18 With regard to sentence bargaining, reference is made to a few cases decided on the issue. In *Attorney General of Canada v Roy*<sup>28</sup> the Crown appealed against a sentence of a fine of \$150 following the accused's plea of guilty to a charge of unlawfully manufacturing spirits contrary to the Excise Tax Act. The sentence imposed by the summary conviction court had been suggested by counsel, who then appeared for the Crown. Upon appeal the Crown sought a fine of \$500 instead on the basis that its suggestion at trial was made by mistake and the sentence was inadequate. The appeal raised the issue of the propriety of plea bargaining and of the role of Crown counsel in the fixing of sentences. This case is an example of a sentence negotiated and arrived at by consent prior to the plea, so that it was somewhat predicated upon the prior intimation by counsel for the Crown as to the nature of the penalty which would be sought. The presiding judge pronounced a number of principles concerning plea bargaining, namely that plea bargaining is not to be regarded with favour. In the imposition of sentence the court, whether in the first instance or on appeal, is not bound by the suggestions made by Crown counsel. Where there has been a plea of guilty and Crown counsel recommends sentence, a court, before accepting a plea, should satisfy itself that the accused fully understands that his fate is, within the limits set by law, in the discretion of the judge, and that the latter is not bound by the suggestions or opinions of Crown counsel. If the accused does not understand this, the guilty plea ought not to be accepted. In this case the court found that the Crown did not satisfy the foregoing test and dismissed the appeal.

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18 C.R.N.S. 89 (Que.Q.B 1972).

## **CIVIL LAW SYSTEMS<sup>29</sup>**

2.19 Some civil law systems adopt the principle of legality in its strict form. Plea agreements in such systems are not possible. Other countries are more flexible. Italy, for one, introduced during 1991 the possibility of sentence agreements between the prosecution and the defence. Depending upon the nature of the case, the agreement may provide for a material, though limited, reduction in fixed sentences in exchange for a plea of guilty. The court is then obliged to consider the propriety of the agreement and may then enforce it.

## **NEW ZEALAND**

2.20 In October 2000 the New Zealand Law Commission finalised a report containing its final conclusions on the legal and administrative structures, procedures and agencies involved in prosecuting criminal offenders.<sup>30</sup> In the report the Commission confirmed its preliminary view expressed in the discussion paper, to the effect that the Commission did not favour charge negotiations being regulated by legislation. Two reasons were advanced for the recommendation:

- \* significant abuse of charge negotiation had not come to light; and
- \* status hearings recently introduced sentence indication as a standard part of judicial practice in the District Courts. The Commission concluded that this development should be monitored with the view to determining whether comprehensive regulation of charge negotiation might be necessary in future and, if so, in what form.

2.21 The Commission, however, expressed the view that this does not mean that clear principles regulating charge negotiation should not be articulated. The Commission recommended that an examination of existing guidelines was called for which would articulate the relevant principles applicable to charge negotiation. The Commission concluded that in some respects the existing

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<sup>29</sup> See TH Weigend op cit.

<sup>30</sup> New Zealand Law Commission Report 66 *Criminal Prosecution* October 2000.

Guidelines did not regulate charge negotiations in sufficient depth. In particular two aspects were suggested for further regulation, that is:

- \* the restriction on a prosecutor supporting a particular sentence option might unnecessarily inhibit the willingness of defendants to plead guilty and could prevent the views of victims being taken into account. The Commission considered that there may be room in the guidelines to enable a prosecutor to make a range of responses to sentencing representations made on behalf of the defendant. In terms of current law a prosecutor cannot guarantee that the sentence agreed upon would be the one ultimately imposed by the court. The Commission concluded, however, that judicial oversight and responsibility for the ultimate sentence should not be diminished. The objection to current practice is the fact that the agreement must refer to a particular sentence, while prosecutors have an obligation to tell the court what they consider to be the *appropriate sentencing range*.
- \* the restriction on laying a lesser charge than that which the evidence supports may at times contradict the ability not to charge at all if public interest so demand. The Commission concluded that prosecutors should not have the power to lay lesser charges than those which the evidence supports because of the potential for inconsistency, bias and prejudice. It is furthermore the role of the court, rather than the prosecution, to decide whether the proven facts warrant a particular sanction.

2.22 Overall the Commission was of the view that a principled practice of charge negotiation would add value to the process and recommended that the following features of plea negotiation needed to be addressed by the Solicitor-General in consultation with the New Zealand Law Society, the criminal bar, the police and other prosecuting agencies:

- C All prosecution agencies should be bound by charge negotiation guidelines;
- C prosecutors should endeavour to ensure, in the course of negotiations, that defendants in similar circumstances receive equal treatment;
- C charge negotiations are not relevant to the sentencing judge's duty and details should not be mentioned in open court, unless raised by the defence;
- C to ensure transparency and accountability in the exercise of charge negotiation discretions, prosecutors should be required to record the outcome of charge negotiations on the file;

- C to ensure that the human rights and dignity of defendants are respected, there should be:
- an express prohibition on prosecutors initially laying more charges or more serious charges than the circumstances warrant;
  - an express prohibition on prosecutors making any offer, threat or promise, the fulfilment of which is not a function of his or her office;
  - an express prohibition on misrepresentation;
  - a requirement that prosecutors offer defendants entering charge negotiations a reasonable opportunity to seek legal advice and to have their counsel present;
  - guidance should be given to prosecutors regarding their obligations when entering charge negotiations with an unrepresented defendant. When defendants are represented, prosecutors should not enter negotiations except when counsel is present or a written waiver of counsel is given;
  - where reasonably practicable, defendants should be present at charge negotiations concerning them, should they so wish;
- C To ensure that the interests of victims are appropriately considered in the process, prosecutors should be required :
- to take into account the victim's views and interests (as far as they are appropriate) in considering whether and on what terms charge negotiations should be conducted; and
  - without compromising the confidentiality obligation to a defendant or the safety of any person, to inform the victim of the outcome of any charge negotiations made and the justification for those negotiations.

2.23 In the discussion paper the Commission pointed out that there were no defence guidelines on the conduct of charge negotiations and requested comment on a whether or not the New Zealand Law Society Rules of Professional Conduct should be expanded to provide defence counsel with guidance on their responsibilities when entering charge negotiations on behalf of a client. Most respondents supported the proposal, especially if the proposals on prosecution

guidelines and duties were to be implemented. The Commission therefore recommended that there should be guidance for defence counsel undertaking sentence negotiation and that in practice such guidance should be developed by the New Zealand Law Society and the criminal bar. The Commission thus suggested that the rules could indicate that discussions regarding the possibility of resolving criminal charges are proper, in some circumstances, and should always be considered.

2.24 A pilot scheme known as “status hearings “ was introduced in the New Zealand District Courts and it operates in district courts throughout the country. The scheme entails that defendants who plead not guilty are referred to a “status hearing” and thereafter the cases proceed as a defended hearing. Status hearings aim to assist in the efficient disposition of cases and to promote the entry of proper pleas at the first opportunity. An evaluation was done of the first 12 months of operation of the scheme in the Auckland District Court and it showed that sentence indications were given in fewer than a quarter of the cases and in most of these cases the defendant pleaded guilty. The conduct of status hearings, however, differs from district to district because no national guidelines were developed.

2.25 At the status hearing judges sometimes discuss with the prosecutor whether the charge that has been laid is appropriate given the summary of facts, and judges may discuss with the defendant or their counsel the basis of their defence. Judges may also indicate the likely type of sentence, for example, imprisonment, community service or periodic detention. This indication should be given only if requested, but practice does vary and there is evidence that some judges proffer an indication of sentence whether it is requested or not. Counsel can of course engage in charge negotiation with the prosecutor before the day of the status hearing, but in practice most do not approach the prosecution until the status hearing itself. The New Zealand Law Commission considers the conduct of status hearings to be administratively expedient, but expressed its concern about a number of issues, including:

- C the position of unrepresented defendants;
- C whether victims' interests are adequately met;
- C the use of sentence indication;
- C charge negotiation; and
- C the proper role of judges - are they, in effect, involved in the decision to prosecute?

2.26 The Law Commission appreciated that from a defence perspective, the desired outcome of all charge negotiations concerns sentencing. However, judicial involvement in such discussions, as occurs in status hearings, is thought to be problematic. In *R v Reece & Ors*<sup>31</sup> the court disapproved of the practice of indicating sentence because of the obvious scope for manipulation and erosion of public confidence in the administration of justice, in particular if this is seen to be done in the course of informal and unstructured discussions between counsel and the trial judge.<sup>32</sup>

2.27 In *R v Edwards*<sup>33</sup>, a case in which the actual sentence considerably exceeded the sentence indication, the Court of Appeal confirmed the principle that it is inappropriate to consider matters of sentence prior to conviction and without the aid of essential pre-sentence and victim impact reports. It expressed the view that indications given in such circumstances must be qualified as to be no real indication at all, and should not be regarded a reliable basis on which to plead. The court furthermore indicated that the process is likely to be relied upon by an accused in determining his plea and warned about the dangers of presiding officers who engage in the process of sentence indication without being fully informed of all relevant sentencing considerations. The Law Commission expressed the **view that problems of this kind clearly indicate the need for legislative intervention to prescribe the proper conduct of status hearings and to ensure consistency throughout the country.** Furthermore, if judges become too actively involved in sentence indication and charge negotiation there is a real danger of the judge descending into the arena by taking an active role to secure a result. The Commission was of the view that if status hearings were to be continued they, should be established and regulated by legislation.

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<sup>31</sup> (22 May 1995) unreported, CA 74-78/95, 3-4, quoted in the Commission's report on page 89.

<sup>32</sup> See also *Pickering v Police* (1999) 16 CRNZ 386.

<sup>33</sup> (25 June 2000) unreported, CA 74/00.

### CHAPTER 3

#### DISCRETION AND POWER OF THE PROSECUTION IN TERMS OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

3.1 It is within the discretion of the prosecutor to decide on which charge to institute or proceed with a prosecution. For instance, a prosecutor may charge an accused who is said to have driven a vehicle recklessly with negligent driving or only with exceeding the speed limit. Such a decision has a material effect upon the ability of the court to sentence the accused because the prescribed maximum sentences differ materially.

3.2 Likewise,<sup>27</sup> upon a plea of guilty, the prosecutor<sup>27</sup> may accept the plea to the charge as it stands, or to an alternative or a lesser competent charge. If a plea on a lesser charge is accepted the main charge falls away.<sup>28</sup> N M Isakov and D van Zyl Smit<sup>29</sup> explain:

In South Africa the power to prosecute is directly controlled by a professional body of prosecutors and negotiations over charges are allowed to take place prior to trial without the consent or approval of the judge. Accordingly **the prosecutor may at any stage before trial accept such reduced pleas as he think fit.**<sup>30</sup> (Emphasis added.)

3.3 However, upon a plea of not guilty the court takes over control of the case and the prosecutor may only accept a change in the plea to guilty on a lesser offence if the court permits him to do so. The prosecutor may, however, stop the prosecution, in which event the accused is

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<sup>27</sup> Sec 6 of the CPA.

<sup>28</sup> *S v Ngubane* 1985 3 SA 677 (A).

<sup>29</sup> "The Decision on How to Plead: A Study of Plea Negotiation in Supreme Court Criminal Matters" 1986 SACC 10.

<sup>30</sup> *S v Ngubane* 1985 3 SA 677 (A); *S v Mlangeni* 1976 1 SA 528 (T); *S v Cordanzo* 1975 1 SA 635 (T).

entitled to an acquittal.

3.4 Section 6 of the Criminal Procedure Act was amended by the Correctional Services and Supervision Matters Amendment Act, 122 of 1991, and provides<sup>31</sup> that the prosecution may at any time before judgment, whether or not an accused has already pleaded to a charge, reconsider the case and upon receipt of a written admission made by the accused in respect of the charge brought against him or a lesser charge, **suspend** the court proceedings and place such person, with his concurrence, under correctional supervision on such conditions and for such period as may be agreed upon. This provision has not yet been put into operation but it will significantly enhance the power of the prosecution to engage in plea negotiations.

3.5 Section 112 (1) (a) of the Act entitles a court to enter a verdict of guilty on a mere plea of guilty - without questioning or evidence - if the presiding officer is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine, or of a fine exceeding R1 500. It is self-evident that the court, in exercising its discretion to convict, will be guided by the State. After all, the prosecutor has at his disposal information needed by the court in order to come to its decision. This, in practice, provides for plea agreements because the State can reach an agreement in terms of which the prosecutor recommends to the court that the section be applied, whereby the defence can ensure that the sentence will fall within a limited range.

3.6 If the R1 500 fine appears to be inappropriate, the court, upon a plea of guilty, questions the accused (section 112 (1) (b)), or a written statement explaining the plea may be filed. The accused may state facts that may favour him in regard to sentence<sup>32</sup> and the State may be prepared to accept or not to dispute the accused's one-sided version as a result of prior plea negotiations.

3.7 If the prosecutor accepts a plea of guilty to an alternative or lesser charge, the prosecutor reduces the issues between the State and the accused to the latter charge. Even if the court records a plea of not guilty, the main charge is not revived and the prosecution proceeds on the

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<sup>31</sup> Sec 6 (1) (c) and (2) as introduced.

<sup>32</sup> Compare *S v Hlangothe* 1979 4 SA 199 (B); *S v Russel* 1981 2 SA 21 (C).

charge to which the plea of guilty was originally tendered.<sup>33</sup>

3.8 The newly introduced section 57A provides for an admission of guilt and payment of fine after appearing in court. It provides that if an accused who is alleged to have committed an offence has appeared in court and is -

- (a) in custody awaiting trial on that charge and not on another more serious charge;
- (b) released on bail; or
- (c) released on warning,

the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding (presently) R 1500,00, hand to the accused a written notice that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again. In this manner a case may be disposed of.

3.9 Section 341 permits of the compounding of certain minor offences, but this applies only to the offences listed in Schedule 3. The Minister may from time to time by notice in the *Gazette* add any offence to the offences mentioned in Schedule 3, or remove therefrom any offence mentioned therein. Schedule 3 is limited to a contravention of a bye-law or regulation made by or for any local authority and certain offences relating to the driving of a motor vehicle.

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<sup>33</sup> Hiemstra *Suid-Afrikaanse Strafproses 277; S v Ngubane* 1985 3 SA 677 (A).

3.10 So much for the discretion of the prosecutor. In addition, the court has powers which may be relevant in this context.

3.11 Section 297 permits of the conditional or unconditional postponement or suspension of a sentence, and caution or reprimand, but only after conviction. The court may in its discretion postpone for a period not exceeding five years the passing of sentence and release the person concerned on one or more conditions, such as:

- \* the payment of compensation;
- \* the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
- \* the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service); and
- \* submission to correctional supervision.

3.12 Section 300 allows a court to award compensation where an offence causes damage to or loss of property. This applies only if there is a finding of guilty and there is an application of the injured person or of the prosecutor acting on the instructions of the injured person.

## **PLEA AGREEMENTS IN PRACTICE**

3.13 There is no doubt that plea discussions and plea negotiation, however informal, do take place in South Africa<sup>34</sup> and are considered legal.<sup>35</sup> This is confirmed by a number of studies on the

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<sup>34</sup> Bekker op cit; Clarke op cit and the authors referred to by them; N M Isakov, Dirk van Zyl Smit "Negotiated Justice and the Legal Context" 1985 *De Rebus* 173; N M Isakov, D van Zyl Smit "The Decision on How to Plead: A Study of Plea Negotiation in Supreme Court Criminal Matters" 1986 *SASK* 3 et seq.; D P van der Merwe *Die Leerstuk van Verminderde Strafbaarheid* unpublished LLD thesis Unisa 1980 185 footnote 7; D P van der Merwe "Informeel Strafvermindering by Moord" 1982 *THRHR* 141; JC Kriegler *Hiemstra Suid Afrikaanse Strafproses* 5th edition(1993) 259.

existence of plea agreements.<sup>36</sup> However, there is no statistical study relating to their prevalence or the degree to which the process limits the number of trials in criminal cases and, except for the judgment in *North Western Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)*,<sup>37</sup> there are hardly any reported judgments in which the process was considered pertinently.<sup>38</sup>

3.14 In the *North Western Dense* case the first applicant, a close corporation, and the second applicant, in his capacity as a member of the first applicant, were charged in a regional court together with Mostert, the production manager of the close corporation. Mostert was charged with culpable homicide only, while the applicants were also arraigned on additional charges. In exchange for Mostert's pleading guilty to the charge of culpable homicide, the State agreed to withdraw all charges against the applicants. It needs to be emphasised that the prosecutor was orally mandated by a senior advocate in the Office of the respondent to accept the deal. Subsequent to this a third party applied for certificate *nolle prosequi* from the respondent. Instead the respondent reinstated the charges against the applicants, who applied to the High Court for an order interdicting the respondent from proceeding with the prosecution. The Court had to decide whether plea bargaining was an integral part of the law of criminal procedure and, if it was, whether it could and/or should interfere with the decision of the respondent to reinstate the charges against the applicants.

3.15 With reference to the initial investigation by the Law Commission into the simplification of criminal procedure and the many articles in legal journals (also cited in the Commission's discussion paper), the court held that plea bargaining as a means of achieving a settlement of the *lis* between the State and the accused was as much an entrenched, accepted and acceptable part of South African law as were negotiations aimed at achieving a settlement of the *lis* between private citizens

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<sup>35</sup> Compare Alfred Allen "Plea Negotiations" 1987 *Obiter* 48.

<sup>36</sup> See note 8.

<sup>37</sup> 1999 (2) SACR 669 (C).

