

SOUTH AFRICAN LAW COMMISSION

REPORT

PROJECT 82

SENTENCING

(A NEW SENTENCING FRAMEWORK)

NOVEMBER 2000

**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 report on the review of the law of sentencing.

**JUSTICE Y MOKGORO
CHAIRPERSON: SA LAW COMMISSION
DECEMBER 2000**

INTRODUCTION

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

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A NEW SENTENCING FRAMEWORK

Executive Summary

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

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

3. Judicial officers, many of whom were opposed to the Act from its inception, have continued to criticise it for limiting their discretion. Even if their objection in principle is set aside, there are difficulties for sentencers in applying the new legislation. The 1997 Act deals with only some of the crucial issues. Only a limited number of crimes is covered while other serious crimes are not dealt with at all (kidnapping, for example, is not included), thus disturbing the proportionality between various types of crime. Most importantly, although latterly there has been a move towards consistency, judges have had difficulty in applying the “substantial and compelling circumstances” test in a context where general sentencing principles and the relationship of the test to them are not clearly defined.

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

be felt for many years to come.

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

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

THE APPROACH OF THE COMMISSION

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

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

A NEW PARTNERSHIP

9. The key to the proposal is that the different arms of government enter into a new partnership. There will be more guidance for the courts on sentencing. In the first instance this will take the form of sentencing principles that are clearly articulated in legislation. In this way there will be a decisive break with common law, which has recognised divergent sentencing principles without establishing a clear relationship or hierarchy.

10. These principles will be supplemented by sentencing guidelines developed by an independent Sentencing Council for a particular category or sub-category of offence. The Sentencing Council will have to do research and consult widely before developing guidelines. It will have to collect and publish on an annual basis comprehensive sentencing data including a full list of all sentencing guidelines. The Council will also have to publish reports on the efficacy and cost effectiveness of the various sentencing options provided by legislation, determine the value of fine units and make policy recommendations on the further development of community penalties.

11. Judicial officers should play a large part on such a Council, both to ensure its independence and for the pragmatic reason that they have considerable practical experience of sentencing. There may be some concern about whether judges should be involved in a policy-making organ, which would generate sentencing guidelines that the judiciary itself would later have to apply. Concerns of this kind were decisively rejected by the Supreme Court of the United States of America in *Mistretta v United States*,¹ which held that although up to that time Congress had delegated an almost unfettered sentencing discretion to judges, the scope of judicial sentencing discretion remained within congressional control. Congress therefore had the constitutional authority to take back this wide discretion and to delegate it, within statutorily defined limits, to an independent commission on which judges may serve.

12. To allow an appropriate role for the courts the guidelines are to be relatively more flexible. In addition the courts will be able to develop jurisprudence on the grounds for departure from the guidelines that will form a cornerstone of the proposed new sentencing partnership.

13. The Sentencing Council will be constituted to allow the judiciary to have a major input in the shaping of the guidelines. It will be a relatively small body but will have the statutory duty to consult widely. The cost of the Council will be more than offset by the efficient use of punishment resources, which should result in savings for the criminal justice system as a

¹ 109 Supp Ct 647 (1989).

whole.

14. The Sentencing Council will be independent but not isolated from public opinion. Both the Ministers most closely associated with sentencing, viz the Ministers of Justice and of Correctional Services, and Parliament would be able to ask the Council to consider the development of guidelines for a category of offences that the public might regard as not being treated with the appropriate degree of seriousness. Cabinet and Parliament would thus be able to take direct steps to bring public opinion to bear on the sentencing framework. However, they would not do so through legislation that might disturb the balance of the sentencing system as a whole or result in sentences that could not be implemented in the long run. The public too would be able to approach the Sentencing Council directly, although not to compel it to act.

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

OTHER INNOVATIONS

16. Careful attention is given to provisions for the major sentences of imprisonment for life or for a fixed period and provisions for the detention of dangerous criminals. Where such persons have committed offences that involved a serious physical injury and continue to present a major risk to the public, they may be detained for extended periods.

17. Community penalties are expanded by further provision for correctional supervision and community service. Conditions that may be attached to these sentences are spelt out and the procedures for imposing them simplified.

18. More emphasis is placed on restitution and compensation for victims of crime. To this end a new sentence of reparation is proposed. It includes elements of both restitution and compensation. The sentence may be imposed as an independent sentence, either on its own or together with other sentences. In addition imprisonment or a fine may be suspended on condition of reparation. The proposal is that the sentencing court must consider some form of reparation in every case.

19. The method of calculating fines has also been overhauled. In the future fines will be more closely related to the means of the offender.

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

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

PART 1

SENTENCING REFORM CONSIDERED

INTRODUCTION

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

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

1.3 Many of these potentially contradictory concerns are heightened by the contemporary South African experience. Increased fear of crime has led to calls for heavier sentences from many quarters. It is a public response that cannot be denied. At the same time the values of the new South African Constitution¹ are increasingly being accepted. With this acceptance has come the notion that old practices, including sentencing, have to be reviewed. Some sentences such as capital and corporal punishment have already been rejected on constitutional grounds as contrary to human dignity.²

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

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

1.4 Recently, the Constitutional Court has again warned that “[o]ne must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights”.³ At the same time, there is growing recognition that the equal protection of the law that the Constitution promises⁴ also means that the rights of victims of crime need to be respected and reflected in appropriate sentences. What is appropriate in sentencing need not be what was always done in the past. There is increasing recognition that community sentences, of which reparation and service to others are prominent components, form part of an African tradition and can be invoked in a unique modern form to deal with many crimes that are currently sanctioned by expensive and unproductive terms of imprisonment.⁵

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

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

1.7 Before putting forward the proposals of the Commission on a new sentencing

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

⁴ See section 9(1) of the Constitution.

⁵ See, for example, Vivien Stern *Alternatives to prison in developing countries* (1999).

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

SHORTCOMINGS OF THE EXISTING SENTENCING SYSTEM

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

- a. Like cases are not being treated alike because there is unfair discrimination against some offenders, in particular, on grounds of race and social status. Such allegations are difficult to deal with, for a system in which there are no clear sentencing guidelines results in sentencers having a very broad discretion. This makes it difficult to rebut such accusations. In such a system, justice is not easily seen to be done.
- b. The judiciary does not give sufficient weight to the seriousness of particular offences and therefore is imposing disproportionately light sentences in these cases. At the moment this complaint is particularly prominent for certain types of sexual offences, but the focus may shift, as other crimes become the object of public concern. In addition, the seriousness of some offences is being downplayed by not hearing views of victims, either in particular cases or about the heinousness of a type of crime generally.
- c. Less serious offences are being dealt with by terms of imprisonment where more imaginative restitutive alternatives could provide solutions more satisfactory to all parties, while at the same time saving valuable prison resources for those offenders deserving harsher punishment.

- d. Offenders are released from prison and other forms of sentence without having served their full sentences, or even a significant part of them, thus undermining the original sentences. Related to this is the charge that these release processes are themselves inadequate because they are done by closed bureaucracies according to unclear criteria, thus mirroring the shortcomings of the sentencing process itself.

LEGISLATIVE RESPONSES TO THE SHORTCOMINGS

1.9 The Government has responded legislatively to these criticisms in two primary ways:

- a. **Mandatory minimum sentences** were introduced by the Criminal Law Amendment Act 105 of 1997. The Act came into force on 1 May 1998. It applies to certain offences committed after that date. Initially the Act applied only for two years but its operation has been extended for a further year. The Act lists some of the most serious offences such as murder, rape and robbery and describes factual situations in which mandatory sentences, including in some situations, life imprisonment, must be imposed, unless “substantial and compelling circumstances” indicating lesser sentences are present. This Act has the advantage of indicating clearly that specific offences committed in specific situations must be punished harshly. It therefore meets at least one of the concerns expressed above. However, in other respects the new Act has raised new difficulties, which will be considered below. It must be emphasised that the new Act was designed from the outset to be a temporary measure and that this was pointed out in Parliament by the Minister of Justice, who, when he introduced the Bill that became the 1997 Criminal Law Amendment Act, noted that further sentencing reform was envisaged.⁶

b. **New release procedures** were introduced by the Correctional Services Act 111 of 1998. These procedures, which have not yet been brought into operation, are designed to meet the criticism that accused persons are released too early and by an inappropriate process. In terms of the new law all prisoners must serve at least half their sentences in prison, or 25 years in the case of those sentenced to life imprisonment. After that they may be **considered** for conditional release on parole but they remain subject to recall for their full sentences. For some categories of crime this minimum

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

non-parole period may be two-thirds or even four-fifths of the initial sentences. The procedure for release is also to be made considerably more transparent by the appointment of new quasi-judicial parole boards on which lay people are represented. There is also provision for the views of the victims of crime to be taken into account by such boards in certain instances.

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

EARLIER INVESTIGATIONS BY THE SOUTH AFRICAN LAW COMMISSION

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

MANDATORY MINIMUM SENTENCES

1.12 At an early stage of its work it became clear to the Van den Heever Committee that the government wished to enact mandatory minimum sentences as a temporary measure. The Committee was opposed to this course but decided that it should launch its own investigation into mandatory minimum sentences as a possible component of sentencing reform. Accordingly, it developed an issue paper on mandatory minimum sentences and invited public comment on the subject by 30 September 1997.⁷ The issue paper was a more wide-ranging document than its title suggests. It analysed the main characteristics of sentencing in South Africa and also considered sentencing developments in a number of countries in order to isolate various options for reform.⁸ On the basis of this analysis

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

⁸ See chapters 2 and 3 of the Issue Paper and the comments on it in Appendix A of the

comments were invited on the following options for reform:

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

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

* **Voluntary sentencing guidelines**

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

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

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

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

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

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

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

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

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

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

- Is there a need for legislation to regulate the imposition of sentence in respect of certain serious crimes?
- If so, which crimes should be targeted for this purpose?
- How should the questions of lenient or excessive sentencing and inconsistency and disparity in sentencing be addressed?
- Is it agreed that the principal issues are those set out in this paper?
- What, specifically, is proposed in relation to those issues (or any further issues) as an effective basis for reformatory legislation?

1.14 The issue paper elicited a wide variety of responses ranging from acceptance of a Minnesota-style guideline system to total rejection of any legislative reform in the area of sentencing.¹

RESTORATIVE JUSTICE

¹ These responses are summarised in Appendix A to Discussion Paper 91 "Sentencing (A new Sentencing Framework)" ISBN 0-621 30070-5, April 2000.

1.15 The work of the Van den Heever Committee was not limited to mandatory sentencing. It also published an issue paper on restorative justice for which it set a closing date of 30 June 1997. This paper dealt with a restorative approach to the criminal justice system and sought comment on victims and their treatment in South African law; victim's rights; victim and community participation in sentencing; compensation for victims; victim impact statements and victim-offender mediation.¹ Of particular relevance for the current report are the comments on matters related to sentencing (compensation, victim impact statements and victim participation in the sentencing process), as the other matters will be dealt with in a separate investigation.²

INVESTIGATIONS CONDUCTED BY THE CURRENT COMMITTEE

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

¹ See extracts from the Issue Paper on Restorative Justice in Appendix B of the Discussion Paper.

² A summary of the responses received is contained in Appendix B of the Discussion Paper.

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

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

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

1.19 Both studies, together with a comparative conclusion have subsequently been published.¹ The key empirical finding was that there were significant disparities in sentencing

¹ South African Law Commission "An empirical quantitative and qualitative study of the sentencing practices of the South African criminal courts, with particular emphasis on the Criminal Law Amendment Act, 105 of 1997" Research Paper 17, June 2000.

for serious offences, particularly on regional lines, and that these had persisted even after the coming into effect of the 1997 Criminal Law Amendment Act.² The 1997 Act was not without impact. It had increased sentences for some offences. In particular the sentence for rape had increased significantly, although not to the extent that legislation had envisaged. The study found that the newly emerging sentencing patterns could have a major impact on the prison population as longer sentences would lead to growing overcrowding.

1.20 The qualitative study revealed a wide range of opinions amongst criminal justice professionals on sentencing practice. Detailed criticism of aspects of sentencing, such as the limited use made of orders for restitution and compensation were noted. Many decried perceived inconsistencies in sentencing. Opinion on the 1997 Act was divided but there was strong opposition, particularly among the judges interviewed, to the idea of mandatory minimum sentences

FURTHER RESEARCH

1.21 In addition to the two empirical studies, the Committee commissioned detailed research on the events surrounding the passage of the 1997 Criminal Law Amendment Act.³ This study also analysed the submission made to Parliament at the time that the new law was being considered. The most important conclusion that can be gleaned from this research is that there was considerable divergence of views about the desirability of mandatory sentences or indeed of any attempt to limit sentencing discretion. The views of the different role players were largely similar to those reflected in the earlier research of the Van den Heever Committee and those again uncovered by the survey of attitudes commissioned by the Committee after the 1997 Act had come into operation.

RESPONSE BY THE COURTS TO THE 1997 CRIMINAL LAW AMENDMENT ACT

1.22 In addition to the various studies it commissioned the Committee itself analysed the response, as reflected in the judgments of the courts, to the 1997 Criminal Amendment Act. Initially it appeared as if this would be a difficult task. The mandatory minimum sentencing provisions of the 1997 Criminal Law Amendment Act came into force on 1 May 1998 but it took some time for their effects to be felt as they applied only to crimes committed after that date.⁴ There was a time lag before the various divisions of the High Court were called upon

² The sample that was studied unfortunately did not allow a scientific conclusion on the presence or absence of racial disparities in sentencing.

³ The full report produced for the Committee by Ms Paula Proudlock is not reproduced here but is on file with the South African Law Commission.

⁴ *S v Willemse* 1999 (1) SACR 450 (C).

to interpret these provisions and there has been a further delay in the reporting of relevant judgments. By the second half of 1999 they started to appear regularly in the law reports. They give an interesting picture of the legal problems that the courts have encountered with this legislation and an indication of the pitfalls to be avoided in new South African sentencing legislation.

Sentencing jurisdiction

1.23 The first, and arguably less important, question related to the sentencing jurisdiction of the courts. In particular, there was concern about the provision for offenders who had committed crimes for which the Act prescribed life sentences. Many such offences are tried in the regional courts and the Act provides that they have to be referred to the High Court for sentence as life imprisonment is not within the sentencing jurisdiction of the regional courts. There was a technical dispute about whether the regional court in fact had the jurisdiction to try cases in which a mandatory sentence might have to be imposed, but the question was settled by affirmative answers of full benches in both the Cape and Transvaal Divisions of the High Court.⁵ Of more moment is the substantive criticism advanced by a number of judges of the procedure in terms of which the court that imposed sentence was not the trial court. As Davis J explained succinctly in *S v Jansen*: “It is difficult to obtain a sufficient understanding of the matter in its entirety when only matters of sentencing are referred to this [High] Court.”⁶

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

1.24 The second, and major, question about the legislation that has exercised the South African judiciary is the interpretation of the words, “substantial and compelling circumstances.” It is easy to see why this should be so. If “substantial and compelling circumstances” are found to be present the mandatory minimum sentences prescribed by the Act are not applicable. Then the Court is at large, as it would have been prior to the passage of the Act, to exercise its discretion on the imposition of sentence. There has been a wide range of interpretations of the words “substantial and compelling”. At the one extreme has been the view of Stegmann J in *S v Mofokeng*⁷ that they allowed the sentencing court virtually no discretion: He explained that

⁵ See *S v Ibrahim* [1999] 1 All SA 265 (C); *S v Mdatjiece* unreported judgment of the Transvaal Provincial Division SH 375/98 delivered on 30 December 1998, referred to by Stegmann J per *contra* in *S v Mofokeng* 1999(1) SACR 502 (W) at 513h.

⁶ 1999 (2) SACR 368 (C) at 372g.

⁷ 1999 (1) SACR 502 (W).

for 'substantial and compelling circumstances' to be found, the facts of the particular case must present some circumstance that is so exceptional in nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case that it could be described as 'compelling' the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified.⁸

1.25 In Judge Stegmann's view, factors that ordinarily would be regarded as aggravating or mitigating at sentence could not simply be weighed to see if they are a substantial and compelling ground for departure, unless they were of an "unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes".⁹ To do otherwise would mean that the court was preferring its own judgment to that of Parliament and would "compromise the integrity of the court".¹⁰

1.26 At the other extreme was the unreported judgment of Leveson J in *S v Majalefa and Another*¹¹ which held that notwithstanding the new legislation the starting point remained that consideration had to be given to all aggravating and mitigating factors in the traditional way. In this view the new Act was only an attempt to introduce a measure of conformity in the sentencing process and should therefore not be regarded as introducing a major change in the approach to sentencing.

1.27 Both extremes have found endorsement in unreported judgments in other divisions of the High Court. In the Natal Division Squires J in *S v Madondo*¹² emphasised that the intention of Parliament was that penalties for rape of a girl under 16 should be increased and that the court would not easily intervene to impose a lesser sentence as compelling reasons for doing so would not be lightly found. He explained that a "compelling" reason was "clearly more than just a disparity between what the Court feels may be sufficient and the prescribed minimum. To consider such a difference alone as constituting compelling reasons would, I think, be subversive of the legislature's intention." Judge Squires explained that compelling was a "strong" word that meant "almost irresistible", constituting at least a strongly sensed

⁸ At 523c.

⁹ At 524d.

¹⁰ At 523b.

¹¹ Delivered on 22 October 1998 in the WLD, quoted extensively in *S v Blaauw* 1999 (2) SACR 295 (W) at 305i to 306i.

¹² Unreported judgment of the NPD, case CC22/99, delivered on 30 March 1999.

obligation". He went on to opine that factors such as the age of the girl; "nearly sixteen years or sixteen months", or whether she was physically harmed or not, would usually not come into play for the purpose of sentencing under the new Act. The approach of Squires J, which of course is substantially similar to that adopted in *S v Mofokeng*, has been followed in other decisions in the same Division.¹³

1.28 The approach, which suggests that the new Act has changed little in the fundamental approach to sentencing, has also received further support. In *S v Cimani*¹⁴ Jones J of the Eastern Cape Division noted that he would attempt a definition of "substantial and compelling circumstances". He went on to hold:

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

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

1.29 As in *S v Majalefa*, this is really the reassertion of the traditional sentencing principles. With these grounds of departure Judge Jones in *Cimani* found it easy to justify a departure from the prescribed minimum in the case before him.