<sup>38</sup> But for *S v Blank* 1995 (1) SACR 62 (A) 82 et seq. Cf N M Isakov, Dirk van Zyl Smit "Negotiated Justice and the Legal Context" (1985) *De Rebus* 173.

in a civil dispute. In fact, the court expressed the view that the criminal justice system would probably break down if the procedure were not to be followed. The court held further that although it may need elaboration, an accurate description of a plea agreement is that it is the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence. The court also found that a deal in the sense of a negotiated settlement of the *lis* between the applicants, Mostert and the State had been reached and that deal fell within the definition of a negotiated plea agreement.

3.16 The court found further that the Director of Public Prosecutions was not obliged to institute a prosecution whenever a *prima facie* case was made out and a private person demanded a certificate *nolle prosequi*. The Directors of Public Prosecutions were possessed of a discretion and were clothed with the authority to decline to prosecute an accused person, even when a *prima facie* case had been made out against that person. It would therefore be appropriate for the Court to interfere with the decision-making of the respondent if the dictates of justice so demanded. The Court took the view that it would be palpably unfair to allow the respondent to enjoy and to continue to enjoy the benefits of the plea agreement reached, but to be able to avoid doing what it was clearly contemplated he would do when the agreement was reached. Accordingly, the Court held that the respondent had to be held to his part of the bargain, and a basic rule of such procedure should be that a prosecutor should stand by an undertaking solemnly given during the negotiations leading up to a plea settlement. Instances where solemn agreements had been concluded between accused persons and the prosecuting authorities, in terms whereof accused persons gave up certain rights in exchange for an abandonment of prosecution, are therefore instances where a stay of prosecution is the appropriate remedy where the State subsequently appeared to renege on what it had offered as a *quid pro quo*. The court accordingly granted an order permanently staying the prosecution of the applicants.

3.17 According to a study conducted as early as 1983 by D van Zyl Smit and N M Isakov<sup>39</sup> in the Cape Supreme Court, informal plea negotiations are usually initiated by the party who is in a vulnerable position, and depend very much on the personalities of and the mutual trust between the prosecutor and the defence. During discussions with thirteen Cape judges, divergent views were

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<sup>39</sup> "The Decision on How to Plead: A Study of Plea Negotiation in Supreme Court Criminal Matters" 1986 SACC 10 et seq.

expressed on plea negotiations. The two extreme views were:

**I refuse to have anything to do with plea negotiation at all.** I have an anathema to the US system because a judge has no knowledge of the case whereas the prosecutor and defence do have. **It is not part of our system for a judge to even suggest a plea.** In my view in no circumstances should a prosecutor approach the judge before trial to ask the judge if it would be appropriate were the prosecutor to accept a plea.

as against:

I often call in both counsel, and say, go and settle this matter. **I brow-beat them a bit into a plea and say: Surely you don't think this is murder; surely it is culp [culpable homicide].** Such discussion is between myself and both counsel, assessors excluded. I don't think it's important if the accused is found guilty of culp or of murder with extenuating circumstances. He is seemingly punished for the act he committed - no matter what legal label is attached to it.

3.18 The authors<sup>40</sup> came to the conclusion that plea negotiation should be permitted and even be encouraged, since it has the tacit approval of jurists involved, that substantive justice is sometimes a more important consideration than procedural regularity, and that the majority of judges admit that they are involved in plea negotiation in some way or other.

3.19 In a recent publication,<sup>41</sup> the practice of plea negotiations in South African courts was examined by Catherine Clarke. The findings in respect of attitudes towards plea negotiations are of importance and are referred to in some detail:

As the South African criminal courts evolve to be more efficient and equitable, the problems experienced in the US system can be anticipated and possibly avoided. Indeed, if there is a theoretical bar to plea negotiating in South Africa, it has been largely ignored in more recent years in favour of a more participatory model of justice. A participatory model of criminal justice makes an effort to hear community concerns, victims rights groups and incorporate rehabilitation and restitution programmes such as NICRO.

New visions of the plea negotiation process see it as a process to serve the accused, the

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<sup>40</sup> "The Decision on How to Plead: A Study of Plea Negotiation in Supreme Court Criminal Matters" 1986 SACC 18.

<sup>41</sup> 1999 Cilsa 141 "Message in a bottle for unknowing defenders: Strategic plea negotiations persist in South African courts" Catherine T Clarke.

system and community. For example, a balanced plea agreement can move minor cases out of the system to make room for more important trials serving efficiency goals. Likewise, a creative plea agreement can mandate a rehabilitative programme for the accused, and establish a restorative justice plan to compensate a victim. Open-minded attitudes held by all parties involved increases the opportunities for just and restorative case dispositions.

3.20 Clarke discussed a number of issues:<sup>42</sup>

### **Who negotiates?**

She found that negotiation on behalf of the State may be by the *trial prosecutor or senior prosecutor, a representative of the Attorney-General's office or the investigating officer*:

Trial prosecutors usually need approval for a negotiated plea agreement from a senior control prosecutor, especially if a withdrawal of charges is involved.

The negotiations sometimes take the form of a group discussion between the attorney, investigating officer and senior prosecutor. On occasion a magistrate or judge will be present during these informal discussions.

### **What can a defender negotiate for?**

A defence lawyer can negotiate for anything and if the defender is properly prepared, most prosecutors were willing to listen to almost any proposal. . . The burden remains on the defence lawyer to understand the nuances of each case, then be creative in considering alternative dispositions from the pre-trial stage through to the sentencing stage.

### **What types of plea agreement exist?**

There is a wide spectrum of plea agreements. The most important factor distinguishing plea agreements is the question of whether the accused will receive a criminal record at the end of the plea negotiations. . . .

### ***Charges withdrawn with no community service or other punishment attached***

Charges are withdrawn as a result of an agreement between the defence lawyer and prosecutor. The disadvantage for the accused is that the withdrawal of charges is provisional, but an agreed withdrawal usually puts an end to the case. Withdrawal is often motivated by humanitarian grounds or insufficiency of evidence.

### ***Community service or diversion alternatives with a plea of guilt; no record attaches with successful completion of service hours***

Diversion alternatives are primarily for juveniles in South Africa, however, some adult cases are diverted. Diversion alternatives in South African trial courts are typically negotiated

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<sup>42</sup> At 156 *et seq.*

through formal written representations by an accused. The agreement is usually in the form of a written contract with an NGO (like NICRO) or with the prosecutor's office directly.<sup>43</sup> The contract is concluded between the accused, a supervisor from a placement agency, and a senior public prosecutor. An accused must complete a diversion programme or a designated community service project, otherwise charges will be reinstated. Once the community service hours have been completed the prosecutors sign the docket off so that no record exists. Some prosecutors prefer to postpone a case until all conditions of diversion (eg psychiatric counselling with community service hours) have been completed successfully rather than withdraw the charges altogether from the start.

***Negotiate to have charges withdrawn and an admission of guilt fine fixed (section 57 of the Criminal Procedure Act) resulting in no formal criminal record for the accused***

The prosecutor may agree to accept an 'admission of guilt fine' which is fixed.

***Charge bargaining***

It is common to negotiate serious charges down to lesser charges, for example, to agree to change the charge to one of culpable homicide on a charge of murder. The issues in the case are thereby reduced.

***'Record' pre-trial agreements***

There are several types of plea agreements where a defence lawyer negotiates either an oral or written plea of guilt, the client receives a criminal record, and then the type of retribution (and sometimes restitution) imposed varies widely. Those discussed earlier in this report are not repeated.

3.21 Clarke concluded:

Pre-trial negotiations can improve court efficiency by reducing backlogs of outstanding cases so that the more serious cases proceed to trial and minor cases can be resolved without a full trial. Other creative dispositions like restorative justice, community service, and restitution-based sentencing alternatives can be proposed by defence-lawyers during plea negotiations.

These plea negotiations referred to by Clarke are all permitted - at least by implication - by the Criminal procedure Act.

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<sup>43</sup> See, eg, the Wynberg prosecutor's 'Pre-trial Community Service Contract' whereby an accused's case *is* withdrawn and community service can be performed in the courthouse.

## SENTENCE BARGAINING

3.22 Sentence bargaining is not regulated by the Criminal Procedure Act, and most judicial officers and lawyers would regard it as improper. For example, in *S v Blank* the attorney claimed he thought that the trial judge had 'agreed' to a sentence of non-incarceration prior to the court hearing. The trial judge later wrote emphatically: 'I at no stage inferred, nor was it either stated or suggested to me, that I was being asked to give an indication as to whether or not I would consider myself bound, in view of the attitude of the state on sentence, not to impose imprisonment. Had counsel requested any such indication I would have terminated the meeting forthwith.'

3.23 Clarke, nevertheless, found evidence of some agreements:

**There are many pre-trial negotiations that occur where alternative sentencing options are discussed in exchange for a guilty plea; but final sentencing discretion remains with the magistrate or judge.** Most prosecutors and defence lawyers insist that there is no sentencing bargaining whatsoever in South African criminal courts because of the deeply entrenched principle of judicial sentencing discretion. Sometimes, however, discussions occur in the chambers of the sentencing magistrate or judge. A judge may give an indication to the defence to plead guilty - usually to a lesser charge or competent verdict - and/or to the prosecutor to accept a guilty plea to such a lesser charge. However, **the defence would ideally like to know what sentence can be expected.** Generally, judges state that although they are prepared to discuss pleas with counsel they would not indicate what sentence would be imposed if a plea of guilty were proffered. Some legal scholars assert that judges are adamant in not indicating what sentence would be imposed. Yet, an outside observer can see that some judges are less removed from the negotiation process and might move along a settlement with some indication of the judge's thinking. **As the pure accusatorial model melts away in many countries judges participate more frequently in pre-trial discussions.**

### ***Negotiate for correctional supervision instead of incarceration***

The result of some pre-trial negotiations is that an accused pleads guilty to specific charges and an informal agreement is struck whereby the accused is 'likely' to be sentenced to non-custodial programme such as correctional supervision as a part of a suspended sentence.<sup>44</sup>

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<sup>44</sup> CPA s 276(A) Correctional Supervision ('Trial court to truly consider correctional supervision as a sentencing option'); CPA s 276(1)(i) Nature of Punishments ('subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted offence, namely: (i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.').

Again, these types of sentencing agreements are not binding on the sentencing magistrate or judge.

## **CHAPTER 4**

### **THE COMMISSION'S RECOMMENDATIONS IN EARLIER DISCUSSION DOCUMENTS**

#### **THE COMMISSION'S RECOMMENDATIONS IN THE FIRST WORKING PAPER**

4.1 In its initial working paper the Commission recommended that statutory provision be made for a procedure of plea negotiation and the conclusion of plea agreements, and that the procedure should be as non-prescriptive as possible.

#### **COMMENT ON THE COMMISSION'S INITIAL PROPOSAL IN THE WORKING PAPER**

4.2 The Commission's proposal elicited support as well as criticism. These comments are now dated and did not raise any pertinent point not dealt with earlier in this report, and are not repeated.

#### **THE COMMISSION'S EVALUATION IN ITS INTERIM REPORT**

4.3 The Commission was of the opinion that the practice of plea negotiation in South Africa could make an important contribution to the acceleration of the process. Statutory measures could be provided to meet legitimate objections so that the procedure could eventually be used to improve the effectiveness of the system of criminal law, while still maintaining established principles.

4.4 The Commission carefully considered the objections raised. The Commission's view was, however, that the practice should be statutorily recognised as this could make an important contribution to the acceleration of proceedings while the objections, which apply equally to the informal practice, could likewise be met by legislation.

#### **THE COMMISSION'S RECOMMENDATION IN THE INTERIM REPORT**

4.5 The Commission recommended that legislation be adopted by means of the addition of the Criminal Procedure Act of a new section 106A as follows:

"106A. Plea discussions and plea agreements. - (1) The prosecutor and the accused or his legal representative may hold discussions with a view to reaching an agreement acceptable to both parties in respect of plea proceedings and the disposal of the case.

(2) Any agreement reached between the parties shall be reduced to writing and shall state fully the terms of the agreement and any admissions made and shall be signed by the prosecutor, the accused, the legal representative and the interpreter, as the case may be.

(3) The contents of such an agreement shall be proved by the mere production thereof by both parties: Provided that in the case of an agreement concluded with an accused who is not legally represented the court shall satisfy itself that the accused understands the contents thereof and entered into the agreement voluntarily and without improper influence.

(4) The judicial officer before whom criminal proceedings are pending shall not participate in the discussions contemplated in subsection (1): Provided that he may, before an agreement is reached, be approached by the parties in open court or in chambers regarding the contents of such discussions and he may inform the parties in general terms of the possible advantages of discussions, possible sentencing options or the acceptability of a proposed agreement.

(5) The judicial officer shall before the accused is required to plead in open court or, if he has already pleaded, before judgment is given, be informed that plea discussions are being conducted or are to be conducted or that the parties have reached a plea agreement as contemplated in subsection (1).

(6) If after discussions the parties have concluded a plea agreement and the court has been informed as contemplated in subsection (3), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court: Provided that if the court is for any reason of the opinion that the accused cannot be convicted of the offence with which he is charged or of the offence in respect of which an agreement was reached and to which he pleaded guilty or that the agreement is in conflict with the provisions of section 25 of the Constitution of the Republic of South Africa or with justice, the court shall record a plea of not guilty in respect of such a charge and order that the trial proceed.<sup>45</sup>

(7) No evidence of a plea agreement or of admissions contained therein or of statements relating to such agreement shall be admissible as proof of guilt or credibility in subsequent criminal proceedings."

## **THE RESOLUTION ADOPTED BY THE PORTFOLIO COMMITTEE ON JUSTICE**

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<sup>45</sup> This is a reference to the Interim Constitution.

4.6 When considering the Commission's recommendations during 1996, the Portfolio Committee on Justice (Senate) concluded that the practicability of the procedure should first be established with regard to the unique South African circumstances in view of significant differences between our criminal justice process and those of other jurisdictions where such procedure is followed. During its deliberations on the Bill its attention was drawn to the fact that with regard to plea bargaining, the prosecution has limited authority to make concessions favourable to the accused in respect of the sentence to be imposed by the court, and this therefore affects its ability to conclude a plea agreement with the defence. In foreign jurisdictions, where the process of plea bargaining has a significant impact on the ability of the courts to cope with heavy caseloads, for example in the United States, the role and ability of the prosecuting authority to influence the sentence to be considered by the court differs significantly from the position in South Africa. The matter was referred back to the Department of Justice with a request to re-submit a recommendation to Parliament. Subsequently the Department requested the Law Commission to reconsider the matter afresh in the light of the resolution adopted by the then committee.

#### **THE COMMISSION'S RE-EVALUATION IN THE SECOND DISCUSSION PAPER**

4.7 **Addressing first the concerns expressed by the portfolio committee** in 1996, the matter of the practicability in the unique circumstances of South Africa has to be addressed. In the Commission's second discussion paper the view was expressed that the difficulty of the Portfolio Committee was in part due to the wide definition proposed by the Commission. This covered all agreements between the State and the accused. As pointed out in this report, the Criminal Procedure Act, because it gives a wide discretion to the prosecution, both directly and indirectly, does provide for plea agreements. What it does not cover is sentence agreements. One cannot assess the impact of such agreements simply because without having any opportunity to test the system, it is not possible to evaluate it in practice. However, studies show that plea (and even sentence) negotiation is alive and well and performs an important part in our criminal justice system.

4.8 As has been pointed out, by enacting the amendment to section 6 of the Act, statutory recognition has been given to sentence agreements. The amendments have not been put into operation because of administrative concerns and problems.

4.9 It is true that our criminal justice system differs from that in the USA in some material

respects, but as far as the ability to negotiate a plea is concerned, there are no differences of any note. Our system is capable of handling this if responsibly dealt with. But in order to prevent the unforeseeable, an important limitation was introduced into the redrawn proposals contained in the second discussion paper: **The procedure was only to be available on a test basis in certain courts.**

4.10 The Commission also considered the issue of **constitutionality** of the procedure in the light of the qualifications to the application of the proposed procedure to certain courts only. The Commission was satisfied that such a differentiation could be justified on a number of grounds, for example, there is a marked difference in competence of court personnel in lower and higher courts, which would lessen the risk run by an accused in higher courts.

4.11 Another serious matter is the **backlog in courts** and the **inability of the Legal Aid Board** to finance the defence of the indigent. **The Commission was of the view that it would be easier for practitioners to permit their clients who are guilty to plead guilty if the outcome of the case is predictable.**

4.12 **Protection of the victim** from publicity and against having to be subjected to cross-examination has also become a sensitive issue. Plea agreements may limit such exposure.

4.13 Since the Commission's recommendation in the interim report, **legislation providing for minimum sentences** in respect of certain offences has been passed by Parliament. The Criminal Law Amendment Act, Act 105 of 1997, provides for minimum sentences for certain serious offences. It is clear from the provisions of this Act and the circumstances under which minimum sentences are prescribed, that it significantly increases the ability of the prosecution to influence the imposition of sentence by preferring lesser charges or accepting pleas of guilty on lesser charges. The scope for sentence negotiation is, however, in these cases thereby eliminated.

4.14 In view of this development the Commission was of the opinion that the practice of plea negotiation in South Africa could make an important contribution to the acceleration of the process. Statutory measures should be provided to meet legitimate objections so that the procedure could eventually be used to improve the effectiveness of the system of criminal law, while still maintaining

established principles.

## **PRINCIPLES ADOPTED BY THE COMMISSION IN THE SECOND DISCUSSION PAPER**

4.15 The Commission proposed that the present study be limited to sentence agreements. The Commission was of the view that other plea agreements are sufficiently provided for in the Criminal Procedure Act and do not require regulation since there is no evidence of abuse of these provisions.