1.30 In more recent judgments a more nuanced approach has developed between the interpretation that would allow the courts almost no room for manoeuvre and a reading that would limit the restrictions of the new legislation to an extent that arguably undermines the intention of the legislature completely. In *S v Blaauw*¹⁵ Borchers J consciously attempted to steer an interpretative course between the two extremes. She found that the Act did narrow the discretion that courts had previously had to impose sentence and that it did so more rigorously than if the court had merely had to find that there were "circumstances" that justified it departing from the prescribed minima. On the other hand, the legislature had not defined what it meant by "substantial and compelling" as qualifiers of circumstances. It had

¹³ See *S v Ngubane* Unreported judgment of the NPD, per Squires J, case CC31/99, delivered on 30 March 1999; *S v Shinga* unreported judgment of the D&CLD, per Nicholson J, case CC176/99, delivered on 26 October 1999; and (implicitly) *S v Khuzwayo*, unreported judgment of the D&CLD, per Combrink J, case CC103/99, delivered on 30 August 1999.

¹⁴ Unreported judgment of the ECPD, case CC11/99, delivered on 28 April 1999.

¹⁵ *Supra*.

not specified that the circumstances should be “exceptional”, which would make them even narrower. To determine if a departure was allowed one need not look for exceptional circumstances but at the cumulative effect of all the aggravating and mitigating circumstances of the case. If, in the light of these, the prescribed sentence would be “startlingly inappropriate” it could depart from them, but otherwise it was bound to impose them.¹⁶ This approach has been followed, with minor qualifications, in subsequent decisions of the Witwatersrand Local Division of the High Court.¹⁷

1.31 The moderate approach has much to commend it, as it allows the courts some discretion without undermining the intention of the legislature. It remains difficult to apply however, as it requires the courts to consider, albeit within a different framework, all the aggravating and mitigating factors that it has traditionally considered. It is precisely the strategy of spelling out all manner of circumstances that allow a departure from the prescribed minima, which has led to some judgments of the courts being severely criticised by the public for having taken inappropriate factors into account. Perhaps the best example of this is *S v Abrahams*¹⁸ where Foxcroft J held that the offender who had raped his own daughter was not a threat to society as a whole and that this was a mitigating factor that could be considered along with others in deciding not to impose the prescribed life sentence. While the public criticism of the judge for articulating a mitigating factor of this kind is entirely understandable and justified, it may be argued that the relatively inflexible structure of the legislation has led courts, who believe that the prescribed sentence would be inappropriate, to put forward ‘mitigating factors’ of this kind.

1.32 The words “substantial and compelling” are not common qualifiers in South Africa. They were probably adopted from the sentencing guidelines that have been developed by the Sentencing Commission in the American State of Minnesota to guide the courts in the exercise of their discretion.¹⁹ Unlike the Minnesota guidelines the South African legislature has not spelt out further what they entail.²⁰ This is clearly a weakness but it does not mean that words cannot be interpreted without simply reintroducing existing principles. A novel

¹⁶ At 311a-h.

¹⁷ *S v Dithotze* 1999 (2) SACR 315 (W); *S v Homareda* 1999 (2) SA 319 (W). *S v Segole* 1999 (2) SACR 115 (W) and *S v Zitha and others* 1999 (2) SACR 404 (W), both of which follow the approach adopted by Stegmann J in *S v Mofokeng supra* were both decided prior to the decisions in *Blaauw, Dithotze and Homarada*.

¹⁸ Unreported judgment of the CPD, case SS 99, delivered 20 September 1999.

¹⁹ D van Zyl Smit “Mandatory Minimum Sentences and Departures from them in Substantial and Compelling Circumstances” (1999) 15 *SAJHR* 270.

²⁰ *S v Blaauw supra* at 303g.

interpretation is propounded by Davis J in *S v Schwartz*.²¹ The learned judge emphasises that “the key to the application of ‘substantial and compelling’ must be the crime”.²² He noted that this required a determination of the moral blameworthiness that could be attached to the offence in the particular circumstance under which it had been committed. This limits the range of factors that can legitimately be considered in determining whether there are “substantial and compelling circumstances” present that can justify a departure from the minimum. The focus on the relationship between the nature of the crime and the length of the sentence also impelled Davis J to emphasise the principle of desert as a single logical point of departure for his analysis. As he explained:

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

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

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

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

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

²¹ 1999 (2) SACR 380 (C).

²² At 386b.

Constitutionality

1.34 The constitutionality of the new Act was challenged in a number of cases. With the exception of *S v Dzukuda*; *S v Tilly*; *S v Tshilo*²³ which was decided on narrow procedural grounds in May 2000, that is, after the discussion paper had been finalised, these challenges were uniformly rejected. However, the responses to them are a useful indicator of the relationship between constitutional principle and legislative intervention in this sphere. The issue can best be summarised as follows.²⁴ Foreign jurisprudence, both Canadian²⁵ and Namibian,²⁶ quoted with approval by South African Courts,²⁷ indicates that any legislation that resulted in sentences that were grossly disproportionate to the crime would be unconstitutional on the grounds that they would be cruel, inhuman and degrading. A mandatory sentence regime runs the risk of being unconstitutional if in its application it results in grossly disproportionate sentences being imposed. The 1997 Criminal Law Amendment Act, precisely because it allows for departures from the prescribed minima in “substantial and compelling circumstances”, is not, on the face of it, a mandatory sentence regime of the constitutionally dubious kind. If, however, the interpretation of the departure clause were so narrow that it could result in such disproportionate sentences, it would be open to constitutional challenge. In *S v Homareda*²⁸ Cloete J suggested that courts should be alert to this danger and, if the result of applying the new legislation was disproportionality, they should refer the matter to the Constitutional Court. It is clear that any new sentencing legislation would have to bear these strictures in mind in determining whether it would pass constitutional muster. It will also have to consider the underlying principle that the constitutionally recognised dignity of all members of society requires that no sentence should restrict the autonomy of an offender more than is justified by legitimate functions of penal law.²⁹

1.35 In *Dzukuda* Lewis J noted that there was a line of cases (that she was compelled to follow) that confirms that the prescription of sentences in the form that it is done by the 1997 Criminal Law Amendment Act is not “unfair and unconstitutional”. Nevertheless, she held

²³ 2000 (3) SA 229 (W).

²⁴ For a fuller constitutional analysis, see D van Zyl Smit “Sentencing and Punishment” in M Chaskalson *et al* (eds.) *Constitutional Law of South Africa* (Revision Service 5, 1999) 28-6 – 28-10a.

²⁵ *Smith v The Queen* (1987) 34 CCC (3d) 97; *R v Goltz* (1992) 67 CCC 481.

²⁶ *S v Vries* 1996 (2) SACR 638 (Nm); *S v Likwa* 1999 (2) SACR 44 (Nm).

²⁷ *S v Jansen supra* at 373g-374g; *S v Schwartz supra* at 383f-j.

²⁸ 1999 (2) SACR 319 (W) at 326a.

²⁹ See *S v Schwartz supra* at 386h to 387b.

that the procedure by which someone who was convicted of rape in a regional court had to be referred to a High Court for sentence, if a life sentence was mandatory, was unconstitutional, as it infringed the right of the person to be sentenced to a fair trial. However, this ruling was overturned by the Constitutional Court in September 2000.³⁰

Life and other very long sentences

1.36 The question of mandatory sentences also highlights the confusion that exists on the relationship between life imprisonment and long sentences that may be served consecutively. In *S v Ngubane*³¹ the accused was convicted of three counts of premeditated murder. The prescribed sentence for premeditated murder is life imprisonment. The judge seriously considered finding “substantial and compelling circumstances” for not imposing it because he believed that the offender would serve a longer period in prison if three fixed periods of imprisonment were imposed to run consecutively than three life sentences which have to run concurrently. In the end he decided that this was not a compelling circumstance. The fact that it was even considered is in itself worrying. The Supreme Court of Appeal has recently confirmed that life imprisonment is the heaviest sentence that can be imposed.³² It reiterated that to impose such an exceptionally long term of imprisonment that the offender has no possible hope of ever being released, no matter what happens, does not belong in a civilised legal system.³³ Moreover, the practical justification for the sentence is also disappearing. Section 73 (6) of the new Correctional Services Act provides that all prisoners must be considered for release after they have served 25 years of their sentences. This effectively puts them on a par with prisoners sentenced to life imprisonment, as they in terms of the new Act must be considered for release after having served 25 years. This background is of significance for establishing the place of life sentences in relation to other sentences in any new sentencing system.

SENTENCING AND PRISON OVERCROWDING

1.37 The findings of the study on sentencing patterns commissioned by the Committee is given further weight by recent statistics derived from the Department of Correctional

³⁰ *S v Dzuduka; S v Tilly; S v Tshilo* unreported judgment of the CC case CCT 23/00 delivered on 27 September 2000.

³¹ Unreported judgement of the D&CLD, per Magid J, case 160/99, delivered 8 November 1999.

³² *S v Siluale en ander* 1999 (2) SACR 102 (SCA) at 106i.

³³ *Ibid.* at 106j-107a.