**Out-of-court settlements (deviations) of criminal cases - for example, as provided for in the amended section 6 - are now the subject of a separate investigation and proposal.**

4.16 There are two types of sentencing agreements. The one is where the prosecution, in exchange for a plea of guilty, undertakes to submit to the court a proposed sentence or agrees not to oppose the proposal of the defence. This type is known in our law (cf *Blank's case supra*). The agreement has no effect on the court and does not require any particular action from the court. The court can ignore the agreement or implement it. If it ignores the agreement, the plea of guilty stands, as does the sentence. The Commission concluded that there was no reason why this procedure should be dealt with by way of legislation.

4.17 The second type is the case where the accused agrees with the state to plead guilty provided an agreed sentence is imposed. The Commission concluded that it is this type of agreement that should be legalised and regulated, subject to what follows.

- \* The agreement must be reached before the plea. In the US the bargain must be struck before the trial. Otherwise practical problems arise. If the court does not accept the agreement, the trial will have to restart before another court.
- \* Such an agreement will become binding on both the accused and the prosecution as soon as the plea is entered, but it does not bind the court.
- \* The agreement must be in writing and must contain a preamble, setting out the relevant rights of the accused which have to be explained to him before the agreement is concluded.

- \* If the agreement is reached, the accused pleads guilty and the sentence agreement is then disclosed to the court.
- \* The court, before convicting the accused, has to question the accused to ascertain whether the accused understood his rights, that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts. In other words, the procedure of sections 112 (1) (b) and (2) comes into operation.
- \* This, at the same time, enables the court to assess whether the agreed sentence is appropriate or inappropriate.
- \* The court then accepts or rejects the agreement.
- \* If it accepts it, the accused is found guilty in terms of the plea and the agreed sentence is imposed.
- \* If the court is of the view that it would have imposed a lesser sentence than the agreed sentence, it may likewise find the accused guilty but impose the lesser sentence.
- \* If it rejects the agreement, the accused is so informed. The accused then has a choice: he may abide by his plea and the matter proceeds as usual. He is, however, entitled to withdraw his plea, in which event the matter has to begin anew before another judicial officer. No reference may then be made to the plea agreement or the proceedings before the first court.
- \* The Commission gave consideration to providing victims' input in the negotiations but came to the conclusion that it would be in conflict with the general scheme of the Criminal Procedure Act and would be impractical. The Commission, however, allowed for a provision in terms of which the prosecutor should consider the views of the victim when engaging in negotiations.
- \* The judicial officer should not instigate or take part in any negotiations. To invite the

judge to preside over negotiations appears to be fraught with dangers.

- \* Once a person is convicted and sentenced in terms of an agreement, he should not have a right of appeal against either. Review would be the proper remedy in the event of undue influence or the like.

## **RECOMMENDATION**

4.18 The Commission recommended that the Criminal Procedure Act be amended to provide for sentence agreements, and the following amendment was submitted for comment:

**CHAPTER 16A**  
**PLEA AND SENTENCE AGREEMENTS**

**Plea agreements in respect of plea of guilty and sentence to be imposed by court**

- 111A.** (1) (a) The prosecutor and an accused, or his or her legal adviser, may before the accused pleads to the charge, enter into an agreement in respect of-
- (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
  - (ii) an appropriate sentence to be imposed by the court if the accused is convicted of the offence to which he or she intends to plead guilty.
- (b) The prosecutor may only enter into an agreement contemplated in paragraph (a) -
- (i) after consultation with the police official charged with the investigation of the case and, if reasonably feasible, the complainant; and
  - (ii) with due regard to the nature of and circumstances relating to the offence, the accused and the interests of the community.
- (c) The prosecutor, if reasonably feasible, shall afford the complainant or his or her representative the opportunity to make representations to the prosecutor regarding -
- (i) the contents of the agreement; and
  - (ii) the inclusion in the agreement of a compensation order referred to in section 300.
- (2) An agreement between the parties contemplated in subsection (1), shall be reduced to writing and shall -
- (a) state that, before conclusion of the agreement, the accused has been informed -
    - (i) that he or she has a right to remain silent;
    - (ii) of the consequences of not remaining silent;
    - (iii) that he or she is not obliged to make any confession or admission that could be used in evidence against him or her;
  - (b) state fully the terms of the agreement and any admissions made; and
  - (c) be signed by the prosecutor, the accused, the legal adviser and the interpreter, as the case may be.
- (3) The presiding judge, regional magistrate or magistrate before whom criminal

proceedings are pending, shall not participate in the discussions contemplated in subsection (1): Provided that he or she may be approached by the parties in an open court or in chambers regarding the contents of the discussions and he or she may inform the parties in general terms of the possible advantages of discussions, possible sentencing options or the acceptability of a proposed agreement.

- (4) The presiding judge, regional magistrate or magistrate shall, before the accused is required to plead, be informed by the prosecutor in open court that the parties have reached an agreement as contemplated in subsection (1) and he or she shall then inquire from the accused to confirm the correctness thereof personally.
- (5) If the parties have concluded an agreement and the court has been informed as contemplated in subsection (4), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court, where after that agreement, subject to the provisions of subsections (6), (7) and (8), binds the prosecutor and the accused.
- (6) Where the contents of an agreement has been disclosed in open court, the presiding judge, regional magistrate or magistrate shall question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty and whether he or she entered into the agreement in his or her sound and sober senses freely and voluntarily and without improper influence, and may –

  - (a) if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence; or
  - (b) if he or she is for any reason of the opinion that the accused cannot be convicted of the offence in respect of which the agreement was reached and to which the accused has pleaded guilty or that the agreement is in conflict with the accused's rights referred to subsection (2)(a), he or she shall record a plea of not guilty in respect of such charge and order that the trial proceed.
- (7) Where an accused has been convicted in terms of subsection (6)(a), the presiding judge, regional magistrate or magistrate shall consider the sentence agreed upon in the agreement and if he or she is –

  - (a) satisfied that such sentence is an appropriate sentence, impose that sentence;
  - (b) of the view that he or she would have imposed a lesser sentence than the sentence agreed upon in the agreement, impose the lesser sentence; or
  - (c) of the view that the offence requires a heavier sentence than the sentence agreed upon in the agreement, he or she shall inform the accused of such heavier sentence he or she considers to be appropriate.
- (8) Where the accused has been informed of the heavier sentence as contemplated in

subsection (7)(c), the accused may -

- (a) abide by his or her plea of guilty as agreed upon in the agreement and agree that, subject to the accused's right to lead evidence and to present argument relevant to sentencing, the presiding judge, regional magistrate or magistrate proceed with the sentencing proceedings; or
- (b) withdraw from his or her plea agreement, in which event the trial shall proceed *de novo* before another presiding judge, regional magistrate or magistrate, as the case may be.

(9) Where a trial proceeds as contemplated under subsection 6 (b) or *de novo* before another presiding judge, regional magistrate or magistrate as contemplated in subsection (8)(b) -

- (a) no reference shall be made to the agreement;
- (b) no admissions contained therein or statements relating thereto shall be admissible against the accused; and
- (c) the prosecutor and the accused may not enter into a similar plea and sentence agreement.

(10) A conviction or sentence imposed by any court in terms of an agreement under this section shall not be subject to appeal.

## CHAPTER 5

### COMMENTS ON THE COMMISSION'S PROPOSALS IN THE SECOND DISCUSSION PAPER

5.1 The Commission's second discussion paper elicited comments from a number of role-players which included Judges, Magistrates, Directors of Public Prosecutions, Law Societies, and academics. The comments can broadly be divided into one of the following categories:

- \* Objections to the proposed procedure;
- \* Support for the statutory recognition of sentence agreements coupled with recommendations for amendments to certain provisions; and
- \* Comments on aspects not dealt with in the discussion paper.

These are discussed below.

### OBJECTIONS TO STATUTORY RECOGNITION OF SENTENCE AGREEMENTS

5.2 Most respondents support the enactment of legislation which will regulate sentence agreements. Some of the support is, however, subject to proposals for amendments to the draft Bill contained in the discussion paper.<sup>46</sup> (The proposed amendments will be discussed in Chapter 6.)

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<sup>46</sup> The judges of the High Court Durban, Advocate MT Chidi of the Office of the Premier, Northern Province, Mr JHS Hiemstra of the Office of the Director of Public Prosecutions Freestate, Mr J Jansen van Vuuren, Regional Court Magistrate, the Office of the Director of Public Prosecutions Witwatersrand, Director of Public Prosecutions Cape of Good Hope, Legal Component of the Detective Service and Crime Intelligence, Mr RP Stuart Deputy Director of Public Prosecutions, Pietermaritzburg, MS Padayachee Lawyers for Human Rights Pietermaritzburg, the National Council of Women of SA, SJ Marais magistrate Steynsburg, H VD P Visagie magistrate Steytlerville, Mr Patel attorney, advocate M Stander of the Office of the Director of Public Prosecutions Cape Town, Professor P Bekker, Unisa, Mr J Henning, Deputy National Director of Public Prosecutions.

5.3 Objections in principle to the proposals have been received from Mr S Kalimashe of the Legal Advisory Services of the Eastern Cape Government, who is extremely critical of the discussion paper; Ms S van der Walt, Chief Magistrate Pretoria North, who is of the view that the *status quo* should be respected because the proposed provisions will interfere with the magistrate's independence; and Advocate PBC Luyt, senior advocate in the Office of the Director of Public Prosecutions Pretoria, who is of the view that the procedure proposed will not have the effect of simplifying procedures, but will rather be more time-consuming with an added burden on the administration of the courts.

## THE COMMISSION'S EVALUATION

### Assessment of plea negotiations

5.4 Bekker<sup>47</sup> points out that a number of reasons have been presented to explain why the plea bargaining system - really sentencing agreements - has reached its present proportions in the USA. They are these:

- (a) the rise of professional police and prosecutors who develop and select their cases more carefully, so that there are relatively few genuine disputes over guilt or innocence left to be resolved by juries;
- (b) the rise of specialisation and professionalism on the defence side and the broadening of the right to counsel;
- (c) the fact that jury trials have become cumbersome and expensive;
- (d) the due process revolution which places a heavy burden upon the prosecution and gives the accused additional rights which strengthen his bargaining position;
- (e) the expansion of substantive criminal law;
- (f) the desire to reach a sentence that fits the accused and the crime and does not fall under a rigid sentencing statute;
- (g) administrative necessity.

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<sup>47</sup> Op cit 178-179.

5.5 Some of these considerations do not apply to South African conditions.<sup>48</sup> The inducement to reach an agreement differs depending from whose perspective the matter is seen. For the accused it will be to have a degree of certainty about the outcome of the trial, e g, in the light of the wide sentencing discretion of courts, the accused has an interest to know what sentence will be imposed should he be found guilty. On the other hand, there will be no incentive to plead guilty if the accused has reason to believe that the police may have been incompetent in the investigation or that the lack of competence of the prosecution may lead to an acquittal. Bekker<sup>49</sup> points out that US prosecutors are almost always elected public officials. Conviction rates are important for their political future. They consequently do not press charges unless the chances of convicting the accused are good. In South Africa the position appears to be otherwise and often, especially in lower courts, the prosecution does not always consider the probability of a conviction before proceeding with a criminal matter.

5.6 For the prosecution the main reason to enter into sentence negotiation especially would be to expedite matters and to save time and costs. The most important advantage gained through plea negotiation is the part that it plays in reducing the number of cases that have to go to trial. Statistics in New York City indicated that 85% of all guilty pleas tendered were to less serious charges than those originally brought.<sup>50</sup> In the USA plea negotiation is regarded as a necessity and an important contributing factor in coping with overburdened court rolls. Without plea negotiation the criminal justice system would collapse. The process contributes to the speedy and economical disposal of trials.

### **Arguments supporting objections to the proposed procedure**

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<sup>48</sup> Mr Kamisane is extremely critical of the article written by Catherine Clarke and the Commission's reference thereto. In his view she does not have the language of a seasoned criminal lawyer in actual court practice in South Africa and has language that clearly identifies her as a non-South African. In his view we do not have any American problems to anticipate in our country and we're not Americans and should not be trying to be American. In his view an obsequiousness to American models is revealed in the discussion paper with distressing lack of proud homegrown creativity.

<sup>49</sup> Op cit 185-186.

<sup>50</sup> D P van der Merwe *Die Leerstuk van Verminderde Strafbaarheid* 186.

5.7 The main arguments advanced in objection to statutory recognition of sentence agreements are:

- (a) “plea bargaining” already exists in practice and there is no need to legislate for a procedure which is already under excellent control.<sup>51</sup>
- (b) the problem of secrecy.
- (c) the proposed procedure will interfere with the independence of the judiciary,
- (d) it will not simplify matters but will rather be a more time-consuming process with an added burden on the administration of the courts.

5.8 These objections to the system are not novel. The Commission was fully aware of them and dealt with them in the previous reports and came to the conclusion that there are no substance in these objections, a view to which the Commission adheres.

It is true that there are various dangers inherent in the practice of plea negotiation and therefore its utility and the desirability as a vehicle for furthering the ends of justice may be questioned. The dangers inherent in the practice are precisely those mentioned in the objection to statutory recognition of the process, and it is precisely because of the fact that

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<sup>51</sup> Mr S Kalimashe. Mr TW Levitt, Regional Court Magistrate, Durban, is of the view that since the discussion paper accepts that informal plea bargaining is alive and well in South Africa, the question immediately arises as to the need to codify the procedures when our criminal procedure is markedly different to that of countries such as the USA and Canada. Two issues are raised, firstly the rule against prescription to a judicial officer as to what sentence to impose (minimum sentences aside) defeats the objective of the procedure and therefore no certainty of sentence can be guaranteed and secondly, existing legislation (the Criminal Procedure Act) makes provision for the exact purpose and intent of plea bargaining.

the process is not regulated that these dangers are real. It is because of these dangers that the process of plea negotiation can become a shadowy justice system unto itself - one that threatens to pervert the criminal justice process as we know it and diminishes its stature in the eyes of the public. It is a common response of abolitionists to characterize the plea negotiation process as unnecessary, improper and degrading to the criminal justice system. The common criticism is that the process is an irrational, unfair and secretive practice facilitating the manipulation of the system and the compromise of principles.

The independence of the judiciary is expressly preserved because the presiding officer retains his or her sentence discretion and is not bound by the agreement. The agreement merely facilitates the sentencing process.

5.9 The Commission carefully considered these objections as well as the traditional objections to the practice, and is of the view that plea “bargaining” or plea negotiation in itself is not a distasteful or inherently shameful practice. It ought not necessarily be characterised as a failure of principle. Furthermore, the Commission is of the view that the term “plea bargaining” is not an appropriate description of the process. Justice should not be seen to be something that can be purchased at a bargaining table. The Commission therefore prefers the more appropriate and more neutral term “sentence agreements”.

5.10 The Commission is of the view that although the Criminal Procedure Act contains some provisions which are compatible with a process of plea negotiation (see discussion in chapter 3), the process has never been given statutory recognition. In this regard the Commission is in agreement with the views of Mr Justice JC Kriegler<sup>52</sup> that the process should be recognised and regulated:

Hier te lande is daar geen wette-regtelike of regterlike voorskrifte nie terwyl geen ingeligte sal wil voorgee dat die praktyk nie jarelank reeds algemene toepassing vind

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<sup>52</sup> *Hiemstra Suid Afrikaanse Strafproses* 5<sup>th</sup> edition (1993) at 259.

nie. Dit kom nie daarop aan of dit prinsipieel verwerplik dan wel 'n onvermydelike meeloper van die akkusatoriese stelsel 'n noodsaaklike tydsbesparingsmiddel is nie.

Dis 'n werklikheid wat sal voortbestaan, oogluikend en ongekontroleer soos tans of, kennelik verkieslik, onbeskaamd raakgesien en behoorlik georden. Die feit dat die oorgrote beskuldigdes in ons laer howe nie regsbystand geniet nie - en bowendien meermale gebuk gaan onder taal-, kultuur- en opvoedkundige belemmerings - benadruk die behoefte aan gedragsreëls.

5.11 In addition the Commission is of the view that it would be better to address the objections to the process by regulation than to allow it to continue unregulated. If practised properly it should be recognised as the expression and merging of two complementary principles: those of efficiency and restraint. In this regard efficiency means more than just simple expediency or thrift. The principle of efficiency favours, among other things, accuracy. The goal of accuracy in plea negotiation requires as a general rule that any offence to which the accused agrees to plead guilty be a realistic reflection of the accused's conduct to the extent that it can be proved, and that any sentence the prosecutor agrees to recommend or not to oppose be justifiable in terms of general sentencing principles. At the same time the principle of efficiency demands an acknowledgement of the fact that the concept of cost has moral and human dimensions. Pre-trial settlement therefore ought to be put on some rational and organised basis which currently does not exist.

5.12 The Commission deems it necessary to deal in some detail with the traditional objections to plea negotiations because they are relevant to the objections raised by the respondents to the discussion paper.

5.13 An important objection to plea negotiation is the **perception of secrecy**. As put by Mr Kamishane:

... a veil is dropped between the forces that prevailed upon the accused to plea bargain and the terms of the plea bargain along with what the parties choose to tell the judge. Some of these forces may represent reprehensible dealings and may be marshalled by incorrigible criminals relying on their ability and opportunity to erase direct evidence, destroy real evidence and intimidate state witnesses and thereby gain an upper hand in plea bargaining. A custom may develop according to which circumstantial evidence may have its force and credibility eroded, given the easier and shorter way out of a long trial, namely; plea

bargaining. Great skills at deception may have a chance to be developed such as great skill in putting out that the prosecutor and the investigator know more about the crime than what they really do know.

The argument is that it is better to have an open trial than to settle the case in secret in the prosecutor's office.

The public's attitude to private agreements is one of suspicion, and the consequences of secret transactions have a serious impact on the image of the administration of justice.