Services.³⁴ South African prisons are suffering from overcrowding that has reached levels where the conditions of detention may not meet the minimum standards set in the Constitution. In the short term the problem is brought about by an enormous increase of prisoners awaiting trial. This problem is beyond the remit of this investigation. A closer examination of prison statistics shows, however, that in the medium term the change in sentencing patterns will produce an intolerable burden for an already overloaded system. The trend is that prison sentences of between 3 and 7 years have declined since 1995. However, sentences of 7 to 10 years, 10 to 15 years, 15 to 20 years, and 20 years to life have increased in the same period by 50%, 67%, 70 % and 124 % respectively. The longest sentences are clearly increasing the most. The effect of more very long sentences is of course cumulative, raising the spectre of a system eventually driven to drastic release strategies or, failing that, to collapse. Obviously, as the sentencing system regulates this 'input', this tendency has to be borne in mind in any long-term reform strategy.

INTERNATIONAL DEVELOPMENTS.

1.38 Finally in this overview of evidence collected, it must be noted that there have of course been many developments and refinements in the sentencing systems of the countries that are mentioned in paragraph 1.11 above³⁵ since that research was completed in 1997. For current purposes these details are of less interest. One development though, of potential significance as a hybrid model, is the mechanism created for the development of sentencing guidelines in England and Wales. The Court of Appeal, Criminal Division, has long given guideline judgments that use individual cases to indicate the range within which sentences should be imposed by lower courts for particular offences or subcategories of them.³⁶ These guideline judgments deal exclusively with sentence levels and with aggravating and mitigating factors specific to the offence. They thus indicate to the lower courts what factors they should consider when deciding on the appropriate sentencing level within the proposed range. Generally these judgments have been somewhat more prescriptive than South African sentencing judgments and, by giving more explicit guidance, provided more consistency. Historically, however, there was no compulsion on the Court of Appeal to give such judgments, with the result that the development of sentencing tariffs was somewhat piecemeal and little attention could be paid to the development of the sentencing system as a whole.

1.39 This position has been substantially changed by sections 80 and 81 of the omnibus

³⁴ Statistics presented to the National Council for Correctional Services in January 2000.

³⁵ See also Appendix A of the discussion paper.

³⁶ Andrew Ashworth *Sentencing and Criminal Justice* (2 ed, 1995) 349.

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

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

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

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

1.41 It is too early to judge the efficacy of the Sentencing Advisory Panel. There has been some criticism of the detailed drafting of sections 80 and 81. Thus, for example, Dr. David Thomas has suggested that it is impractical for the Court of Appeal to consider setting guidelines in every one of the many appeals it hears.¹ A number of distinguished sentencing experts were appointed to the Panel in mid-1999 and the results of their work are being awaited with interest. The significance of the Panel for South Africa lies not in the details of its operation, but in the apparent acceptance by the English judiciary of the principle of integrating in a novel way expert knowledge and legislated criteria into the judicial

¹ David Thomas “Sentencing Guidelines” *Sentencing News* Issue 2, 15 August 1999. 10-11.

sentencing process.

THE COMMISSION'S DISCUSSION PAPER ON A NEW SENTENCING FRAMEWORK

1.42 On 13 April 2000 the Commission published a discussion paper on a new sentencing framework. The closing date for comments was 31 May 2000. The discussion paper was distributed widely to key role players, including judges, magistrates, prosecutors, academics, Directors of Public Prosecutions, private legal practitioners, government departments and international experts on the law of sentencing. In addition, advertisements were placed in the newspapers drawing the public's attention to the discussion paper. The discussion paper was made available on the Internet and members of the public could write in to request copies

1.43 The discussion paper proceeded from the basis that the substantial criticism of the sentencing system that had been made to it, as well as its own research and analysis, required a systematic reformist intervention. It concluded that the ideal system should be seen to promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the State to enforce in the long term.

1.44 The discussion paper made a range of recommendations designed to achieve these goals. The most innovative proposal was that sentencing principles be clearly stated in law and that normative sentencing guidelines be established by a combination of a Sentencing Council and the Supreme Court of Appeal. Other aspects of the paper, relating to a reconfiguration of the sentences to be imposed and to consideration of the needs of victims and restorative justice generally were less controversial in principle, but required considerable attention to detail. The case for reform was not only argued in the abstract but the paper included a draft Sentencing Framework Act in which specific legislative form was given to the proposed innovations.

1.45 The publication of the discussion paper and the accompanying draft Act was followed by an extensive process of consultation. Comments were invited from those persons who had been sent the paper and from members of the public who requested it. A list of the persons and institutions that responded with written comments is attached in Annexure A. Public workshops on the discussion paper were widely advertised to stimulate further discussion. Four regional workshops were conducted during the period 12-15 June 2000 in Pretoria, Durban, Cape Town and Bloemfontein. At these workshops the proposals were subjected to intensive analysis and evaluation. A list of the participants attending the workshops is attached in Annexure B. After the conclusion of the workshops and an

evaluation of the comments, the Commission's initial proposals were reconsidered and a revised draft Bill was debated in detail at an intensive three-day seminar in Cape Town. This seminar was attended by the project committee members and a number of invited local and international experts. A list of participants is attached in Annexure C. During this seminar the Commission's proposals for reform and the accompanying draft legislation were refined considerably.

1.46 Overall the many written and oral responses that were received, were helpful and broadly positive. Particularly encouraging among the written responses were those from leading sentencing scholars, such as Professor Andrew Ashworth, the Vinerian Professor of English Law at the University of Oxford, Professor Chris Clarkson of the University of Leicester, Professor Andrew von Hirsch, Professor of Penal Theory and Penal Law at the University of Cambridge and Professors Stephan Terblanche and Dana van der Merwe of the University of South Africa. Although they made many detailed suggestions for improvements these scholars, as well the equally eminent foreign experts that attend the seminar in Cape Town, endorsed the idea of a sentencing framework roughly along the lines proposed in the discussion paper.

1.47 Most of the South African respondents too agreed with the basic approach of the discussion paper, namely that sentencing should be the outcome of a legislatively structured partnership between the various branches of government. However, the fundamental premise was not acceptable to all. In particular, the judges of the Orange Free State and Witwatersrand Divisions of the High Court objected to the idea of sentencing guidelines developed by a Sentencing Council, even if these allowed for a degree of flexibility in their application. In their opinion, sentencing depended on the "experience, humanity, moral judgment and good sense of judicial officers".² They argued that a legislative framework was unlikely to structure sentencing discretion fairly, as it could always be avoided. In any event, they believed that the need to give reasons coupled with rules of precedent and safeguards of an appellate system was sufficient to guarantee a just sentencing framework. Neither submission offered any positive suggestions for legislative reform of sentencing in South Africa.

1.48 In its deliberations on the discussion paper the Commission paid considerable attention to both these objections in principle and to the more detailed suggestions for improvements that were made by many of the respondents. In part II, which follows immediately, it gives its overall response to them. In Part III, where it deals with the five chapters of the draft Act in detail, some of the changes that were made as result of

² Quoted from the submission by the Judges of the Witwatersrand Local Division of the High Court.

comments received are highlighted. However, many of the refinements in the draft must also be attributed in a large part to eagle-eyed commentators, who often suggested alternative wording. The Commission is grateful for all these contributions, even where they are not acknowledged specifically.

PART II

A NEW SENTENCING PARTNERSHIP

INTRODUCTION - BRIEF SUMMARY OF THE EVIDENCE

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

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

- (a) First, judicial officers, many of whom were opposed to the Act from its inception have continued to criticise it for limiting their discretion. Even if their objection in principle is regarded as overstated, it does seem fair to say that there are difficulties for sentencers in applying the new legislation. The Act deals with only some of the crucial issues and does not create a comprehensive sentencing framework or provide guidance on matters of sentencing principle. A limited number of crimes is covered while other serious crimes are not dealt with at all (kidnapping, for example, is not included), thus disturbing the proportionality between various types of crime. In addition, although there has latterly been some move toward consistency, judges have had difficulty in applying the “substantial and compelling circumstances” test in a context where general sentencing principles and the relationship of the test to them are not clearly defined. In this difficult situation the public has been very critical of the judiciary without perhaps understanding the constraints of the legislation. The finding that a father who raped his young daughter represented no threat to the public at large, and

that a ruling of substantial and compelling circumstances justifying the departure from a prescribed minimum sentence could be based, inter alia, on that “fact”, is a notorious example of a case that caused a widespread outcry.

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

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

2.4 The research conducted on restorative justice revealed that there was near universal support for giving victims an increased, although still not dominant, role in the sentencing process. It also found a significant sentiment favouring the use of restorative justice initiatives in less serious cases. In addition, there was no doubt that respondents felt that current measures for the compensation of victims of crime could be improved. This improvement should be applied both to reparation that could be obtained in the sentencing process and to the wider issue of considering the creation of a national victim compensation scheme. The submission on the discussion paper and the national workshops confirmed the widely felt need for reparation to be an element of sentencing, wherever possible. This

sentiment was however accompanied by the recognition that there might be practical limits on the reparation that could be made.