**This argument is ill-conceived if the process is properly regulated. If, for example, the agreement must receive the stamp of approval of the court, the degree of secrecy is limited. Sometimes secrecy is preferable, for instance in order to protect the innocent victim or outsiders who have nothing to do with the case. To have everything settled in an open trial is unrealistic and unattainable. The criminal justice system cannot bear the strain and costs, including the cost of defending the indigent.**

**The concerns about the shadowy practice of plea negotiations are equally applicable to charge negotiations as they are applied in practice at present, with no formal recognition in legislation.**

5.14 Another is the **suppression of evidence**. Where the State enters into an agreement with the defence to exclude evidence that may be relevant to sentencing or to the nature of the charge or the circumstances under which the offence was committed, the State may be in breach of its obligation to the court and the community. At the same time, the court's function of imposing punishment in the exercise of its discretion is reduced to a symbolic approval of the agreement.

**This point of criticism can also be addressed if the process is properly regulated. In the accusatorial system such as ours, the court currently does not control the evidence and the parties are free to "suppress" or limit the scope of the evidence. In addition, the accused has the right to remain silent, and when he speaks, to choose what he wishes to say. If properly regulated the problem can be addressed.**

5.16 Plea agreements may be characterised by the **absence of judicial control**. The terms of

an agreement and the negotiation process are usually matters for the conscience of the Director of Public Prosecutions and the prosecutor, and the court is unable to control them.

**The objection is based upon a misconception. The court may not be able to control the negotiations, but it is able and obliged to control the outcome of the negotiations. No court is bound by the agreement reached and because of judicial control, the parties are discouraged from reaching an agreement which may not pass judicial muster.**

5.17 The **participation of a judicial officer** in the negotiation process may be difficult to reconcile with the role of impartial administrator of justice. It could create the impression that the judicial officer as a person in a position of authority is exerting undue influence to exact a plea of guilty.

**Again, this matter can be regulated. If one accepts that the judicial officer is not supposed to take part in the negotiation, the point falls away.**

5.18 It could be argued that not all plea agreements give rise to voluntary pleas of guilty. There are various ways in which attorneys, public prosecutors and presiding officers could **improperly influence** an accused to plead guilty. A prosecutor could bring charges against an accused that are in no way supported by evidence simply to place himself in a better bargaining position so as to force a settlement. He could also charge an accused with the most serious offence possible to achieve the same object. An attorney could have ulterior motives in "forcing" an accused into a settlement. Plea negotiations may result in an accused being influenced to plead guilty to a crime of which he is not guilty. Several factors, such as fear of a particular penalty and the publicity of a public trial, may persuade an accused to accept a settlement. Plea agreements could result in the crime to which the accused pleads guilty not being a true reflection of the act which he committed. The weaker the State's case, so the argument goes, the greater the possibility that an accused could plead guilty when he or she is not guilty.

**Undue influence is a serious concern which has to be addressed in any legislation. It is nothing new. Under the present system an accused may plead guilty because of undue influence and abuse of the prosecutorial powers. Again problems could be limited if the**

process is regulated. The court's control and the ability of the accused to change the plea or to attack the agreement by way of a review, ought to provide the necessary protection. In addition, by limiting the procedure initially to the higher courts where a higher level of competence is to be expected, abuses may be minimised. An additional safeguard could be the issuing of guidelines for the conclusion of agreements to prosecutors by the Office of the Director of Public Prosecutions.

5.19 The opportunity for plea negotiation and the nature of agreements are dependent upon certain factors such as the personalities of prosecutors and legal representatives, the relationship between the State and the defence, the approach of different prosecutors to negotiations and the quality of the discussions. These factors could **potentially promote the unequal treatment of accused** persons, inconsistency in sentencing and general uncertainty.

**It has to be conceded that unequal treatment of accused persons is inherent in human nature. Undefended persons are always at a disadvantage and under the present system have no, or no effective access to the prosecutor to reach any kind of settlement. Factors such as the personality of the prosecutor, counsel and the presiding officer are ever present and the introduction of formal plea negotiations as an option will not add to the problem. If the prosecutor has an incentive to negotiate, subject to the court's approval, with the undefended accused, the treatment may in the end be less unequal.**

5.20 The question is often raised **as to the extent to which parties can be held to their agreements**. When can a party repudiate an agreement? Can the agreement be declared invalid if there was deception or if the sentence is totally inappropriate or if public interests demand it? Plea negotiation, as presently applied in South Africa, makes no provision for this.

**This matter was considered in the *North Western Dense Concrete CC* case. The enforceability of plea agreements is an important issue. In South African law the position is not clear at all. In Canada for example, there have been cases in which the courts have refused to hold the prosecution to a position taken as to sentence by Crown Counsel**

appearing at the trial.<sup>53</sup> On the other hand, there have been cases suggesting the unilateral abandonment of concluded plea agreements. This ought not to be permitted<sup>54</sup>. In *R v Stone*,<sup>55</sup> the defendant was promised by the prosecution that if she gave information as to who the person really was who had liquor in her garage, the minimum fine of \$50 would have been imposed upon her. She accordingly pleaded guilty and was fined \$200. It appeared that the prosecution was of the view that the information she gave was valueless and therefore considered itself absolved of their bargain. On appeal, the court allowed her to appeal against the sentence because she had not been told by the prosecution that it considered itself absolved from the agreement. Again the Commission is of the view that the matter should be regulated. If, for example, the matter is formalised, the State will be bound by the agreement, subject to the court's approval. If the court rejects the agreement, the accused's plea of guilty will fall away and the status quo ante will be restored.

5.21 The manner in which sentencing is achieved here **fails to serve the traditional purpose of punishment**. Those who boast of their settlements and "bargains" are the best advertisers against the traditional purpose of punishment, namely deterrence. Another purpose of punishment is to instil remorse in the offender and to have him expiate guilt. A plea of guilty is sometimes treated with more sympathy. In plea bargaining, remorse is often not a motive for pleading guilty. Insight into the reprehensibility of one's offence is an important condition for rehabilitation, and plea negotiation may also hamper the purpose of rehabilitation.

**The true object of punishment remains a bone of contention. As with the death penalty, there is no evidence that any sentence is much of a deterrence. Since the settlement must produce an agreed sentence that is acceptable to the court, one has to assume that the sentence will reflect the objects of the court and existing sentencing principles. Remorse is an overstated matter. There is no evidence that anyone pleads guilty out of a sense of**

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<sup>53</sup> See for example *R v Kirkpatrick* [1971] C.A. 337 (Que.); *R v Mouffe* (1972), 16 C.R.N.S. 257 (Que. C.A.).

<sup>54</sup> See for example *R v Ah Tom* (1928), 49 C.C.C. 204 (N.S.S.C.).

<sup>55</sup> (1932), 58 C.C.C. 262 (N.S.S.C.).

remorse. People plead guilty because they know that the likelihood is that they will be found guilty and because they expect a more lenient sentence. The Commission is of the view that sentence agreements do serve the overall sentencing objective of deterrence. The end result of an agreement will be that an accused is convicted and sentenced. This in itself will have a deterrent value. The fact that an accused participated in his or her sentence determination can also promote rehabilitation because the accused assumes some level of responsibility for the content of the sentence.

5.22 The Commission is of the view that the arguments (e g in the comments of Advocate M Stander of the Office of the Director of Public Prosecutions Cape Town<sup>56</sup>) submitting that the proposed procedure will cause further delays in the finalisation of cases, and that prosecutors are inexperienced and will not have time for consultation due to their workload, are not necessarily well-conceived. If it is accepted that the practice of plea negotiation already takes place on an informal basis, it is difficult to see how the proposed procedure will add to the woes of the criminal justice system. Where do prosecutors find the time to negotiate with the defence on acceptance of pleas to lesser charges under the existing practice? The proposed procedure is also largely based on an application of the provisions section 112(1)(b) or 112(2) of the Criminal Procedure Act, and the Commission fails to see how it will delay the process to the extent that it will become counter productive. The principal aim of the procedure is to shorten trials, which in the end will allow more

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<sup>56</sup> In the comments of Advocate M Stander the practical working of the provisions is questioned in view of the following factors -

- \* inexperience of prosecutors;
- \* the high volume of cases on court rolls which will render the negotiating process virtually impossible in practice;
- \* the fact that the negotiating process will involve the following -
  - mandatory discussion with the investigating officer;
  - possible consultation with the complainant;
  - mandatory negotiation with the defence;
  - mandatory reduction of the agreement to writing; and
  - possible approach to the judicial officer.
- \* insufficient time to engage in such a process and practical problems with court rolls when prosecutors start negotiating.

time for negotiating pleas and sentences.

5.23 It is precisely because of inexperienced prosecutors that the Commission recommended in the discussion paper that the procedure should be phased in. In addition the Commission was of the view that not all prosecutors should be allowed to embark on the procedure, but it should be reserved for the more experienced prosecutors. In this regard the Commission is of the view that Policy Guidelines should be issued by the National Director of Public Prosecutions to address these and other practical problems. That is an administrative problem and does not affect the principle of the matter or the proposed legislation.

5.24 The question whether the proposed legislation should be limited to sentence agreements or whether it should be more broadly defined to provide for a range of possible agreements, which, for example, include an agreement relating to the charge or charges only, is an important one. In the discussion paper the Commission recommended that provision should be made for sentence agreements only. This recommendation was questioned by a number of respondents.<sup>57</sup>

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<sup>57</sup> Professor Watney, for example submits that there are situations where a plea of not guilty is entered and the defence has admitted all but a single question e. g. knowledge of unlawfulness. This result in a relatively short trial during which the court has to decide the question at hand – should it find that knowledge of unlawfulness did not exist, an acquittal follows. If the state succeeds in proving knowledge of unlawfulness, the accused is convicted. Experience has learnt that, especially at high and regional court level, the sentencing phase has evolved to be cumbersome and it is often during this stage when the foundations are laid for a possible later appeal. The leading of expert witnesses in the fields of psychiatry, psychology, criminology, sociology and statistics and the emotional inputs of family members and complainants alike, have become commonplace. The purpose of the proposed legislation is to shorten and simplify this procedure. Professor Watney therefore proposes that the prosecutor and accused and or his legal representative be granted the discretion to decide whether to enter into an agreement on sentence – even in matters where a plea of not guilty is tendered by the accused.

Mr RP Stuart, SC, Deputy Director of Public Prosecutions, Pietermaritzburg, notes that subsection (7) implies that sentence will necessarily form part of any agreement reached but he is of the view that there is room for an agreement on the basis of a conviction only whilst leaving room for argument and evidence as to sentence.

A committee of attorneys, commenting at the request of the Law Society of the Cape of Good Hope, proposes that the legislation should not be limited to sentence agreements because it holds the view

5.25 The Commission is of the view that the proposals are not to be supported. In the discussion paper the Commission proposed that the present study be limited to sentence agreements. The Commission was of the view that other plea agreements are sufficiently provided for in the Criminal Procedure Act and do not require regulation since there is no evidence of abuse of these provisions. **Out-of-court settlements (deviations) of criminal cases - for example, as provided for in the amended section 6 - are now the subject of a separate investigation and proposal.**

5.26 There are two types of sentencing agreements. The one is where the prosecution, in exchange for a plea of guilty, undertakes to submit to the court a proposed sentence or agrees not to oppose the proposal of the defence. This type is known in our law (cf *Blank's case supra*). The agreement has no effect on the court and does not require any particular action from the court. The court can ignore the agreement or implement it. If it ignores the agreement, the plea of guilty stands, as does the sentence. The Commission concluded that there was no reason why this procedure should be dealt with by way of legislation.

5.27 From a discussion paper published by the New Zealand Law Commission<sup>58</sup> it appears that that a similar position exists in New Zealand. There is no legislation dealing with charge negotiations and the Commission recommended that legislation is not necessary in the absence of evidence indicating that the system is abused. The Commission, however, recommended that prosecution guidelines and duties be implemented and that the New Zealand Law Society Rules of Professional Conduct should be expanded to provide defence counsel with guidance on their responsibilities when entering charge negotiations on behalf of a client.

5.28 For these reasons the Commission is of the view that legislation should be limited to sentence agreements, and that problems relating to charge bargaining be addressed by Policy Guidelines issued by the National Director of Public Prosecutions.

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that the current provisions which allows plea bargaining, are abused.

<sup>58</sup>

New Zealand Law Commission Report 66 *Criminal Prosecution* October 2000.

## CHAPTER 6

### SUPPORT FOR THE STATUTORY RECOGNITION OF SENTENCE AGREEMENTS COUPLED WITH RECOMMENDATIONS FOR AMENDMENT TO CERTAIN PROVISIONS

#### THE COMMISSION'S RECOMMENDATION IN THE DISCUSSION PAPER

6.1 The Commission's recommendations have been quoted in chapter 4. For practical purposes the provisions will be quoted separately hereafter when considering the comments relevant to each provision.

#### COMMENTS RECEIVED ON THE DRAFT LEGISLATION

6.2 Most respondents support the enactment of legislation which will regulate sentence agreements. Some of the support is, however, subject to proposals for amendments to the draft Bill contained in the discussion paper.<sup>59</sup>

6.3 Subsequent to the decision in *North Dense Concrete CC and another v Director of Public Prosecutions (Western Cape)*,<sup>60</sup> the Department of Justice requested an opinion of the State Law Advisers on the question whether plea bargaining by magistrates can be used as a method to conduct case management control in magistrates' courts. They were referred to several authorities

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<sup>59</sup> The judges of the High Court Durban, Advocate MT Chidi of the Office of the Premier, Northern Province, Mr JHS Hiemstra of the Office of the Director of Public Prosecutions Freestate, Mr J Jansen van Vuuren, Regional Court Magistrate, the Office of the Director of Public Prosecutions Witwatersrand, Director of Public Prosecutions Cape of Good Hope, Legal Component of the Detective Service and Crime Intelligence, Mr RP Stuart Deputy Director of Public Prosecutions, Pietermaritzburg, MS Padayachee Lawyers for Human Rights Pietermaritzburg, the National Council of Women of SA, SJ Marais magistrate Steynsburg, H VD P Visagie magistrate Steytlerville, Mr Patel attorney, advocate M Stander of the Office of the Director of Public Prosecutions Cape Town, Professor P Bekker, Unisa, Mr J Henning, Deputy National Director of Public Prosecutions.

<sup>60</sup> 1999(2) SACR 669 (C).

regarding plea bargaining (including the Commission's interim report on the simplification of criminal procedure) and these authorities agree in general that plea bargaining is something that occurs regularly in practice.

They concluded that the participation of magistrates in conducting case management flow by means of plea bargaining is a policy issue upon which they cannot comment. They agree with the recommendation by the Law Commission in its interim report that legislation should be passed to regulate the existing practice of plea bargaining in criminal procedure in South African courts.

6.4 Mr Jansen van Vuuren, Regional Magistrate, points out that in the USA the discretion in respect of sentencing has passed from the judge to the district attorney. He raises the question as to what will happen in South Africa if the presiding officer questions the accused and discovers that the accused is admitting facts that show he is guilty of a substantially more serious offence than that which was agreed upon between the two parties. He proposes that some mechanism should be put in place in terms of which the presiding officer can order that the plea agreement be referred to the senior prosecutor or the Director of Public Prosecutions for reconsideration.

This problem is in the view of the Commission not peculiar to sentence agreements but can occur under section 112 or during any trial where the accused was not charged with the most serious crime.

6.5 The judges of the Free State Division of the High Court have no objection in principle to a procedure which provides for sentence agreements, as this may well expedite criminal trials. They, however, point out that there is a difference of opinion among various divisions of the High Court regarding minimum sentences in terms of Act 105 of 1997, and suggest that the implementation of the new procedure should wait until there is certainty about the minimum sentences.

The matter has been or will be dealt with soon by the Supreme Court of Appeal and the Constitutional Court, and there is no reason in the opinion of the Commission to delay legislation.

6.6 The Judges of the High Court in Durban support the proposals but caution that what is intended to be introduced may be appropriate in a first-world situation but not in South Africa, where the bulk of criminal cases take place in the lower courts. In that forum it may be difficult for accused

persons who are not represented to enter into such agreements.

This concern has been addressed by the Commission earlier in this report.<sup>61</sup>

6.7 Professor M Watney of the Rand Afrikaanse University proposes the possibility of a conditional sentence agreement. He submits that there are situations where a plea of not guilty is entered and the defence has admitted all but a single question, e g knowledge of unlawfulness. This results in a relatively short trial during which the court has to decide the question at hand – should it find that knowledge of unlawfulness did not exist, an acquittal follows. If the state succeeds in proving knowledge of unlawfulness, the accused is convicted. He therefore proposes that the prosecutor and accused and or his legal representative be granted the discretion to decide whether to enter into an agreement on sentence – even in matters where a plea of not guilty is tendered by the accused.

Although the Commission has some sympathy for the suggestion, it appears to be impractical and out of the ordinary scheme of things.

6.8 As mentioned, Advocate M Stander of the Office of the Director of Public Prosecutions Cape Town, has no objections in principle to the proposed legislation but questions the practical working of the provisions.

6.9 Advocate R Meintjies, Deputy Director of Public Prosecutions, Transvaal discussed the proposals with her colleagues. They are of the view that there is a need in some instances, for the possibility of formal, binding and transparent agreements, and therefore support the amendment of the Criminal Procedure Act to provide for sentence agreements.

6.10 A committee of attorneys practising in and around Cape Town submitted comments at the request of the Law Society of the Cape of Good Hope. The committee is of the view that the legislation is sound in principle, but points out that many crimes are excluded from plea bargaining owing to the provisions of the Criminal Law Amendment Act, Act 105 of 1997, which provide for

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<sup>61</sup> See paragraph 5.19.

mandatory sentences. Plea bargaining will not reduce the court rolls if the most serious cases are excluded from the process.