THE APPROACH OF THE COMMISSION

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

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

- (a) The legislature has the advantage that it represents the will of the people and can convey the public sentiment about the need to punish a specific type or category of offence in a particular (usually harsher) way. However, an inflexible sentencing framework set by the legislature may result in grossly disproportionate sentences that are unconstitutional. There is also the further disadvantage that legislative intervention dealing with specific crimes without an overview of the whole system of imposing and implementing sentence may lead to sentences that the system does not have the capacity to implement. The long-term result of this can only be early releases, as the prison system gradually becomes intolerably overcrowded.
- (b) The courts have the advantage that they try individual cases and can make sentencing decisions based on the specific facts of the case and information about the particular accused. Some South African judges believe that this advantage alone should give them an unfettered discretion to impose sentence. However, unstructured discretion is an exercise of absolute power that cannot be tolerated in a democratic state. This argument has been the driving force in sentencing reform in Anglo-American jurisdictions for the past three decades.³

³ The seminal works on the topic are undoubtedly those of former US federal judge, Marvin Frankel, *Criminal Sentences: Law without Order* (1972) and Andrew von Hirsch, *Doing Justice: The choice of Punishments* (1976). For comprehensive modern overviews, see, Chris

In response it can be and was argued that in South Africa the sentencing discretion of judicial officers is not entirely unstructured. Sentencing jurisprudence, as developed through the appellate system, has led to the emergence of some general sentencing principles. In South Africa, however, even these are relatively poorly developed and historically the higher courts have allowed sentencers a great deal of discretion. As Professor Rob Nairn remarked in 1977: "The problem of uniformity has not yet been approached seriously and scientifically in our law, and until it is it will remain a murky and uncertain, albeit vital problem."⁴ This criticism remains pertinent.

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

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

2.7 The objective of the Commission is to put forward proposals that combine, as far as

Clarkson and Rod Morgan *The Politics of Sentencing Reform* (1995) and Michael Tonry *Sentencing Matters* (1996).

⁴ RG Nairn "Sentencing *S v Young* 1997 1 SA 602 (A)" (1977) 1 SACC 189-191.

possible, the advantages that may be derived from the involvement of all three branches of government in the sentencing process and eliminate the disadvantages inherent in giving a single one of them priority. In the model that the Commission proposes, sentencing decisions will continue to be made by the courts, but these decisions will be informed by new initiatives from the legislative and administrative branches that will meet the need for consistency as well as sensitivity to the seriousness of offences, the needs of victims and the capacity of the system to carry out the sentences that have been imposed.

A NEW STRUCTURE

2.8 The key to the proposal is that the different arms of government enter into a new partnership. There will be more guidance for the courts on sentencing. In the first instance this will take the form of sentencing principles that are clearly articulated in legislation. In this way there will be a decisive break with common law, which has recognised divergent sentencing principles without establishing a clear relationship or hierarchy.

2.9 These principles will be supplemented by sentencing guidelines developed by an independent Sentencing Council for a particular category or sub-category of offence. The Sentencing Council will have to do research and consult widely before developing guidelines. It will have to collect and publish on an annual basis comprehensive sentencing data including a full list of all sentencing guidelines. The Council will also have to publish reports on the efficacy and cost effectiveness of the various sentencing options provided by legislation, determine the value of fine units and make policy recommendations on the further development of community penalties.

2.10 In the view of the Commission judicial officers should play a large part on such a Council, both to ensure its independence and for the pragmatic reason that they have considerable practical experience of sentencing.⁵ There may be some concern about whether judges should be involved in a policy-making organ, which would generate sentencing guidelines that the judiciary itself would later have to apply. Concerns of this kind were decisively rejected by the Supreme Court of the United States of America in *Mistretta v United States*,⁶ which held that although up to that time Congress had delegated an almost unfettered sentencing discretion to judges, the scope of judicial sentencing discretion remained within congressional control. Congress therefore had the constitutional authority to take back this wide discretion and to delegate it, within statutorily defined limits, to an independent commission on which judges may serve.

⁵ See also part II ch 2 where the structure of the Sentencing Council is considered in more detail.

⁶ 109 Supp Ct 647 (1989).

2.11 In the discussion paper the Commission suggested a combination of sentencing guidelines developed by a sentencing council with guideline judgments to be given by the Supreme Court of Appeal. In the consultation process it became clear that such an approach would be impractical. The foreign experts emphasized that the Supreme Court of Appeal would not have the holistic view of national sentencing requirements that a comprehensive system of guidelines should take into account. Moreover, interventions on individual guidelines would disturb the system as a whole. Accordingly the Commission now recommends a simple system of direct guidelines. To allow an appropriate role for the courts the guidelines themselves are to be somewhat more flexible than initially proposed. In addition the courts will be able to develop jurisprudence on the grounds for departure from the guidelines that will form a cornerstone of the proposed new sentencing partnership. The Sentencing Council will also be constituted in a way that will allow the judiciary to have a major input on the shaping of the guidelines themselves.

2.12 The Sentencing Council will not be isolated from public opinion. Both the Ministers most closely associated with sentencing, viz the Ministers of Justice and of Correctional Services, and Parliament would be able to ask the Council to consider the development of guidelines for a category of offences that the public might regard as not being treated with the appropriate degree of seriousness. Cabinet and Parliament would thus be able to take direct steps to bring public opinion to bear on the sentencing framework. However, they would not do so through legislation that might disturb the balance of the sentencing system as a whole or result in sentences that could not be implemented in the long run. The public too would be able to approach the Sentencing Council directly, although not to compel it to act.

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

2.14 At a substantive level, explicit attention is given to restitution and compensation for victims of crime. To this end a new sentence of reparation is proposed. It includes elements of both restitution and compensation. The sentence may be imposed as an independent sentence, either on its own or together with other sentences. In addition imprisonment or a fine may be suspended on condition of reparation. The proposal is that the sentencing court must consider some form of reparation in every case.

2.15 The procedural innovations designed to benefit victims of crime include a

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

THE LEGISLATIVE FRAMEWORK

Innovations

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

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

2.18 Clarity on the sentence to be imposed for a particular offence or sub-category of offence will assist in making the operation of the criminal justice system as a whole more efficient. Accused persons will know what penalty they face by pleading guilty to a specific offence. Where counsel for the defence negotiates a plea of guilty with the prosecution, both sides will know what the likely outcome will be. To a greater or lesser extent such negotiations are a feature of most criminal justice systems and another committee of the Commission is currently investigating how they can best be regulated to eliminate abuses while achieving maximum efficiency. The proposed sentencing framework will assist in this process by ensuring that the sentencing basis for negotiations is established clearly. This will facilitate negotiations, which currently are handicapped by neither the prosecution nor the defence being able to predict with any degree of certainty the sentences that will result from the pleas upon which they might agree.

2.19 The development of sentencing guidelines by the Sentencing Council requires an

articulated basis from which it can proceed. To this end the proposed Sentencing Framework Bill deals in the first substantive sections, after the definitions, with the purpose of sentencing and the principles to be applied in deciding upon an appropriate sentence.

2.20 There must be clear provisions about what is meant by sentencing guidelines and the process for establishing such guidelines by the Sentencing Council.

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

2.22 Clarity also requires that the public have a clear idea of how the sentence will be implemented. This is particularly true of community penalties and also of the rights of victims to make representations at the stage of release.

Codifying, modifying and simplifying existing sentencing legislation

2.23 The new partnership that is envisaged, implies that the law governing sentencing is accessible to all the parties involved in the sentencing process. In practice the law describing the sentences that may be imposed and the procedure to be followed on imposition is contained primarily in chapter 28 of the Criminal Procedure Act 51, of 1977. Chapter 29 of the same Act governs compensation and restitution. Both have been amended many times. It is clear that the new legislation requires a fresh look at these provisions.

2.24 The punishments that may be imposed must be reconsidered. The consultation with foreign experts in particular persuaded the Commission that the penalty structure could be simplified and modernised. In addition to the new penalty of reparation other changes are designed to streamline the existing penalties. All sentences involving loss of liberty are dealt with under the heading of imprisonment. Special provision is made for life imprisonment, for extended detention of dangerous criminals and for the treatment-oriented detention of drug addicts. A new system of unit fines is introduced. The community penalties of correctional supervision and community service are more clearly described and a standardised list of conditions that may be imposed to meet modern restorative requirements is introduced.

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

sentencing scheme must also be reconsidered. The new Act attempts to simplify these provisions and to relate them directly to the two types of sentence, viz. the fine and imprisonment, that may be suspended.

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

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

2.28 The punishment jurisdiction of the regional and district magistrates' courts limits their ability to impose certain punishments. A case may therefore be made for including questions of punishment jurisdiction in comprehensive sentencing legislation, particularly as section 51(2) of the 1997 Criminal Law Amendment Act also increased the punishment jurisdiction of the regional court to some extent. The Commission does not support this argument. Sentencing jurisdiction is one of the bases according to which the hierarchy of courts is established. It is therefore properly dealt with in the legislation establishing those courts, other than the High Court that has inherent jurisdiction to impose all lawful punishments. The Commission notes, however, the criticism of the provision in the 1997 Criminal Law Amendment Act that requires the High Court to impose a sentence in instances where the prescribed sentence is life imprisonment even if the accused is tried and convicted in the regional court. This criticism culminated in the judgment of Lewis J in *S v Dzukuda* holding that the procedure was unconstitutional.⁷ Even if the question of constitutionality or otherwise of the procedure is set aside, it is inherently undesirable to separate the trial from the sentence. The sentencing framework that is being proposed in this report will result in the repeal of the "artificial" provision in the 1997 Act that allows for persons convicted in the regional court to be sentenced by the High Court. Consideration should be given to mechanisms outside sentencing legislation to ensure that as a matter of general practice courts only try those cases that they have the sentencing jurisdiction to sentence appropriately. This can be achieved by the prosecuting authorities allocating cases for trial in a way that ensures this result. If there are practical difficulties with this solution the issue of sentencing jurisdiction should be re-examined as part of a wider review of the structure of the criminal courts. Such a review should await the development of the

⁷ See text above paragraph 1.33.

sentencing guidelines proposed by the Commission, as the sentencing guidelines are likely to specify a relatively small number of sub-categories of offences that will require life sentences or other sentences beyond the jurisdiction of the regional courts.

ISSUES THAT WILL NOT BE COVERED IN THE SENTENCING FRAMEWORK BILL

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

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

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

2.32 Parole is technically not a sentencing issue, as it relates to the implementation rather than the imposition of sentence. In theory, parolees are simply serving part of their sentences in the community where they are subject to restrictions and may be recalled at any time until the full period of time specified in their original sentences has elapsed. In practice, of course, it makes a great difference to the offenders whether their sentences are served in prison or outside of it. The public too, perceives a sentence served in prison as harsher than one served subject to the conditional release of parole.

2.33 The simplest and fairest system of parole is one where persons with sentences of similar severity have an equal opportunity to be considered for parole. If, at the sentencing stage, restrictions on the possibility of being released on parole are placed on some prisoners and not others, it fundamentally distorts the relative proportionality between sentences which lies at the heart of these proposals for sentencing reform. At the moment there are no such restrictions. However, section 276B of the Criminal Procedure Act, which

was inserted in 1997 but which has never been brought into effect, provides that a judge or magistrate who sentences an offender to imprisonment for more than two years may determine a non-parole period of up to two-thirds of the sentence, or 25 years, whichever is shorter. Similarly, section 73(6)(b)(v) of the Correctional Services Act 111 of 1998, which has also not been brought into effect, provides that an offender sentenced to a mandatory term of imprisonment in terms of the 1997 Criminal Law Amendment Act must serve four-fifths of the term of imprisonment or 25 years, whichever is shorter, before being considered for parole, unless the court orders that parole must be considered after two-thirds of the sentence.

2.34 The Commission recommends that, in order to ensure real proportionality between sentences, no power be given to sentencers to specify a non-parole period in the proposed Sentencing Framework Act. Accordingly no primary reference to parole need be included in the sentencing legislation. The practical effect will be that all sentenced prisoners will be **considered** for release on parole after having served the same proportion of their sentences. This does not mean that they will be released, even conditionally, when they have served the minimum period. It should be noted that the new parole system to be introduced by the 1998 Correctional Services Act is designed to ensure a thorough consideration of parole decisions and to reduce the risk of early release that will unnecessarily endanger victims of crime and the public in general. The new procedures include independent parole boards and provision for victims of violent crime to be able to bring their concerns to these boards. The proposed Sentencing Framework Act complements these provisions by stipulating that victims must be informed at the sentencing stage of their rights to make representations when parole is considered. The proposed Act also provides that the sentencing court may specify any particular factors that it wishes to bring to the attention of the parole boards.

2.35 The current proposals do not deal with the sentencing of children, as the Commission has recently made comprehensive proposals on youth justice, which cover children facing criminal charges.⁸ Although the draft Act does not deal specifically with youth, it may be important in determining the degree of culpability of an offender or in establishing a basis for departure from a sentence proportionate to the seriousness of the offence.⁹

2.36 Finally, it is important that the sentencing of convicted offenders should not be confused with the diversion from the criminal justice system of alleged offenders whose guilt has not been established beyond a reasonable doubt. The draft Bill deals only with the

⁸ SA Law Commission *Report on Juvenile Justice* Project 106, July 2000, ISBN 0-621-30228-7.

⁹ For the significance of these factors in the sentencing framework, see Part III Chapter 1, paragraph 3.1.21 below.

former, that is, with offenders who have been convicted. The warrant for the State to intervene and limit the rights of an offender is derived from a conviction. This does not mean that, in practice, there may not be an overlap between sentences and diversionary strategies, particularly in the area of community corrections. Diversion of the unconvicted ought, however, to be dealt with in appropriate provisions of the Criminal Procedure Act.

PART III


THE DRAFT BILL THE DRAFT BILL

The draft Sentencing Framework Bill attempts to spell out in legislative terms the ideas for a new sentencing system based on a new partnership as described in Part 2 above. The chapters in this part follow the chapters of the proposed Bill. The notes they contain focus on certain provisions that seem to the Commission to be particularly controversial or to require further explanation.

CHAPTER 1

SENTENCING PRINCIPLES SENTENCING PRINCIPLES

THE PURPOSE OF SENTENCING AND SENTENCING PRINCIPLES

3.1.1 In establishing a sentencing framework it is impossible to avoid the wider questions of the general approach that should underlie sentencing. The Commission has proceeded from the position that the purpose of a sentence is to punish those offenders, and only those, who have been found guilty of a particular offence by limiting their rights and imposing obligations on them. Obviously the punishment must not be so severe that it infringes the human dignity of the offender. The reference to the human dignity  the offender in the preamble makes this point. The reference to human dignity also implies that the punishment must be limited by the restrictions contained in the Constitution, including the constitutional prohibition of cruel, inhuman or degrading punishment or treatment.

3.1.2 It is necessary to have this provision on punishment at the beginning of the Bill to make clear that the legislature is aware that sentences limit fundamental rights and that such limitation is only justified when accused persons have been convicted by due process of law. This is the constitutional basis of the whole criminal justice system. It is why an innocent person cannot be sentenced, even if such a 'sentence' would deter or prevent crime.

3.1.3 There is a second aspect of constitutionally acceptable sentencing. Punishment imposed must not be “grossly disproportionate” to the crime committed. This principle has been recognised in the law of many countries that have constitutions with entrenched bills of fundamental rights.¹⁰ The reasoning is simple. If it is the fact that an offender has been convicted of a crime that allows the state to impose a sentence that limits the rights of the offender, then the right to punish is limited by the seriousness of the offence itself. To punish significantly beyond that level would be to subject the offender to an unjustifiable loss of rights that may well be “cruel, inhuman, or degrading”.

3.1.4 If one of the main problems with the current sentencing system is disparity, in the sense that like cases are not treated alike, then it is not unreasonable to suppose that one must have a clear idea of what the purpose of sentencing is and what principles should be applied to it. The constitutional prohibition of grossly disproportionate punishment allows the legislature considerable scope to set a framework of principles for the determination of appropriate punishments and at the same time points the legislature in the direction of the ideal sentencing system. We would argue positively that it is desirable that punishment in the first instance must be proportionate to the seriousness of the offence so that offenders can get their just deserts. The seriousness of the offence depends in turn on the harm caused by the offence and the culpability of the offender in respect of the offence. A focus on harm and culpability will enable a court to impose adequately severe sentences. The advantage of having the offence as the main focus of the sentencing decision is that if offences can be weighted and compared then one of the main criticisms of the current system, namely sentencing disparities, can be addressed. A clear notion of which offences are most serious is a first step towards ensuring that like cases are treated alike. Similarly, a way must be found of determining culpability, which does not lead to inconsistency, thereby ensuring equality and excluding unfair discrimination on any of the grounds mentioned in section 9(3) of the Constitution.

3.1.5 The method proposed for determining proportionality is, in the first instance, to focus directly on the seriousness of the offence committed. Courts, and also the Sentencing Council when developing guidelines, will have to evaluate this in the light of how seriously an offence of the same kind is regarded by other courts in terms of the punishments they routinely impose for it. In the case of common law offences a single-offence category, for example, ‘murder’ or ‘fraud’, may encompass a very wide range of seriousness. In such instances it may be necessary to break the offences up into sub-categories in order to make a meaningful comparison. This is already being done, not only in the schedule to the 1997

¹⁰ D van Zyl Smit “Constitutional Jurisprudence and Proportionality in Sentencing” (1995) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 369-380.

Criminal Law Amendment Act, which specifies penalties of defined sub-categories of serious common law offences, but also by concepts such as robbery with a dangerous weapon, which is a sub-category of the common law offence of robbery. It is envisaged that the Sentencing Council will develop normative guidelines dealing with the major common law offences and that they will introduce sub-categories where these are necessary because guidelines for broadly defined offences would otherwise be too rigid. Where there is no sentencing guideline the sentencing court will have to rely on such information as is currently available on sentencing practice or can be made available by the Sentencing Council. Obviously, where the offence is new, or where there is little by way of precedent, the courts will rely more heavily on their own judgment of the seriousness of the offence.

3.1.6 In addition to the seriousness of the offence it is proposed that a further factor be considered in the primary determination of a proportional sentence, namely the presence or absence of relevant previous convictions of the offender. Strictly speaking, this is an additional factor that goes beyond the requirements of offence proportionality and one which desert theorists have difficulty in justifying.¹¹ Some go as far as rejecting the notion that previous convictions ought to be relevant to sentence. They argue that considering previous convictions represents a form of double jeopardy. Among those theorists who support the consideration of previous convictions, some have argued that accused persons who have been confronted with the wrongfulness of their conduct by a previous conviction deserve to be punished more harshly if they again ignore the dictates of the law. Other supporters argue that the absence of previous convictions entitles offenders to a type of discount, which they gradually lose as they commit more crimes.¹² It is not possible to settle this difference of opinion here. The proposed provision (section 3(4) of the draft Bill) makes it clear that the offence should be the primary consideration. The presence or absence of previous convictions should merely be a modifier of the appropriate sentence. Restrictions are contained in the term “relevant” previous convictions and in the limitation in the qualifier, “moderate”. South African jurisprudence has long considered the relevance of some previous convictions rather than others.¹³ A restriction of the impact of the previous

¹¹ See, in general Andrew Ashworth *Sentencing and Criminal Justice* (1995) 152-160; Andrew von Hirsch “Desert and Previous Convictions” in Andrew von Hirsch and Andrew Ashworth (eds.) *Principled Sentencing Readings on Theory and Policy* (2ed) (1988) 191-187.