The committee foresees the following practical problems with regard to plea bargaining and suggests that these problems be addressed before implementing the proposed legislation:

- \* Undefended persons are always at a disadvantage and under the present system have no, or no effective access to the prosecutor to reach any kind of agreement. The committee raises the issue of how these accused persons' interests will be protected.<sup>62</sup>
- \* The lack of public defenders and legal aid funds will frustrate the efficiency of the legislation.
- \* The provision providing for the trial to proceed before another presiding officer will result in further delays in the court process. When an accused residing in a small town elects to withdraw from a plea agreement, a magistrate from another area will have to preside. This will create additional costs for the State and the question arises as to whether the magistrate will suspect that the accused withdrew from a plea agreement.
- \* Owing to their workload, prosecutors do not have time to enter into plea bargaining agreements, and many prosecutors do not have enough experience to negotiate appropriate sentences. Prosecutors must have the ability to judge whether a matter should go to trial or not and if they have not been seized with a particular matter before, they will not be able to apply their minds as to an appropriate sentence.

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<sup>62</sup> Advocate M Stander, of the Office of the Director of Public Prosecutions in Cape Town points out that problems could arise where the accused is not defended or illiterate, especially since the prosecutor will be negotiating personally with the accused. It could place both parties in a difficult position. Sentencing has traditionally been in the discretion of the presiding officer and it would be difficult, especially for inexperienced prosecutors, to agree with the defence on an appropriate sentence.

These facts will contribute to delays.

- \* The committee is concerned as to how the presiding officer will be satisfied that the sentence agreed upon is appropriate.

6.11 The committee proposes that the legislation not be limited to sentence agreements because it holds the view that the current provisions which allow plea bargaining are abused and suggests that all plea agreements should be reduced to writing.

The problem the Commission has is that apart from the bald allegation of abuses, no facts are given. It is also not understood how having such agreements in writing would prevent abuses. The original proposals of the Commission which were rejected by the Portfolio Committee did provide for this, but upon reconsideration the Commission concluded that the original proposals were too rigid and impractical.

The committee also suggests that the legislation should provide that an accused be exempted from prosecution if there was an agreement with the State that charges would be withdrawn to prevent reinstatement of charges. This is a matter which will be dealt with in the Commission's separate investigation into out of court settlements, and falls outside the scope of the present study.

6.12 The Division Legal Services in the Head Office of the SA Police Service supports the insertion of the proposed legislation in the Criminal Procedure Act. Its members point out that it will speed up the judicial process, which would in turn save the investigator time. It will also assist in obtaining better conviction rates, and such would boost the morale of the members of the Police Service.

6.13 Mr RP Stuart, SC Deputy Director of Public Prosecutions, Pietermaritzburg, fully supports the enactment of legislation which provides for plea agreements.

#### **COMMENTS AD SECTION 111A(1)(a)(ii)**

6.14 It reads:

- (1) (a) The prosecutor and an accused, or his or her legal adviser, may before the

accused pleads to the charge, enter into an agreement in respect of-

- (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
- (ii) an appropriate sentence to be imposed by the court if the accused is convicted of the offence to which he or she intends to plead guilty.

6.15 Mr JHS Hiemstra is of the view that an agreement can only propose an agreed sentence. The presiding officer should still be allowed to exercise his or her unlimited sentencing discretion. It is proposed that section 111A (1)(a)(ii) should read " A suggested appropriate sentence".

6.16 The Director of Public Prosecutions Witwatersrand discussed the discussion paper with chief prosecutors, senior prosecutors and the most experienced Deputy Director of Public Prosecutions. Some of the participants argued that such agreements should not be confined to the stage "...before the accused pleads to the charge ...". They were of the view that a plea or sentence agreement should be possible at any stage during the trial. They referred to instances of (for example) protracted fraud trials where an agreement on both the conviction and sentence becomes a possibility after some evidence has been led and tested. They also referred to matters where the *lis* in the state case is confined to a single aspect such as wrongfulness or the one or other legal argument re the interpretation of a statute.

6.17 The Deputy Director of Public Prosecutions Witwatersrand, Mr ZJ van Zyl, is firmly of the view that the opportunity for such agreement should be confined to the stage before the accused pleads to any charge. The accused should not have the opportunity to have two bites at the proverbial cherry. The possibility of an agreement re the sentence should be the carrot convincing the guilty accused to admit to his guilt and have the matter finalised. Any leeway in this regard will unnecessarily hamper the speedy finalisation of cases, the paramount object of the proposed legislation.

6.18 Some of the participants raised their concerns about the procedure that should be followed where an accused has been charged with multiple counts (for example fraud and a multitude of statutory offences) and the accused wishes to enter into an agreement with regard to only some of the counts (for example: all the statutory charges). Would the presiding officer be in a position to

decide whether the sentence agreed upon in the agreement is an appropriate sentence (subsection 7(a)) and should the trials then be separated? These and other practical aspects may, of course, be left for the courts to deal with. Mr ZJ van Zyl is *prima facie* of the view that plea and sentence agreements will only be practical and applicable where the prosecution and the defence make a complete package deal. Nothing prevents an accused from pleading guilty in terms of section 112 of the Criminal Procedure Act in matters where section 111 A would not apply.

6.19 The Legal Component of the Detective Service, Crime Intelligence of the SA Police Service proposes that the word “adviser” be replaced with the word “practitioner” to bring it in line with the words used in the Constitution and the Criminal Procedure Act.

The Commission agrees with this proposal.

6.20 Advocate PBC Luyt, senior advocate at the Office of the Director of Public Prosecutions Pretoria notes that the calling of the proposed meetings with the envisaged people involved, taking into consideration the case loads carried by prosecutors, can be time-consuming owing to the non-availability of all the role players. Experience has taught him that merely on possible pleas, without having regard to a specific sentence, “bargaining” is more often than not very time-consuming, to such an extent that in some instances a full trial would have been quicker than the discussions. If the discussions also include the presiding officer as envisaged by subsection (3), and/or representations as contemplated in subsection (1)(c), the procedure might even be more time consuming.

He also points out that the Bill does not exclude certain types of sentences that can be agreed upon. If, for example, it is agreed upon that correctional supervision will be imposed in terms of section 276(1)(h) of Act 51 of 1977, how will the prerequisite in section 276A(1)(a) of the Act be dealt with? Must a report be obtained before an agreement can be reached? If so, will it still be necessary to place such a report before the court? If it is not necessary to obtain the report before the agreement is reached, what would the purpose be of wasting valuable time in formal negotiations and the reduction to writing of an agreement in view of the fact that the court can only exercise its discretion after the handing in of such a report? An informal agreement to plead guilty and the State’s support for such a sentence will be less time-consuming. If it will not be necessary to put the report before the court after it was obtained for the purposes of the agreement, there is a

lacuna in the legislation that will have to be amended. Amendments that will render criminal procedure even more intricate are unnecessary.

## THE COMMISSION'S EVALUATION

6.21 As far as Mr Hiemstra's suggestion is concerned, and as the Commission has pointed out before, an agreement to suggest a sentence is already permissible and does not require regulation. The problem is that the accused cannot withdraw from the agreement or change the plea of guilty if the Court does not accept the suggestions.

6.22 Concerning the debate in the office of the DPP of the WLD, the Commission agrees with the views of Mr van Zyl on both counts. As far as the first is concerned, it is believed that the accused should not be allowed first to test the water and see whether the State has a strong case or not.

6.23 Turning then to Mr Luyt: The Commission believes that the proposed procedure does not affect or amend the other sentencing provisions of the CPA and if they lay down prerequisites, those still apply. If a prosecutor believes that the bargaining will be time-consuming and will not cause any saving of time, he or she is not obliged to begin or proceed therewith.

## COMMENTS AD SECTION 111A(1)(b)

6.24 The provision reads:

- (b) The prosecutor may only enter into an agreement contemplated in paragraph (a) -
  - (i) after consultation with the police official charged with the investigation of the case and, if reasonably feasible, the complainant; and
  - (ii) with due regard to the nature of and circumstances relating to the offence, the accused and the interests of the community.

6.25 Mr J Jansen van Vuuren proposes that section 111A(1)(b)(i) be amended in that the words “if reasonably feasible” be deleted.

6.26 Mr JHS Hiemstra proposes that the sentence should start with the words “if reasonably

feasible” in order to apply to both the prosecutor and the police officer. It is a practical reality that the investigating officer seldom attends court and is more often than not so inexperienced that he or she cannot contribute meaning fully to the proceedings.

6.27 The Director of Public Prosecutions Witwatersrand submits that this subsection is superfluous. It is more often than not possible to get hold of the investigating officer. The term is vague and will lead to endless litigation. The decision to enter into plea and sentence agreements should be left with the prosecution, which is not bound to accept the view of either the police officer or the complainant. The Canadian example is impractical for the different South African criminal justice reality. Relatively few criminal trials are tried in the High Courts and the real backlog is in the lower courts, where the proposed procedure must make the most telling impact. The prosecutors in those courts simply do not have the time to consult with the parties mentioned.

6.28 Advocate M Stander points out that a problem can arise from consultation in that it is not clear to what extent the opinion of the police officer and/or complainant binds the prosecutor. Complainants do not have a sound knowledge of the law and would not be inclined to accept a plea on a lesser charge even if the State cannot prove the main charge.

6.29 Professor Watney questions the practicality of subsection (1). In practice it is often difficult to obtain the presence of the investigating officer at court proceedings. At the stage when the defence initiates a discussion with the prosecutor on a plea / sentence agreement, the complainant will in all probability not be in court. Postponing the case in order to obtain the presence of the investigating officer and the complainant will result in further institutional delays. This will obviate the whole purpose of this amendment. He submits that the sole discretion as to whether to enter into an agreement contained in paragraph (a) of section 111A(1) should remain with the public prosecutor. The prosecutor should in his/her own discretion determine whether a consultation with the investigating officer/complainant will assist him in arriving at a correct decision. In this regard the National Director of Public Prosecutions may ensure proper control of these issues by issuing guidelines in the Policy Directives e.g. senior or control public prosecutors to approve such agreements, etc. The same remarks apply to section 111 A (1)(c).

6.30 The Division Legal Services in the Head Office of the SA Police Service proposes that subsection (1)(b)(i) be amended to read “ after consultation with the police official charged with the

investigation of the case and, if reasonably feasible, the complainant; and” to ensure that the facts of the case are thoroughly considered and an agreement is not entered into at random.

6.31 Advocate R Meintjies, Deputy Director of Public Prosecutions proposes the amend of subsection (1)(b) by adding the following subparagraph:

**(iii) with reference to a person who is charged with an offence referred to in Schedule 6, with the consent of the Director of Public Prosecutions or a person authorized by such Director.**

She submits that reference should be had to sections 6, 50(6), 58 and 60(11)and 11(A). Given the seriousness of these crimes and the fact that an agreement effectively amounts to a stopping of the proceedings on such charges, and also to negating the fact of minimum sentences as provided for in the General Law Amendment Act 105 of 1997, some caveat is called for.

## **THE COMMISSION'S EVALUATION**

6.31 The Commission understands the concerns relating to the practicality of the provision but believes that those with an interest in the matter should be heard, if feasible, before the agreement is entered into. Obviously, the prosecutor is not bound by their views but should at least take cognisance thereof. Qualifying the consultation with the police official in the same manner would allay many of the concerns.

6.32 As far as Adv Meintjies' proposal is concerned, the Commission is of the view that the sentence agreement cannot circumvent the provisions of Act 105 of 1997 and that her proposal cannot be accepted.

## **COMMENTS AD SECTION 111A(1)(c)**

6.33 The provision reads:

- (c) The prosecutor, if reasonably feasible, shall afford the complainant or his or her representative the opportunity to make representations to the prosecutor regarding-
- (i) the contents of the agreement; and
  - (ii) the inclusion in the agreement of a compensation order referred to in section 300.

6.34 Mr J Jansen van Vuuren proposes that the words “ if reasonably feasible” be deleted. In his view it is vital that victims of crime should be involved to a greater extent in the plea negotiation phase and it will strengthen the prosecutor’s hand in plea negotiations. He envisages that the prosecutor may take the initiative in negotiations and set up a date, time and venue for such negotiations. The victim must therefore be given some sort of notice to attend the proceedings. It should be peremptory for the prosecutor to receive representations from the victims, even if it is by telephone or second hand via the investigating officer or a family member of the victim.

6.35 Advocate MT Chidi is of the view that it is not clear in terms of section 300 whether provision is made for insured property, and if so how this section will impact on the principle of “the right of recourse” in the law of insurance.

6.36 The Director of Public Prosecutions Witwatersrand and members of his staff are of the view that the whole of this section should be removed. Where appropriate and attainable the steps set out in subsection (1)(c)(ii) are already taken by the prosecution. Subsections (1)(b) and (c) envisages two meetings with the complainant: a meeting with the view to enter into an agreement and a meeting at which the complainant is granted the opportunity to make representations with regard to the contents of the agreement. The aim of the proposed procedure is to shorten proceedings, and the proposed subsections will slow down the whole process.

6.37 Advocate M Stander points out that it would not always be possible for the prosecutor to afford the complainant the opportunity to make representations with regard to the agreement, especially in lower courts, because a prosecutor may be faced with a number of agreements on a particular day, making it impossible and time-consuming to go through the agreements.

6.38 Mr TW Levitt points out that the provision seems to be superfluous as provision is made in subsection (1)(b) for consultation with the complainant, and more particularly because consultation is not compulsory. He proposes that the agreement should rather include reference to whether a section 300 order has been considered, and if not tendered, the reason therefor. This will encourage prosecutors to consider the interests of victims in each case and to consider in particular some form of compensation, thus settling as far as is possible. The delictual side of the matter simultaneously.

6.39 Advocate R Meintjies proposes the amendment of subsection 1(c)(ii) to read as follows:

- (ii) the inclusion in the agreement of a compensation order **whether as referred to in section 300 or not, and all of the provisions of section 300 will be applicable irrespective of whether such order falls within the ambit thereof or not, or as a condition of a suspended sentence...**

She proposes that serious consideration should be given to widening the present scope and ambit of section 300, which is unnecessarily limiting. The ratio therefor undoubtedly is the difficulty in determining the quantum of the loss/damages caused, which will impact negatively on the duration of criminal trials. These considerations should not pose a problem if incorporated into an agreement with the victim/complainant's co-operation. In many instances there is a greater need for therapeutic counselling owing to the trauma caused than for compensation as a result of proprietary loss. If a condition of suspension is imposed, no such limitation exists. However, in some instances, an order separate from the sentence imposed might be more appropriate. The provisions of section 300, with reference to such order having the effect of a civil judgment, should mutatis mutandis be made applicable.

## **THE COMMISSION'S EVALUATION**

6.40 There is a clear division of opinion on the matter and it is impossible to reconcile the conflicting points of view. There is merit in the view that the provision in part duplicates par (b) of the Bill. This report does not deal with section 300, but it should be noted that the matter was considered by the Commission in its investigation into sentencing, where amendments to the present provisions were recommended. In the Commission's view the proposal should remain as it is. It places the onus on the complainant to make representations. These must be reasonably

feasible. To be more or less prescriptive does not appear to be justified.

## COMMENTS AD SECTION 111A (2)

6.41 The provision reads:

- (2) An agreement between the parties contemplated in subsection (1), shall be reduced to writing and shall –
- (a) state that, before conclusion of the agreement, the accused has been informed –
- (i) that he or she has a right to remain silent;
  - (ii) of the consequences of not remaining silent;
  - (iii) that he or she is not obliged to make any confession or admission that could be used in evidence against him or her;
- (b) state fully the terms of the agreement and any admissions made; and
- (c) be signed by the prosecutor, the accused, the legal adviser and the interpreter, as the case may be.

### **Ad subsection (2)(a)(i)-(iii),**

6.42 Mr Hiemstra raises the question as to who is going to explain these rights to the accused. If it is the prosecutor it will mean that he or she will become a witness, and this is unheard-of and impractical.

6.43 Mr Jansen van Vuuren proposes that subsection (2)(a) be amended to include mention of the fact that the accused has the right to legal presentation and that if he or she concludes a plea or sentence agreement and the presiding officer confirms the agreement, there may be no right to a trial in open court. This will ensure that the finality of the proceedings is indicated to the accused.

6.44 The Director of Public Prosecutions Witwatersrand and members of his staff support the proposal.

6.45 The Division Legal Services in the Head Office of the SA Police Service propose that

subsection (2)(a) be amended to read:

“state that, before conclusion of the agreement , the accused has been informed of-

- (i) that he or she has the right to remain silent;
- (ii) of the consequences of not remaining silent;
- (iii) that he or she is not obliged to make any confession or admission that could be used in evidence against him or her;
- (iv) that he or she has the right to choose, and to consult with a legal adviser;
- (v) of the procedures as contemplated in subsections (7), (8) and (9);”

6.46 The Legal Component of the Detective Service, Crime Intelligence of the SA Police Service proposes that subsection (2)(a) should be amended to include:

“(iv) that he/she has the right to choose, and consult with, a legal practitioner”

6.47 Advocate R Meintjies notes that the ratio for this subsection is not understood. It is clear from this proposed Bill that nothing that is said may be used in evidence against an accused. Had this not been the case, there might have been a need for these provisions. Certainly what is hoped for is co-operation in a free and voluntary manner without any undue influence having played a role. It would appear that the right to silence is given some misplaced weight, especially since the contents of the agreement may not be used as evidence against such accused. It is proposed that the above be replaced with the following:

- (a) state that the accused has agreed to the terms and conditions of the agreement freely and voluntarily without any undue influence and whilst in his/her sober senses
- (b) state fully the terms of the agreement and any admissions made **and the facts agreed to including facts relevant for purposes of sentence;** and
- (c) be signed by the prosecutor, the accused, the legal adviser and the interpreter, as the case may be.

#### **Ad subsection (2)(b)**

6.48 The judges of the Free State Division of the High Court point out that section 111A (2)(b) refers to “the terms of the agreement”, and propose that such agreement should also reflect the complete factual basis upon which the agreement is based. This subsection should therefore be worded in such a manner that there can be no misunderstanding or uncertainty that the court must

have a complete picture regarding the agreed facts.<sup>63</sup> The proposal on plea and sentence agreements is clearly intended to include much more information, as is the case with a plea in terms of section 112(1)(b) read with section 112(2) of the Criminal Procedure Act. This agreement should contain sufficient information about the charge in order to enable the presiding officer to come to a conclusion with regard to the appropriate sentence for the accused. The information should include facts as provided for in section 114(3)(a) of the Act and the explanation of the charge that is provided for in section 150 of the Act. It is therefore proposed that section 111A(2)(b) should be extended by adding the words “state fully the terms of the agreement, **the facts/circumstances of the charge** and any admissions made” or “state fully the terms of the agreement, including the substantial facts of the matter, all other facts relevant to the agreed sentence and any admissions made.”

6.49 Professor Watney proposes that provision should be made that the accused must make a full disclosure of the facts and the manner in which the offence was committed. This will enable the court to make an informed decision on the acceptability of the sentence agreement. Provision should be made (subsection 111A(2)(d)) for the accused to disclose fully any previous convictions before entering into an agreement with the public prosecutor.

#### **Ad subsection (2)(c)**

6.50 The Division Legal Services in the Head Office of the SA Police Service proposes that subsection (2)(c) should read:

“Be signed by the prosecutor, the accused, the legal adviser, the interpreter and, where a compensation order contemplated in section 300 is included in the agreement, the complainant, as the case may be.”

### **THE COMMISSION'S EVALUATION**

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<sup>63</sup> This concern is also raised by The Director of Public Prosecutions Witwatersrand who claims that the agreement should contain sufficient information about the charge in order to enable the presiding officer to come to a conclusion with regard the appropriate sentence for the accused. Similar viewpoints are held by Professor PM Bekker, Professor Watney, Mr Patel,

6.51 Once again, the divergent points of view cannot be reconciled. The Commission regards it as impractical to have a statement of agreed facts in every case. If the parties wish to record those facts, they should be free to do so, but otherwise the procedure will be too cumbersome. As to who will inform the accused of his or her right, it will probably happen in practice that a form will be prepared which will set out those rights in the preamble to the agreement.

The proposed obligation on the accused to disclose his or her previous convictions has theoretical but not practical merit unless there is a penalty attached to non-disclosure. The Commission cannot conceive of any realistic penalty.

With regard to subsection (2)(a) the Commission is of the opinion that the accused need only be informed about those rights that are relevant to the agreement. The Commission is of the view that by pleading guilty and entering into a sentence agreement the accused waives the following rights: the right to be presumed innocent; the right against self-incrimination; and the right to remain silent. The key right in issue in the sentencing agreement is the right against self-incrimination: on the basis of the accused's "evidence" (the agreement), he or she is convicted. The objective of the section should be to ensure that in the plea and sentence negotiations the relevant rights have been properly waived, that is voluntarily, knowingly and intelligently. Subsection (c) therefore directs the presiding officer to enquire after that issue. The rights referred to in the current proposal are concerned with the pretrial proceedings relating to detained accused. The consequences of not remaining silent relate to the negative inference that may not be drawn. This, in the Commission's view, is not relevant to court proceedings and plea negotiation. The same applies to the right not to make a confession or admission. The Commission is therefore of the view that the proposal should refer to the rights which are relevant to the agreement and should be amended to refer to the right to be presumed innocent, the right to remain silent and the right not to be compelled to give self-incriminating evidence.

6.52 With regard to subsection (2)(b) the Commission recommends that the provision be amended as proposed by the DPP (WLD). The problems raised by the Free State judges and Mr Patel are covered by the proposal of the DPP of the WLD.

6.53 With regard to subsection (2)(c), the proposal made by the SAPS is accepted.

## COMMENTS AD SECTION 111A(3)

6.54 The provision reads:

(3) The presiding judge, regional magistrate or magistrate before whom criminal proceedings are pending, shall not participate in the discussions contemplated in subsection (1): Provided that he or she may be approached by the parties in an open court or in chambers regarding the contents of the discussions and he or she may inform the parties in general terms of the possible advantages of discussions, possible sentencing options or the acceptability of a proposed agreement.

6.55 Most respondents object to the possibility that the presiding officer should become involved in the discussions. The judges of the Free State Division of the High Court point out that in terms of the Commission's proposals this procedure will only be available on a test basis in certain courts whereas section 111A (3) makes reference to: judge, regional court magistrate or magistrate", in other word all criminal courts. They therefore suggest that the procedure should be reserved for more experienced prosecutors. They are not in favour of the proviso in subsection (3) which provides that the presiding officer may become a party to the discussions regarding sentence agreements. They pose the question as to what will happen if the matter is taken on review and the parties do not agree about what such officer had said during the discussions.

6.56 The Director of Public Prosecutions Witwatersrand and members of his staff strongly oppose this subsection. There should be no possibility of any accused approaching a presiding officer in chambers. This is the case for security reasons as well as to avoid any hint of an impression that the parties and the presiding officer are in cahoots.

6.57 Advocate M Stander points out that problems may arise in terms of the proposal in that judicial officers cannot realistically advise the parties as to the advantages or acceptability unless he or she knows all the facts or on sentencing options unless he or she knows the accused's criminal record. If such talks fail must the judicial officer recuse him or herself. It is submitted that the presiding officer should recuse him or herself because of knowledge of the facts and criminal record of the accused. In rural areas problems may arise since only one presiding officer may be available.

6.58 Mr TW Levitt points out that the presiding officer is prohibited from participating in the formulation of the agreement yet it provides for the presiding officer to give an opinion on the

agreement, thus being used as a sounding board. The idea is that if he or she indicates that the agreement is not in order it will become a draft only. This in essence means that the consultation with the presiding officer becomes part of the discussions expressly prohibited in terms of the first part of the section. He is of the view that it is unnecessary to inform the parties of the possible advantages of the agreement because the accused's attorney, if he or she has one, will do so.<sup>64</sup>

6.59 Mr RP Stuart, SC, Deputy Director of Public Prosecutions, Pietermaritzburg, has a problem with this principle. While he fully understands the danger of the judicial officer taking part in the actual negotiations, he believes that the judicial officer has a vital role to play in encouraging the parties to reduce the issues which need to be decided at the trial. A classic example would be a murder case where there has been an identification parade, the accused has made a confession to a magistrate and there is also ballistic evidence linking the accused to the crime. There is a general attitude among legal practitioners to dispute all the allegations and put the State to proof thereof. In such a case the accused may well raise self-defence as justification for the killing. This would probably first arise after the State had led all of the available evidence, which would probably take weeks. If the judicial officer encourages the parties to try and limit the issues and talk to each other the case could be finalised with one or two material witnesses being called rather than a lengthy stream of witnesses whose evidence is really irrelevant to the defence of the accused.<sup>65</sup>

6.60 He submits that once the parties start talking to each other the chances of a plea agreement are significantly improved. Without some form of initiation by the judicial officer the reduction of issues and plea agreement discussions will not generally happen and the object of accelerating the court process will not be achieved. He is accordingly of the view that subsection (3) should not be restricted to a situation where discussions have already commenced and when the presiding officer is approached regarding the contents of the discussions. The appropriate time to inform the parties in general terms of the possible advantages of discussions is really at the commencement of proceedings.

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<sup>64</sup> See also comments of Professor M Watney, of the Rand Afrikaans University and Advocate PBC Luyt, senior advocate in the Office of the Director of Public Prosecutions, Pretoria.

<sup>65</sup> Some of the concerns raised by Advocate Stuart will be addressed in a separate investigation by the Commission dealing with a more inquisitorial approach to criminal procedure.



## THE COMMISSION'S EVALUATION

6.61 Most respondents are opposed to the principle contained in the proviso to the subsection. The Commission is of the view that valid objections are raised and accordingly proposes that the proviso to the subsection be deleted. The Commission also accepts that a provision should be formulated to provide for the implementation or phasing in of the process in the different courts.

## COMMENTS AD SECTION 111A(4)

6.62 The provision reads:

- (4) The presiding judge, regional magistrate or magistrate shall, before the accused is required to plead, be informed by the prosecutor in open court that the parties have reached an agreement as contemplated in subsection (1) and he or she shall then inquire from the accused to confirm the correctness thereof personally.

6.63 The Director of Public Prosecutions Witwatersrand and members of his staff support the proposal. Some of them were, however of the view that the section is superfluous in view of the provisions set out in section 112(2) of the Act. This approach raises the question about the relationship between the proposed section 111A and the existing sections 112-114 of the Act. Mr Van Zyl is of the opinion that it would seem that the procedure set out in section 111A has a life of its own and section 112 *et seq* provides for another, although in some respects related, procedure.

6.64 The Legal Component of the Detective Service, Crime Intelligence of the SA Police Service proposes that the subsection be amended to read:

- (4)(a) The presiding judge, regional magistrate or magistrate shall, before the accused is required to plead, be informed by the prosecutor in open court that the parties have reached an agreement as contemplated in subsection (1).
- (b) The presiding judge, regional magistrate or magistrate shall then personally inquire from the accused to confirm the correctness thereof."

6.65 Advocate R Meintjies, Deputy Director of Public Prosecutions, Pretoria is of the view that the following subsections are problematic, for the reasons that follow:

- \* In (4) the procedure is emphatically before plea, whilst in (8)(a) reference is suddenly made to a 'plea of guilty';
- \* the state is bound by the agreement but not the accused, if the sentence or part thereof is found unacceptable by the presiding officer, whilst the agreement is par excellence also one of agreement on sentence;
- \* the fact of a plea having been tendered should only be recognised if the agreement as a whole is found to be acceptable;
- \* the State should be bound by the agreement, thus seemingly precluding the State from proceeding with any charge that might have been brought against the accused, had it not been for the fact that an agreement had been reached whereby, for instance, many court hours could have been saved; or
- \* a plea of not guilty is to be entered and the trial is to proceed if what the accused has thus far admitted is not admissible as evidence against him. Certainly, a further plea, whereby it can properly be established what the issues are and where any admissions made will be binding, should be possible. Here, too, a *de novo* trial is called for.
- \* it might be impossible to consider the proposed sentence properly without the presiding officer being able to direct some kind of questioning and without provision being made for the previous convictions of the accused being placed on record;
- \* should the sentence not be acceptable, both the State and the accused should be able to withdraw from the agreement and in the *de novo* proceedings, the State should have a clear right to proceed on any charge;
- \* if the parties choose to proceed where the sentence is found unacceptable, a right to appeal against the sentence imposed, should be provided for

6.66 She therefore proposes that the subsection (4) be amended to read as follows, the parts in brackets to be deleted:

- (4) The presiding judge, regional magistrate or magistrate shall, [before the accused is required to plead,] be informed by the prosecutor in open court that the parties have reached an agreement as contemplated in subsection (1) and he or she shall then inquire from the accused to **personally** confirm [the correctness thereof(*of the contents or the fact of an agreement having been reached?*) personally] **the fact that an agreement has been reached**

## THE COMMISSION'S EVALUATION

6.67 The Commission accepts the view of Mr Van Zyl and proposes that the proposal be retained as it is. There is no substance in the criticism of Advocate Meintjies that subsections (4) and (8) are in conflict. They clearly refer to different stages of the process. The Commission also accepts that the criticisms relating to the fact that the State is not allowed to withdraw from the agreement if the court considers a lighter sentence, are valid. This will be dealt with when considering subsection (7). The Commission is of the view that the provision should be retained as it is.

## COMMENTS AD SECTION 111A (5)

6.68 The provision reads:

(5) If the parties have concluded an agreement and the court has been informed as contemplated in subsection (4), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court, where after that agreement, subject to the provisions of subsections (6), (7) and (8), binds the prosecutor and the accused.

6.69 Advocate MT Chidi is of the view that the complainant if reasonably feasible should also be bound by the contents of the agreement.

6.70 The Director of Public Prosecutions Witwatersrand and members of his staff support the proposal. Some, however, raised questions as to the position should the facts agreed upon change after the court had ordered that the contents of the agreement be disclosed in open court. This could, for example, occur when an injured complainant dies of his or her injuries or where further investigations expose a more serious crime than the one that has been agreed upon. Mr Van Zyl is of the view that such complications would rarely occur and the prosecutor should take such possibilities into account when deciding to into an agreement.

6.71 Mr TW Levitt points out that it is customary for the contents of a statement made in terms of section 112 (2) of the CPA to be read into the record. At this point the complainant and witnesses are removed from the court in the event that section 113 is invoked. It is also not pertinently prescribed that the court enter the fact that the statement has been handed in. The court is obliged

to record everything either in long hand or mechanically. In his view the agreement will probably bind the State and the accused immediately consensus is reached on the contents.

## THE COMMISSION'S EVALUATION

6.72 The Commission agrees with the comments made by Mr Van Zyl and is of the view that the provision should be retained as it is. The problem referred to by Mr Levitt is not convincing. The process provided for in the legislation is different from section 112 procedures. The Commission is of the view that the time when the agreement becomes binding should specifically be regulated.

## COMMENTS AD SECTION 111A (6)

6.73 The provision reads:

- (6) Where the contents of an agreement have been disclosed in open court, the presiding judge, regional magistrate or magistrate shall question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty and whether he or she entered into the agreement in his or her sound and sober senses freely and voluntarily and without improper influence, and may –
- (a) if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence; or
- (b) if he or she is for any reason of the opinion that the accused cannot be convicted of the offence in respect of which the agreement was reached and to which the accused has pleaded guilty or that the agreement is in conflict with the accused's rights referred to subsection (2)(a), he or she shall record a plea of not guilty in respect of such charge and order that the trial proceed.

6.74 Mr JHS Hiemstra is of the view that the written agreement between the parties should be seen in the same light as a statement in terms of section 112(2) and proposes that this section should therefore have similar wording and section 112 should be made applicable to the procedure. The part requiring the court to ascertain whether he or she entered into the agreement in his or her sound and sober senses freely and voluntarily should, however, be retained.<sup>66</sup>

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See also comments of Advocate PBC Luyt who raises the question whether the purpose of this subsection is to institute a separate, but in many aspects similar procedure as envisaged

6.75 Mr Jansen van Vuuren points out that the proviso in section 113 of the Criminal Procedure Act provides that any allegation admitted by the accused up to the stage that the accused's plea is amended to one of not guilty, shall remain in tact as proof of such allegation. Section 111A (6) of the draft Bill provides that the presiding officer shall question the accused with reference to the alleged facts of the case in order to ascertain whether the accused admits the allegations in the charge to which he or she has pleaded guilty. If the presiding officer is not satisfied with the guilt of the accused in terms of section 111A(6)(b) of the proposed Bill, no admissions contained in the plea agreement shall be admissible against the accused. This provision is therefore in conflict with the provisions of section 113(1).

6.76 SJ Marais, magistrate Steynsburg proposes that provision should be made for the submission of a written plea as provided for in section 112(2) of the Criminal Procedure Act.

6.77 The Director of Public Prosecutions Witwatersrand and members of his staff have serious misgivings as to whether the presiding officer should simply order that a trial proceeds, in the event that he/she does not accept the agreed plea of guilty. It follows from the fact that the plea and the sentence agreement will be contained in a single document that the presiding officer becomes familiar to information regarding the accused (such as previous convictions) which should not be at his disposal at the beginning of the trial. The arguments re plea and sentence should either be separated *ab initio* or a *de novo* trial will have to be ordered.

6.78 Mr TW Levitt points out that it is not required to question an accused on his written statement in terms of section 112 and there is no explanation as to why this is required in terms of a sentence agreement.

6.79 The Legal Component of the Detective Service, Crime Intelligence of the SA Police Service proposes that the word " whilst" should be inserted and a comma inserted between "sober senses" and "freely".

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by sections 112 and 113? If so, why? If not, why not merely *mutatis mutandis* incorporate the provisions of the mentioned sections?

6.80 Advocate R Meintjies proposes the following amendment:

(6) Where the contents of an agreement has been disclosed in open court, the presiding judge, regional magistrate or magistrate

**(a) shall enquire from the accused whether he or she confirms the terms of the agreement and the admissions made in the agreement; and**

**(b) may question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has agreed to plead[ed] guilty to and**

**(c) shall question the accused in order to ascertain whether he or she entered into the agreement in his or her sound and sober senses freely and voluntarily and without improper influence, and [may -]**

[(b)](d)shall, if he or she is for any reason of the opinion that the accused cannot be convicted of the offence in respect of which the agreement was reached and to which the accused has agreed to plead[ed] guilty to or that the agreement is in conflict with the provisions of [accused's rights referred to in ]subsection (2)(a), [he or she shall record a plea of not guilty in respect of such charge and order that the trial proceed.] inform the parties of such finding and the reasons therefor, **in which event the trial shall proceed de novo** (before another presiding judge, regional magistrate or magistrate, as the case may be? This seems to be desirable, however, the presiding officer in this instance is not "satisfied" that the accused is in fact guilty, as is the case in subs 8(b) (or 6(g)(bb) in this amended version and in smaller offices such a prescript may complicate matters to a considerable degree)

[(a)](e) shall, if satisfied that the accused is guilty of the offence to which he or she has agreed to plead[ed] guilty to, [convict the accused on his or her plea of guilty of that offence] **inform the parties that he or she is so satisfied [or] and**

[(7) Where an accused has been convicted in terms of subsection (6)(a), the presiding judge, regional magistrate or magistrate shall consider the sentence agreed upon in the agreement and **may direct such en enquiries regarding facts relevant for this purpose, including previous convictions of the accused, to the parties as he or she might deem appropriate.**

**(f) (l)f the presiding officer [he or she] is -**

**(aa) satisfied that such sentence is an appropriate sentence, he or she shall inform the parties that he or she is so satisfied, whereupon the agreement shall become binding upon the prosecutor and the accused and it shall be deemed that the accused pleaded guilty to the charge agreed to and the presiding officer shall find the accused guilty on the charge agreed to and impose that sentence;**

- (bb) of the view that the sentence is disturbingly inappropriate and that he or she would have imposed a lesser sentence than the sentence agreed upon in the agreement[, impose the lesser sentence]; or
- (cc) of the view **that the sentence is disturbingly inappropriate** and that the offence requires a heavier sentence than the sentence agreed upon in the agreement, he or she shall inform the [accused] parties of such lesser or heavier sentence he or she considers to be appropriate.