¹² This is the view adopted by both Ashworth *op. cit.* and Von Hirsch *op. cit.*

¹³ See in general, SS Terblanche, *The Guide to Sentencing in South Africa* (1999) 216-218, who discusses the significance for determining the relevance of previous convictions to sentence, of how recent they are and of their relationship to the current offence. See also the discussion of the need for a provision that sentences fall away as previous convictions after 10 years has elapsed (chapter 4 and section 42 below).

convictions by a reasonableness test is used also in Swedish law.¹⁴

3.1.7 The focus on proportional punishment does not exclude the possibility that sentencing can achieve other of its traditional objectives. An overall objective of the criminal law is obviously to deter crime. It is also the objective of the sentencing system as a whole, as is recognised in the preamble to the proposed Bill. This does not mean, however, that deterrence should determine sentences directly. Sentences set with deterrent objectives in mind might be grossly disproportionate and therefore not only unfair but also unconstitutional. In any event, the emphasis on the offence will mean that the most heinous crimes, which usually are those most requiring deterrence are punished most heavily. One should also note that the proposal is designed to create a system that is fair in the long run and not the 'quick fix' of a temporary measure, such as the mandatory sentences created by the 1997 Criminal Law Amendment Act. In other words, it is argued that the general function of deterrence of crime is best served by the sentencing system if it is fair in that the penalties it inflicts are not disproportionate to the crimes committed.

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

3.1.9 Accommodation may be made if society urgently requires that the offender be incapacitated. It may be possible to impose a sentence other than imprisonment of equivalent penal value that would take the offender out of the community. A difficulty of principle is created if incapacitation requires that an offender be removed from society for longer than is justified by the offence itself. Current South African law recognises the need for an exception in such cases and makes provision for "dangerous criminals" to be detained indefinitely (or for as long as the sentencing jurisdiction of the particular court would allow), that is, beyond the period that would be proportionate to the offence. The Commission

¹⁴ Chapter 29 section 4 of the Swedish Criminal Code 1988 discussed by Nils Jareborg "The Swedish Sentencing Reform" in C Clarkson and R Morgan (eds.) *The Politics of Sentencing Reform* (1995) 95-124. Cf. also Chapter 6 section 4 of the Finnish Sentencing Law 1996, discussed by Jareborg *loc. cit.*

accepts this exception, which has been recognised as constitutional in other countries,¹⁵ as long as it is hedged by appropriate safeguards. These should ensure that the additional detention for dangerous criminals is only used for persons who have been convicted of an offence involving serious physical injury so that the disproportionality of the incapacitating sentence is not “gross”; that an adequate procedure exists to assess their future dangerousness; and that there are safeguards to ensure that the procedures for declaring someone a “dangerous criminal” are not used to impose heavier punitive sentences than the law allows. The existing provisions, sections 286A and 286B of the Criminal Procedure Act, have to be tested against these standards.¹⁶

3.1.10 The concern of sentencing with the rehabilitation of offenders can also be accommodated to some extent within the framework of proportionality. The proposed Act does not deal with the implementation of sentence, but the new Correctional Services Act sets the enabling of sentenced offenders “to lead a socially responsible and crime free life in the future”¹⁷ as the overall objective of both imprisonment and community corrections. It has to be emphasized that a sentence of adequate weight always has to be imposed. Nevertheless, it may be possible, particularly in offences of medium degrees of seriousness to choose between different sentences on the basis that some may facilitate rehabilitation better than others.¹⁸ It may, for example, be the case that appropriately targeted community penalties are more effective in rehabilitating offenders than imprisonment. If penal equivalence can be established between the two, a community penalty would therefore, all other things being equal, be the correct choice.

3.1.11 Finally, it should be noted that there is provision for downward departure from the seriousness of the offence standard by allowing other circumstances to be considered. However, this ground for departure is limited by the stipulation that the departure must be to a “reasonable extent”. The sentence should still reflect the seriousness of the offence as far as possible. Moreover, the circumstances justifying departure have to be “substantial and compelling”. The words “substantial and compelling” are used deliberately, as they allow

¹⁵ See, for example, the decision of the Supreme Court of Canada in *Lyons v The Queen* (1988) 37 CCC (3d) 1.

¹⁶ See the further discussion in chapter 4 below and sections 18,19 and 20 of the draft Bill.

¹⁷ Sections 38 and 50 of Act 111 of 1998.

¹⁸ See Norval Morris and Michael Tonry *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (1991) chapters 4 and 5.

some flexibility while limiting departures to cases where there is very strong, if not exceptional, justification for it. The new partnership requires this in order to reduce unwarranted disparities. In the view of the Commission the most recent jurisprudence on the interpretation of these words¹⁹ offers a point of departure for the development of what is the most complex component of any sentencing system, namely a mechanism to provide for departures in truly deserving cases while ensuring that like cases are treated consistently by giving primacy to the seriousness of the offence. It should be added that the Commission considered listing of various factors as specific grounds for departure. However, it was persuaded by the foreign experts that the attempt to do so might distort the framework. The same argument applied to an attempt to list factors that should never be taken into consideration.

RECOMMENDATION

3.1.12 The Commission recommends the preamble should state the purpose of the Bill in general terms:

Preamble

With the objective of establishing a comprehensive sentencing framework to deter criminal conduct and to make society safer by providing for the consistent and just punishment of offenders with sentences that recognize the human dignity of offenders and of victims of crime.

It should then proceed to deal with the general principles in the following terms:

2. The purpose of sentencing

The purpose of sentencing is to punish convicted offenders for the offences of which they have been convicted by limiting their rights or imposing obligations on them in accordance with the requirements of this Act.

3. Sentencing principles

- (1) Sentences must be proportionate to the seriousness of the offence committed, relative to sentences for other categories or sub-categories of offences.
- (2) The seriousness of the offence committed is determined by the degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender for the offence committed.
- (3) Subject to the principle of proportionality expressed in subsection (1) sentences must seek to offer the optimal combination of-

¹⁹ See part I paragraphs 1.30 to 1.39 above.

- (a) restoring the rights of victims of the offence;
 - (b) protecting society against the offender; and
 - (c) giving the offender the opportunity to lead a crime-free life in the future.
- (4) The presence or absence of relevant previous convictions may be used to modify the sentence proportionate to the seriousness of the offence to a moderate extent.
- (5) (a) Except to the extent that other provisions of this Act modify them, the principles contained in this section must be applied in the determination of all sentences within the limits relating to maximum sentences prescribed in legislation and the sentencing jurisdiction of the court.
- (b) The principles apply notwithstanding minimum sentences that may be set by any law.

4. Departure from sentence proportionate to the seriousness of the offence

The sentence proportionate to the seriousness of the offence referred to in section 3 may be reduced to a reasonable extent where there are substantial and compelling circumstances, other than the degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender for the offence committed, that justify such reduction.

SENTENCING GUIDELINES

3.1.13 The introduction of sentencing guidelines is the key innovation in ensuring consistency and implementing the sentencing framework of the draft Bill. The sentencing principles that underlie the guidelines have already been explained in the previous section. As a result of the responses to the discussion paper, modifications were made to the proposed procedure for the development of guidelines. The procedure that the Sentencing Council must follow is now stated in more abstract terms to give the Council more scope on how best to develop the guidelines: For this reason the 100 point scale that was initially proposed has been dropped. There is also provision for dealing with the (probably fairly rare) instances where the harm caused by an offence will differ significantly from one part of the country to another. This qualification was introduced to deal with crimes, such as stock theft, which differ in this way.

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

It is sometimes said to be unjust and inappropriate to let prison space influence punishment levels. This claim seems plausible on a retributive theory of punishment. Why should offenders' deserts depend on how much room there is in penal institutions? On closer analysis, however, the claim does not stand. Granted, it would not be appropriate to use space constraints to impose unequal punishment on offenders convicted of equally reprehensible conduct. But if parity among blameworthy offenders is maintained, and if punishments are graded according to the gravity of the criminal conduct then desert principles allow some leeway in determining the anchoring points and overall severity level of the penalty scale. To the extent that such leeway exists, resource availability may be a legitimate factor in deciding overall severity levels.²⁰

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

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

3.1.17 It is important to recognize that the guidelines themselves have a degree of flexibility. Departures of 30 percent upward or downward from the guidelines may be allowed.²¹ There may be further flexibility if a guideline allows for the suspension of sentence. For offences of medium seriousness a guideline may provide for more than one sentencing option; for example, a relatively short term of imprisonment or a fairly strict community penalty may both be options.

3.1.18 In applying the guidelines two sets of rules are of relevance. Within the framework of

²⁰ Andrew von Hirsch, Kay A Knapp and Michael Tonry *The Sentencing Commission and its Guidelines* (1987) 13-14.