6.81 She is of the view that this is a sentence agreement and the presiding officer should not be allowed to interfere simply for interference sake. The idea is after all to provide for an expeditious procedure. However, it is agreed that some safety net should be in place. She proposes the following:

- [(8)] (g) Where the [accused has] parties have been informed of the lesser or heavier sentence as contemplated in subsection [(7)(c)] (f),[(aa)] the accused may, upon being informed of the heavier sentence being contemplated as referred to in subsection (f) (cc) or the prosecutor may, upon being informed of the lesser sentence being contemplated as referred to in subsection (f)(bb):
  - (aa) abide by [his or her plea of guilty as agreed upon in] the agreement with reference to the charge and [agree] inform the presiding officer that, subject to the [accused's] right to lead evidence and to present argument relevant to sentencing, the presiding judge, regional magistrate or magistrate may proceed with the sentencing proceedings, in which event the agreement shall become binding upon the parties and the accused shall be deemed to have pleaded guilty to the charge agreed to and the presiding officer shall convict the accused on such charge and proceed with the proceedings on sentence; or
  - (bb) withdraw from [his or her] the [plea] agreement, in which event the trial shall proceed de novo [before another presiding judge, regional magistrate or magistrate, as the case may be.

6.82 Advocate J Henning is of the view that the proposals lack an incentive for the prosecution to engage in negotiations regarding sentence because the court's discretion to impose sentence makes it impossible for the prosecution to bind the court as to the sentence to be imposed. He proposes that some mechanism should be built into the proposals which will allow the prosecution and the defence to provide the court, before pleading, in writing admission of all the elements of the

offence, the agreed facts of the case, including all the facts relevant to sentencing as well as information on previous convictions. This should be disclosed in open court and the prosecutor should request the presiding officer to allow him or her to proceed with the case in terms of the agreement. The presiding officer would thus be empowered to give an indication to the parties as to the acceptability of the agreement and sentence before the accused is requested to plead. If the court is of the opinion that the agreement is unacceptable, the proposed procedure will allow room for further negotiations between the prosecution and defence or for the matter to be resolved there and then in court before the plea is submitted. This will also solve the problem raised by subsection (3) in terms of which the parties can approach the court in open court or in chambers regarding the contents of the agreement and the advantages of plea discussions.

## **THE COMMISSION'S EVALUATION**

6.83 The Commission is of the view that although the proposals are based on section 112 of the Criminal Procedure Act, they are nevertheless sufficiently different to justify its own wording. The proposals provide for an agreement on the charge and an appropriate sentence and is completely different from the section 112 procedure. If the agreement is not accepted by the court, it would be unfair to hold an accused to admissions made when under the impression that the matter will be finalised in terms of the agreed facts. If an accused is always to be held to admissions made in a proposed agreement, whether accepted by the court or not, it makes no sense for him or her to even consider negotiation because whatever is proposed will be held against him or her. The Commission is of the view that provisions similar to those of section 113 of the Criminal Procedure Act are inappropriate because of the *sui generis* nature of the proposed process.

6.84 The Commission is in agreement with the views of the Director of Public Prosecutions Witwatersrand that it follows from the fact that the plea and the sentence agreement will be contained in a single document that the presiding officer becomes familiar to information regarding the accused (such as previous convictions) which should not be at his disposal at the beginning of the trial. The arguments re plea and sentence should either be separated *ab initio* or a *de novo* trial will have to be ordered.

6.85 The Commission deems it necessary to provide for the presiding officer to question the accused personally as to the contents of the agreement and the voluntariness thereof because of

the need to introduce judicial control over the process and the need to protect the interests of the accused in view of the dangers associated with the process.

6.86 In terms of the Commission's proposals the court can convict the accused upon disclosure of the agreement in open court and after questioning the accused as to compliance with the prescripts in the Act. The court then only proceeds to consider the agreed sentence and can either accept or reject the agreement. The procedure hereafter depends on the court's acceptance or rejection of the agreement. If the court accepts the agreement the court proceeds with sentence. If it rejects the sentence and intends to impose a heavier sentence the accused is given the opportunity to either abide by his plea or to withdraw from the agreement. If the court intends to impose a lesser sentence the court may proceed to impose sentence and the prosecution is not given a similar right to withdraw from the agreement. Thus in terms of subsection (5) the agreement becomes binding on the parties once disclosed in court and after the procedures outlined above have taken place. It thus means that the agreement becomes binding after the accused has pleaded and after acceptance by the court.

6.87 In terms of the proposal submitted by Advocate Meintjies, which is supported by Advocate Henning, the contents of the agreement is disclosed in open court whereupon the court shall question the accused concerning with reference to the facts of the case he has agreed to plead to guilty to, whether or not the agreement was entered into voluntarily and whether or not for any reason the accused can be convicted of the offence to which he has agreed to plead guilty to. Hereafter the magistrate informs the parties that he is satisfied that the accused can be found guilty of the offence to which he has agreed to plead guilty to. Without convicting the accused the magistrate proceeds to consider sentence and may direct such enquiries regarding facts relevant to sentence as he may deem appropriate. If the court is of the view that the sentence proposed is appropriate the agreement becomes binding on the parties and the accused is deemed to have pleaded guilty and the court proceeds to impose sentence. If the court is of the view that the sentence is inappropriate in that a lesser sentence should be imposed or a heavier sentence should be imposed the court shall inform the parties accordingly. Having been informed accordingly the parties may either abide by the agreement or withdraw from the agreement. If they withdraw from the agreement the trial proceeds *de novo* before another presiding officer.

6.88 According to Advocate Henning the parties will in terms of the proposal be in a position to

obtain the views of the presiding officer regarding the acceptability of the agreement without having pleaded to or convicted of the charge, the presiding officer exercises control over the proceedings without participating in the proceedings and it leaves room for further negotiations and an early identification of problems.

It should be noted that in terms of the Commission's proposals it is not provided for that the accused should be requested to plead and it is not clear whether the accused is requested to plead before the presiding officer proceeds to question him in terms of subsection (6). It is, however, provided that a finding as to guilt has to be made in terms of subsection (6) after questioning.

6.89 After careful consideration of the proposals by Advocate Meintjies and Advocate Henning and the Commission's proposals in the discussion paper, the Commission is convinced that there is merit in their proposals. It provides for control by the presiding officer over the proceedings, the opportunity to identify problems and it solves the problems raised by the proviso to subsection (3) referred to in paragraph 6.55. The Commission therefore recommends that subsections (6), (7) and (8) be amended in accordance with these proposals.

#### **COMMENTS AD SECTION 111A(7)**

6.90 The provision reads:

- (7) Where an accused has been convicted in terms of subsection (6)(a), the presiding judge, regional magistrate or magistrate shall consider the sentence agreed upon in the agreement and if he or she is –
- (a) satisfied that such sentence is an appropriate sentence, impose that sentence;
  - (b) of the view that he or she would have imposed a lesser sentence than the sentence agreed upon in the agreement, impose the lesser sentence; or
  - (c) of the view that the offence requires a heavier sentence than the sentence agreed upon in the agreement, he or she shall inform the accused of such heavier sentence he or she considers to be appropriate.

6.91 Mr RP Stuart notes that subsection (7) implies that sentence will necessarily form part of any agreement reached but he is of the view that there is room for an agreement on the basis of a conviction only whilst leaving room for argument and evidence as to sentence. The Director of

Public Prosecutions Witwatersrand support the Commission's proposal.

6.92 Advocate Meintjies points out that the section does not provide for either the prosecution or the defence to address the court on sentence. For the presiding officer to be satisfied that the sentence is appropriate he or she has to know all the circumstances, previous convictions and other facts relevant to sentencing. Not all these facts will be contained in the agreement.<sup>67</sup>

6.93 Mr TW Levitt points out that sentencing follows a certain procedure during which the State, defence or even the Court may call witnesses. This is the case whether section 111A(7)(a), (b) or (c) is applicable. It therefore seems unnecessary to provide for the accused's right to lead evidence as reflected in subsection (8). It is also unclear as to why a presiding officer seized with the plea of guilty can continue with the trial in the event of subsection (6)(b) being invoked, whereas if subsection 8(b) is invoked the trial is to commence *de novo* before another presiding officer. In both cases the presiding officer is aware of the admissions made by the accused, yet when an indication is given by the presiding officer that the agreed upon sentence is inappropriate, that presiding officer becomes unfit to see the matter through to its conclusion. This illustrates the difficulty that in South Africa no agreement can bind the court and in his view the current position in South Africa is the better option.

6.94 The Division Legal Services in the Head Office of the SA Police Service proposes that provision should be made for the presiding officer to question the complainant before deciding to accept the sentence contained in the agreement or not.

6.95 Advocate M Stander points out that since the accused is afforded the right to withdraw from his or her plea if the presiding officer considers imposing a heavier sentence, the prosecution should be given a similar right to withdraw from the agreement and subsection (8)) should apply to the State with the necessary changes.<sup>68</sup>

## THE COMMISSION'S EVALUATION

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<sup>67</sup> Similar concerns were raised by Advocate PBC Luyt.

<sup>68</sup> Similar comments were received from Advocate PBC Luyt and Advocate Meintjies.

6.96 The Commission is of the view that there is merit in the proposal for the deletion of subsection (7)(b). Reference has already been made to the proposals of Advocate Meintjies and Advocate Henning. The Commission accepts their proposals and recommends that the subsection be amended accordingly. The proposal of The Legal Services of the SAPS is also accepted.

#### **COMMENTS AD SECTION 111A (8)**

6.97 Mr JHS Hiemstra is of the view that the fact that the proceedings should start afresh before another presiding officer creates serious practical problems. In most rural districts there is only one presiding officer. He proposes that the position should be the same as that where an accused pleads guilty and a plea of not guilty is recorded in terms of section 113. In such a case nothing prohibits that the trial proceeds before the same presiding officer.<sup>69</sup>

6.98 Advocate PBC Luyt questions whether the State will also have the opportunity to lead evidence and address the court in terms of sub-section (8)(a). He is of the view that justice cannot be done if only the accused is heard. In view of the entrenched discretion of the court's discretion pertaining to sentence, it is contemplated that the procedure in subsection (7)(c) read with subsection (8)(b) will more often than not manifest itself in practical terms. He therefore suggests that the procedure will be much more time consuming and impractical than the already tested and effective procedures available in terms of sections 112 and 113.

#### **THE COMMISSION'S EVALUATION**

6.99 The Commission has already dealt with the proposals concerning applying the provisions of section 113. With regard to subsection (8)(b) the Commission is of the view that consideration be given to a proviso that the accused renounce the right to be tried by another presiding officer.

#### **COMMENTS AD SECTION 111A (9)**

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Similar comments were received from H VD P Visagie, magistrate Steytlerville, Professor M Watney of the Rand Afrikaans University, The Director of Public Prosecutions Witwatersrand,

6.100 The provision reads:

- (9) Where a trial proceeds as contemplated under subsection 6 (b) or de novo before another presiding judge, regional magistrate or magistrate as contemplated in subsection (8)(b) –
- (a) no reference shall be made to the agreement;
  - (b) no admissions contained therein or statements relating thereto shall be admissible against the accused; and
  - (c) the prosecutor and the accused may not enter into a similar plea and sentence agreement.

6.101 Mr JHS Hiemstra questions the need to exclude admissions later in the proceedings since an accused is fully informed of his or her rights in terms section 111A(2)(a). He is of the view that the provision is not serving the interests of justice since it allows an accused to present another version to the court. Such a procedure will not be understood by the public as was the case with bail proceedings. He proposes that a position similar to section 60(IIB)(c) be adopted and that any admissions made by an accused should remain intact and should be used against the accused in later proceedings.<sup>70</sup>

6.102 The Legal Component of the Detective Service, Crime Intelligence of the SA Police Service proposes that subsection (9)(c) be amended to read:

- “(c) the prosecutor and the accused may not enter into a similar plea or sentence agreement, as the case may be.”

6.103 Advocate R Meintjies proposes the following amendment:

- (9)(7) Where a trial proceeds [as contemplated] de novo [before another presiding judge, regional magistrate or magistrate] as contemplated in subsection 6 [(b)] (d) or [(8)(b)] 6(g)(bb) –

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<sup>70</sup> Similar proposals were received from H VD P Visagie, magistrate Steytlerville, Advocate M Stander, Mr TW Levitt, and Adv PBC Luyt.

- (a) **the agreement shall be regarded as pro non scripto and no regard shall be had** or reference shall be made to the agreement;
- (b) no admissions contained therein or statements relating thereto shall be admissible against the accused; [and]
- (c) the prosecutor and the accused may not enter into an identical [similar] plea and sentence agreement; and
- (d) **the prosecutor shall not be bound by the charge agreed to and may proceed on any charge.**

### THE COMMISSION'S EVALUATION

6.104 The Commission has already dealt with the reasons why any reference to the earlier agreement should be excluded.<sup>71</sup> The proposals by the SAPS and Advocate Meintjies are accepted.

### COMMENTS AD SECTION 111A(10)

6.105 The provision reads:

(10) A conviction or sentence imposed by any court in terms of an agreement under this section shall not be subject to appeal.

6.106 Mr Jansen van Vuuren is of the view that an accused's constitutional right to appeal may not be removed or restricted following the judgement of the Constitutional Court in *S v Hans Jurgens Steyn* CCT 19/2000 given on 29 November 2000.<sup>72</sup>

6.107 Advocate M Stander foresees no problems with the provision since the proceedings are always open to review if the accused avers, for example, undue influence.

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<sup>71</sup> See paragraph 6.83.

<sup>72</sup> Most of the respondents echoed the same concern. See also comments of The judges of the Free State, Mr Patel,, Mr TW Levitt,, Professor M Watney,

6.108 Advocate CDHO Nel, Deputy Director of Public Prosecutions Port Elizabeth suggests that the proposed subsection(10) should be extended to include a bar on automatic review of a conviction or sentence arrived at in terms of subsections (6) and (7) and (8). He points out that they encounter judicial reluctance to confirm automatic review admissions by accused persons pursuant to guilty pleas where such admissions are intended to cover elements of offences presupposing a certain knowledge on the part of the maker of the admission which is construed by the reviewing judge to fall beyond the proficiency, capability or technical “know how” of such person. These formal admissions are treated as meaningless and the convictions and sentences are regularly set aside and the matters remitted for further questioning or evidence.

6.109 These are usually elements which would not, peculiarly and ordinarily, fall within the particular awareness of the accused, for instance in drunken driving cases, whether a breath sample of the accused had in fact been tested by means of equipment prescribed by legislation. An admission of such legal prerequisite by an undefended accused would not pass muster upon automatic review in his division and a similar scenario would arise if a conviction and sentence ensuing upon a plea of not guilty to theft but guilty to the lesser possession of stolen goods were to go on automatic review. If, indeed the plea bargaining process is designed to simplify and expedite the process the automatic review proceedings should not be made to apply on top of it.

6.110 Advocate R Meintjies proposes the following amendment:

(10)**(8)** A conviction or sentence imposed by any court in terms of an agreement under this section, **except for a sentence imposed in terms of section (6)(g)(aa)-** *(this should be seriously considered- is the presiding officer to state categorically what lesser or heavier sentence he /she is contemplating? If so, proceedings irrespectively might be construed as tacit agreement, excluding an appeal. However, given the fact that provision is made for argument/evidence on sentence, it can be argued that there was no de facto agreement and an appeal should therefor be possible.) shall not be subject to appeal.*

6.111 Advocate PBC Luyt is of the view that if sub-section (7)(c) refers to a specific heavier sentence, this sub-section might be justifiable. If, however, it means a heavier sentence in general as it should be, to exclude the accused’s right to appeal against a sentence which might be inappropriate, will not be in accordance with justice.

## **THE COMMISSION'S EVALUATION**

6.112 The Commission remains of the view that the right to appeal should be limited. In the discussion paper the Commission was of the view that review should be the appropriate remedy. The Commission adheres to that view. In this regard the Commission recommends that the provisions of the Criminal Procedure Act and the Supreme Court Act should apply with the necessary changes. It makes no sense to permit someone who pleads guilty and agrees to a sentence to appeal. It may, however, occur that the agreed facts do not constitute the offence. In such a case an appeal would be justified. If the court informs the accused of its intention to impose a lighter or higher sentence and the accused accepts that sentence, the same considerations apply.

## **CHAPTER 7**

### **PROPOSALS NOT DEALT WITH IN THE COMMISSION'S DISCUSSION PAPER**

#### **PREVIOUS CONVICTIONS**

7.1 The Director of Public Prosecutions Witwatersrand discussed the discussion paper with chief prosecutors, senior prosecutors and the most experienced Deputy Director of Public Prosecutions and they propose that a section should be added which compels the accused to make a full disclosure of his previous convictions to the prosecutor and the court when entering into an agreement (something similar to section (60(11)B of the Act). They are of the view that this will expedite the finalisation of matters, thwart opportunism and be a major stumbling block to any possibility of improper conduct on the part of any of the parties. Provision should furthermore be made for the possibility of setting aside the plea and sentence agreement in the event of incomplete or non-disclosure of previous convictions.

#### **THE COMMISSION'S EVALUATION**

7.2 This matter has already been discussed in chapter 6.

### **MINIMUM SENTENCES IN TERMS OF THE CRIMINAL LAW AMENDMENT ACT**

#### **COMMENTS**

7.3 The Director of Public Prosecutions Witwatersrand discussed the discussion paper with chief prosecutors, senior prosecutors and the most experienced Deputy Director of Public Prosecutions and they are concerned as to whether section 111A could be applied to any charge where a so-called minimum sentence applies.

#### **THE COMMISSION'S EVALUATION**

7.4 This matter has been dealt with in chapter 4 and 6.

## **IMPLEMENTATION**

### **COMMENTS**

7.5 The Director of Public Prosecutions Witwatersrand discussed the discussion paper with chief prosecutors, senior prosecutors and the most experienced Deputy Director of Public Prosecutions and they are of the view that section 111A should not be implemented in the High Courts and/or Regional Courts only. Plea and sentence agreements are the way to go and certainly the most cost-effective method to streamline our ailing and slow criminal justice system. The proposed legislation represents a radical change from the past. To allay fears and ensure maximum effective use, extensive training will have to be provided to all parties concerned. It follows that sufficient notice of the implementation date needs to be given to ensure sufficient training opportunities. This is hopefully the first step in the direction of levelling the playing fields in criminal trials by compelling the accused to reveal his or her case to the prosecution before the trial commences. Such legislation should also pass constitutional muster.

### **THE COMMISSION'S EVALUATION**

7.6 The matter has been dealt with in chapter 6. The Commission is of the view that a provision which allows for the phasing in of the proposals should be provided for. In this regard it is recommended that the implementation of the proposals be made subject to special or general directives issued by the National Director of Public Prosecutions.

## CHAPTER 8

### THE COMMISSION'S FINAL RECOMMENDATIONS

#### DIRECTIVES TO BE ISSUED BY THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

8.1 The Commission recommends that the National Director of Public Prosecutions consider issuing Directives concerning plea negotiation, which, among others, deal with the following issues:

- (a) the phasing in of the legislation on sentence agreements in the various courts;
- (b) that all prosecution agencies should be bound by charge negotiation guidelines;
- (c) prosecutors should ensure, in the course of negotiations, that defendants in similar circumstances receive equal treatment;
- (d) charge negotiations are not relevant to the sentencing judge's duty and the details should not be mentioned in open court, unless raised by the defence;
- (e) to ensure transparency and accountability in the exercise of charge negotiation discretions, prosecutors should be required to record the outcome of charge negotiations on the file;
- (f) to ensure that the human rights and dignity of defendants are respected, there should be:
  - an express prohibition on prosecutors initially laying more charges or more serious charges than the circumstances warrant;
  - an express prohibition on prosecutors making any offer, threat or promise, the fulfilment of which is not a function of his or her office;
  - an express prohibition on misrepresentation;

- a requirement that prosecutors offer defendants entering charge negotiations a reasonable opportunity to seek legal advice and to have their counsel present;
  - guidance should be given to prosecutors regarding their obligations when entering charge negotiations with an unrepresented defendant. When defendants are represented, prosecutors should not enter negotiations except when counsel is present or a written waiver of counsel is given;
  - where reasonably practicable, defendants should be present at charge negotiations concerning them, should they so wish;
- (g) to ensure that the interests of victims are appropriately considered in the process, prosecutors should be required :
- to take into account the victim's views and interests (as far as they are appropriate) in considering whether and on what terms charge negotiations should be conducted; and
  - without compromising the confidentiality obligation to a defendant or the safety of any person, to inform the victim of the outcome of any charge negotiations made and the justification for those negotiations.

## **PROPOSED LEGISLATION**

8.2 The Commission recommends the enactment of legislation to regulate sentence agreements in South Africa and proposes the following provisions:

**CHAPTER 16A**

**PLEA AND SENTENCE AGREEMENTS**

**Plea agreements in respect of plea of guilty and sentence to be imposed by court**

- 111A.** (1) (a) The prosecutor, subject to the directives issued by the National Director of Public Prosecutions, and an accused, or his or her legal practitioner may before the accused pleads to the charge, enter into an agreement in respect of-
- (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
  - (ii) an appropriate sentence to be imposed by the court if the accused is convicted of the offence to which he or she intends to plead guilty.
- (b) The prosecutor may only enter into an agreement contemplated in paragraph (a) -
- (i) if reasonably feasible, after consultation with the police official charged with the investigation of the case and the complainant; and
  - (ii) with due regard to the nature of and circumstances relating to the offence, the accused and the interests of the community.
- (c) The prosecutor, if reasonably feasible, shall afford the complainant or his or her representative the opportunity to make representations to the prosecutor regarding -
- (i) the contents of the agreement; and
  - (ii) the inclusion in the agreement of a compensation order referred to in section 300.
- (2) An agreement between the parties contemplated in subsection (1), shall be reduced to writing and shall -
- (a) state that, before conclusion of the agreement, the accused has been informed that he or she has the right -
    - (i) to be presumed innocent and to put the State to the task of proving his or her guilt beyond reasonable doubt;
    - (ii) to remain silent and not to testify during the proceedings;
    - (iii) not to be compelled to give self incriminating evidence;
  - (b) state fully the terms of the agreement, including the substantial facts of the matter, all other facts relevant to the agreed sentence and any admissions made; and

- (c) be signed by the prosecutor, the accused, the legal practitioner, the interpreter and, where a compensation order contemplated in section 300 is included in the agreement, the complainant, as the case may be.
- (3) The presiding officer shall not participate in the discussions contemplated in subsection (1).
- (4) The presiding officer shall, before the accused is required to plead, be informed by the prosecutor in open court that the parties have reached an agreement as contemplated in subsection (1) and he or she shall then inquire from the accused to personally confirm the fact that an agreement has been reached.
- (5) If the parties have concluded an agreement and the court has been informed as contemplated in subsection (4), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court, where after that agreement, subject to the provisions of subsections (6), (7) and (8), binds the prosecutor and the accused.
- (6) (a) After the contents of an agreement have been disclosed in open court, the presiding officer shall question the accused –

  - (i) as to whether he or she confirms the terms of the agreement and the admissions made in the agreement;
  - (ii) with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has agreed to plead guilty to; and
  - (iii) to ascertain whether he or she entered into the agreement whilst in his or her sound and sober senses freely and voluntarily and without improper influence.
- (b) Where an inquiry has been conducted in terms of paragraph (a) the presiding officer shall –

  - (i) if he or she is for any reason of the opinion that the accused cannot be convicted of the offence in respect of which the agreement was reached and to which the accused has agreed to plead guilty to or that the agreement is in conflict with the provisions of subsection (2)(a), inform the parties of such finding and the reasons therefor, in which event the trial shall proceed *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer; or
  - (ii) if satisfied that the accused is guilty of the offence to which he or she has agreed to plead guilty to, inform the parties that he or she is so satisfied.

- (7) Where the presiding officer has informed the parties as contemplated in subsection (6)(b)(ii), the presiding officer shall proceed to consider the sentence agreed upon in the agreement and may direct such enquiries regarding facts relevant for this purpose, including previous convictions of the accused, to the parties as he or she may deem appropriate and if the presiding officer is –
- (a) satisfied that such sentence is appropriate, he or she shall inform the parties that he or she is so satisfied, whereupon –
    - (i) the agreement shall become binding upon the prosecutor and the accused;
    - (ii) the accused shall be requested to plead to the charge; and
    - (iii) the presiding officer shall find the accused guilty on the charge agreed to and impose the sentence agreed to; or
  - (b) of the view that the sentence is inappropriate and that he or she would have imposed a lesser sentence than the sentence agreed upon in the agreement, he or she shall inform the parties of such lesser sentence he or she considers to be appropriate; or
  - (c) of the view that the sentence is inappropriate and that the offence requires a heavier sentence than the sentence agreed upon in the agreement, he or she shall inform the parties of such heavier sentence he or she considers to be appropriate.
- (8) Where the parties have been informed of the lesser or heavier sentence as contemplated in subsection (7)(b) or (c), the prosecutor may, upon being informed of the lesser sentence being contemplated as referred to in subsection (7)(b) or the accused may, upon being informed of the heavier sentence contemplated in subsection (7)(c) –
- (a) abide by the agreement with reference to the charge and inform the presiding officer that, subject to the right to lead evidence and to present argument relevant to sentencing, the presiding officer may proceed with the proceedings, in which event the provisions of subsection (7)(a)(i), (ii) and (iii) shall apply with the necessary changes; or
  - (b) withdraw from the agreement, in which event the trial shall proceed *de novo* before another presiding officer, as the case may be: Provided that the accused may waive his or her right to be tried before another presiding officer.
- (9) Where a trial proceeds *de novo* or before another presiding officer as contemplated in subsections 6 (b)(i) and (8)(b) –
- (a) the agreement shall be regarded as *pro non scripto* and no regard shall be had or reference be made to the agreement;

- (b) no admissions contained therein or statements relating thereto shall be admissible against the accused;
  - (c) the prosecutor and the accused may not enter into a similar plea and sentence agreement; and
  - (d) the prosecutor may proceed on any charge.
- (10) A sentence imposed by any court in terms of an agreement under this section shall not be subject to appeal.

REPUBLIC OF SOUTH AFRICA

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# CRIMINAL PROCEDURE AMENDMENT BILL

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*(As introduced)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

**[B -2000]**

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REPUBLIEK VAN SUID-AFRIKA

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# STRAFPROSESWYSIGINGS- WETSONTWERP

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*(Soos ingedien)*

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(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

**[W -2000]**

**GENERAL EXPLANATORY NOTE:**

- [ ] Words in bold type in square brackets indicate omissions from existing enactments.
- { } Words in bold type in these brackets indicate an alternative proposal.
- \_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments.
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## BILL

To amend the Criminal Procedure Act, 1977, so as provide for a prosecutor and an accused to enter into a plea and sentence agreement; to further regulate plea proceedings and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

### Insertion of Chapter 16A in Act 51 of 1977

1. The following Chapter is hereby inserted in the Criminal Procedure Act, 51 of 1977, after section 111:

#### CHAPTER 16A

#### PLEA AND SENTENCE AGREEMENTS

#### Plea agreements in respect of plea of guilty and sentence to be imposed by court

- 111A.** (1) (a) The prosecutor, subject to the directives issued by the National Director of Public Prosecutions, and an accused, or his or her legal practitioner may before the accused pleads to the charge, enter into an agreement in respect of-
- (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
  - (ii) an appropriate sentence to be imposed by the court if the accused is convicted of the offence to which he or she intends to plead guilty.

- (b) The prosecutor may only enter into an agreement contemplated in paragraph (a) –
    - (i) if reasonably feasible, after consultation with the police official charged with the investigation of the case and the complainant; and
    - (ii) with due regard to the nature of and circumstances relating to the offence, the accused and the interests of the community.
  - (c) The prosecutor, if reasonably feasible, shall afford the complainant or his or her representative the opportunity to make representations to the prosecutor regarding –
    - (i) the contents of the agreement; and
    - (ii) the inclusion in the agreement of a compensation order referred to in section 300.
- (2) An agreement between the parties contemplated in subsection (1), shall be reduced to writing and shall –
- (a) state that, before conclusion of the agreement, the accused has been informed that he or she has the right –
    - (i) to be presumed innocent and to put the State to the task of proving his or her guilt beyond reasonable doubt;
    - (ii) to remain silent and not to testify during the proceedings;
    - (iii) not to be compelled to give self incriminating evidence;
  - (b) state fully the terms of the agreement, including the substantial facts of the matter, all other facts relevant to the agreed sentence and any admissions made; and
  - (c) be signed by the prosecutor, the accused, the legal practitioner, the interpreter and, where a compensation order contemplated in section 300 is included in the agreement, the complainant, as the case may be.
- (3) The presiding officer shall not participate in the discussions contemplated in subsection (1).
- (4) The presiding officer shall, before the accused is required to plead, be informed by the prosecutor in open court that the parties have reached an agreement as contemplated in subsection (1) and he or she shall then inquire from the accused to personally confirm the fact that an agreement has been reached.
- (5) If the parties have concluded an agreement and the court has been informed as contemplated in subsection (4), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court, where after that agreement, subject to the provisions of subsections (6), (7) and (8), binds the

prosecutor and the accused.

- (6) (a) After the contents of an agreement have been disclosed in open court, the presiding officer shall question the accused –
- (i) as to whether he or she confirms the terms of the agreement and the admissions made in the agreement;
  - (ii) with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has agreed to plead guilty to; and
  - (iii) to ascertain whether he or she entered into the agreement whilst in his or her sound and sober senses freely and voluntarily and without improper influence.
- (b) Where an inquiry has been conducted in terms of paragraph (a) the presiding officer shall –
- (i) if he or she is for any reason of the opinion that the accused cannot be convicted of the offence in respect of which the agreement was reached and to which the accused has agreed to plead guilty to or that the agreement is in conflict with the provisions of subsection (2)(a), inform the parties of such finding and the reasons therefor, in which event the trial shall proceed *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer; or
  - (ii) if satisfied that the accused is guilty of the offence to which he or she has agreed to plead guilty to, inform the parties that he or she is so satisfied.
- (7) Where the presiding officer has informed the parties as contemplated in subsection (6)(b)(ii), the presiding officer shall proceed to consider the sentence agreed upon in the agreement and may direct such enquiries regarding facts relevant for this purpose, including previous convictions of the accused, to the parties as he or she may deem appropriate and if the presiding officer is –
- (a) satisfied that such sentence is appropriate, he or she shall inform the parties that he or she is so satisfied, whereupon –
    - (i) the agreement shall become binding upon the prosecutor and the accused;
    - (ii) the accused shall be requested to plead to the charge; and
    - (ii) the presiding officer shall find the accused guilty on the charge agreed to and impose the sentence agreed to; or

- (b) of the view that the sentence is inappropriate and that he or she would have imposed a lesser sentence than the sentence agreed upon in the agreement, he or she shall inform the parties of such lesser sentence he or she considers to be appropriate; or
    - (c) of the view that the sentence is inappropriate and that the offence requires a heavier sentence than the sentence agreed upon in the agreement, he or she shall inform the parties of such heavier sentence he or she considers to be appropriate.
  - (8) Where the parties have been informed of the lesser or heavier sentence as contemplated in subsection (7)(b) or (c), the prosecutor may, upon being informed of the lesser sentence being contemplated as referred to in subsection (7)(b) or the accused may, upon being informed of the heavier sentence contemplated in subsection (7)(c) –
    - (a) abide by the agreement with reference to the charge and inform the presiding officer that, subject to the right to lead evidence and to present argument relevant to sentencing, the presiding officer may proceed with the proceedings, in which event the provisions of subsection (7)(a)(i), (ii) and (iii) shall apply with the necessary changes; or
    - (b) withdraw from the agreement, in which event the trial shall proceed *de novo* before another presiding officer, as the case may be: Provided that the accused may waive his or her right to be tried before another presiding officer.
  - (9) Where a trial proceeds *de novo* or before another presiding officer as contemplated in subsections 6 (b)(i) and (8)(b) –
    - (a) the agreement shall be regarded as *pro non scripto* and no regard shall be had or reference be made to the agreement;
    - (b) no admissions contained therein or statements relating thereto shall be admissible against the accused;
    - (c) the prosecutor and the accused may not enter into a similar plea and sentence agreement; and
    - (d) the prosecutor may proceed on any charge.
  - (10) A sentence imposed by any court in terms of an agreement under this section shall not be subject to appeal.

**LIST OF RESPONDENTS**

1. Advocate MT Chidi, Director State Law Advisory Services, Office of the Premier Northern Cape
2. Mr JHS Hiemstra, Deputy Director of Public Prosecutions, Free State
3. Mr J Jansen van Vuuren, Regional Court Magistrate
4. Judges of the High Court, Free State
5. National Council of Women SA
6. SJ Marais, Magistrate Steynsburg
7. H VD P Visagie, Magistrate Steytlerville]
8. Mr RAS Patel, Attorney Estcourt
9. Mr ZJ van Zyl, Deputy Director of Public Prosecutions, Witwatersrand
10. Advocate M Stander, Office of the Director of Public Prosecutions, Cape of Good Hope
11. Director of Public Prosecutions, Cape Town
12. Mr LS Kalimashe, Legal Advisory Services, Eastern Cape Government
13. Mr TW Levitt, Regional Court Magistrate, Durban (Association of Regional Magistrates of South Africa)
14. The Law Society of the Cape of Good Hope
15. Professor M Watney, Rand Afrikaans University
16. Judges of the High Court, Durban
17. Mr CDHO Nel, Deputy Director of Public Prosecutions, Port Elizabeth
18. Mr T Geldenhuys, Legal Services, Management Services, SAPS Head Office
19. Advocate NF van Graan, Legal Component, Detective Service, Crime Intelligence, Head Office SAPS

20. Ms S van der Walt, Magistrate Pretoria North
21. Mr RP Stuart, SC, Deputy Director of Public Prosecutions, Pietermaritzburg
22. Ms S Padayachee, National Co-ordinator Child Rights Project, Lawyers for Human Rights, Pietermaritzburg
23. Ms R Meintjies, Deputy Director of Public Prosecutions, Transvaal
24. Law Society of Transvaal
25. Mr J Henning, Deputy National Director of Public Prosecutions
26. Professor PM Bekker, Unisa