²¹ Set at the suggestion of the Judges of the High Court in Durban who proposed that an increase or decrease of up to 25%, or at least 20% would be preferable. Experience has shown that circumstances may vary to such an extent that injustices may occur from over-rigidity.

variation that a guideline itself may allow, the principles in section 3, apply. On this basis a court will be free to select an appropriate sentence that falls within the guideline.

3.1.19 For a departure from the guidelines the limitations on the powers of the sentencing court are stricter. A sub-category should be ideally defined in such a way that an appropriate sentence for all offences that fall within it can be encompassed by a guideline with various options and a maximum of 30 percent variation upwards and downwards. However, if an offence falls within a particular sub-category, but its seriousness requires a sentence that is substantially more or less than the guideline allows, then a departure that goes above or below the parameters of the guideline is allowed.

3.1.20 A departure downwards that goes beyond what the guideline may allow is also possible in circumstances unrelated to the seriousness of the offence. However, this flexibility too must be limited in order to achieve the overall goal of increased consistency. For this reason, departures beyond the limits set by the normative sentencing guidelines will only be allowed if there are “substantial and compelling circumstances” justifying such departure.

3.1.21 A further device to enhance consistency is the provision that all departures from guidelines must be “reasonable”. Courts should not regard themselves as “at large” once they have found that there are grounds of departure, but should still attempt to impose sentences that come as close to the guidelines as possible. This may of course not be realistic in all cases.

RECOMMENDATION

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

5. Sentencing guidelines

- (1) A sentencing guideline specifies a sentencing option or sentencing options and their severity for a particular category of offence or sub-category of offence.
- (2) The sentencing options that may be included in a guideline are -
 - (a) imprisonment;
 - (b) a fine; and

- (c) a community penalty.
- (3) Sentencing guidelines are determined by applying the sentencing principles in section 3 by -
 - (a) grading categories or sub-categories of offences according to their comparative seriousness and ranking them accordingly; and
 - (b) prescribing sentencing options and their severity for categories or sub-categories of offences in terms of their ranking of seriousness, which are within the capacity of the correctional system to implement.
- (4) Sentencing guidelines apply nationally but, where the degree of harmfulness of a category or sub-category of offence varies significantly from one magisterial district to another, different sentencing guidelines may be prescribed for specified magisterial districts.
- (5) In determining the severity of a community penalty as a sentencing option sentencing guidelines must specify the number of months of correctional supervision or the number of hours of community service.
- (6) In determining the severity of a fine as a sentencing option sentencing guidelines must refer only to fine units, as the amount of a fine is calculated in terms of section 22.
- (7) A sentencing guideline may provide -
 - (a) for an increase or decrease of up to 30 percent in the severity of a sentencing option; and
 - (b) that a part or the whole of a sentence of imprisonment be suspended, if such suspension is permitted by this Act.

6. Applying sentencing guidelines

- (1) When an offender is convicted of an offence that falls within a category or sub-category of offence for which a sentencing guideline has been determined, a court must, subject to subsection 4 impose the sentencing option of the level set by the guideline within the range of any increase or decrease that the guideline may allow.
- (2) Where more than one option is available, a court may impose a combination of such options provided that the overall severity must not exceed the severity of a single option.
- (3) In deciding amongst sentencing options and determining sentences within the range of increase and decrease that the sentencing guidelines may allow, the court must apply the sentencing principles in section 3.
- (4) In order to ensure consistency in sentencing reasonable departures from a sentencing guideline are only allowed -
 - (a) upwards or downwards, in circumstances that increase or decrease substantially the degree of harmfulness or risked harmfulness of the

offence or the culpability of the offender; or

- (b) downwards, where there are substantial and compelling circumstances, other than the degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender, that justify such departure.

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

3.2.1 The Sentencing Council, which will determine sentencing guidelines, will be a key player in the new sentencing partnership sketched in Part II. Its composition is therefore of crucial importance. In its discussion document the Commission favoured a membership that should be as representative as possible. However, in the consultation process it became apparent that many groupings in the criminal justice system, both within the state sector and outside, could claim representation on such a Council, which would therefore become unwieldy and expensive. The Commission is persuaded that the input of these groupings can be accommodated by a mandatory requirement that they be consulted. The proposal is therefore for a relatively small Council on which judicial officers, who collectively have to make sentencing decisions, will be heavily represented. They should be complemented by a limited number of state representatives and a single 'outside' expert on sentencing systems. The Director of the office supporting the Council should also be a member to ensure a clear link between administration and policy. Such a streamlined Council will be relatively inexpensive to operate.

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

RECOMMENDATION

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

7. Establishment of the Sentencing Council

- (1) The Sentencing Council is hereby established.
- (2) The Council consists of the following members, appointed by the Minister -

- (a) two judges of the Supreme Court of Appeal or the High Court, appointed on recommendation of the Judicial Services Commission;
 - (b) two magistrates appointed on recommendation of the Magistrates Commission;
 - (c) the National Director of Public Prosecutions, a Deputy National Director of Public Prosecutions or a Director of Public Prosecutions appointed after consultation with the National Director of Public Prosecutions;
 - (d) a member of the Department of Correctional Services of or above the rank of director, appointed after consultation with the Commissioner;
 - (e) a person not in the full-time employ of the State with special knowledge of sentencing; and
 - (f) the Director of the office of the Council.
- (3) The Minister must appoint one of the judges referred to in subsection (1)(a) as chairperson and anyone of the other members as vice-chairperson.
- (4) A member of the Council is appointed for a period of five years and any member whose period of office has expired is eligible for reappointment.
- (5) The Minister may remove a member of the Council from office only on grounds of misconduct, incapacity or incompetence.
- (6) The Minister must replace any member of the Council who ceases to hold the office or position that qualifies him or her in terms of subsection (2) for membership of the Council.
- (7) A member of the Council who is not in the service of the State may receive such allowances as may be determined by the Director-General in consultation with the Minister of State Expenditure.

OPERATION OF THE SENTENCING COUNCIL

3.2.4 The principal ideas underlying the operation of the proposed Sentencing Council have already been mentioned in Part II above. The primary function of the Council is to create sentencing guidelines. It also has specific functions in respect of fines and community penalties. In addition it must provide information on the guidelines and on other aspects of sentencing. An accessible pool of sentencing information is a precondition for any sophisticated sentencing system and the Council will have a key role in developing and co-ordinating it. It must also facilitate training for judicial officers in the new sentencing framework.

3.2.5 In the process of creating and revising the guidelines, it will be essential for the Sentencing Council to stay in touch with public opinion on the relative seriousness of various

offences. There must, therefore, be provision for cabinet ministers and Parliament to approach the Council directly. Where this happens the Council will have to consider establishing new guidelines or revising existing ones, although it will have to make its decision independently. The Council will also be able to respond to direct requests from the public.

3.2.6 The key to the effective functioning of the Sentencing Council will be in the research and consultation it does. In this regard the proposed office within the Department of Justice and Constitutional Development will assist it. Some of the information the Council requires will be statistical in nature and the Department will have to adjust its statistical systems to meet requests for information from the Department.¹ The consultation process is important too and the draft Act therefore sets a procedural framework for such consultation and lays down requirements as to whom should be consulted.

RECOMMENDATION

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

8. Functions of the Council

- (1) The primary function of the Sentencing Council are to establish sentencing guidelines and to review existing guidelines in terms of the general principles of, and in the manner prescribed in, this Act.
- (2) The Council must set the monetary value of unit fines as prescribed by section 22.
- (3) The Council may advise, and must advise when requested by the Minister, on the development of community penalties or other sentencing options.
- (4) The Council must facilitate the establishment of a programme of judicial education on sentencing.
- (5)
 - (a) The Minister, the Minister of Correctional Services or Parliament may request the Council to establish a sentencing guideline or to review an existing guideline.
 - (b) If the Council receives a request made in terms of paragraph (a), it must act upon such request, following the same procedures as if it

¹ Separate research is currently being conducted to specify the requirements and in particular to provide the Department of Justice's "e Justice Project" with the necessary information for the revision of the respective systems.

were itself taking the initiative.

- (6) Any person may request the Council to establish a sentencing guideline or to review an existing guideline and the Council may respond to such a request.

9. Support for the Council

- (1) An independent office under the management of the Director must support the work of the Council, and carry out its directives.
- (2) The office consists of the Director, who must be an official of the Department, and such other staff as are necessary for the proper performance of the Council's functions.
- (3) The Director and staff are appointed in terms of the Public Service Act and the salaries of such staff members must be determined by the chairperson in consultation with the Director-General.
- (4) Such staff, if not officials of the Department, are deemed for administrative purposes to be such officials under the control and authority of the Director.
- (5) The Director-General must provide adequate financial and logistical support for the office and the work of the Council, including the consultation and research required by section 10.
- (6) All government departments must provide statistical and other information required by the Sentencing Council.

10. Procedures and decisions of the Council

- (1) Meetings of the Council are held at the times and places determined by the Chairperson of the Council.
- (2) The Council regulates the proceedings of its meetings and the keeping of minutes.
- (3) A majority of members of the Council constitutes a quorum for a meeting.
- (4) All decisions of the Council are taken by the majority of members present.
- (5) The Council may take decisions about establishing or reviewing sentencing guidelines only after consultation and research.
- (6) The following must be consulted in establishing or reviewing sentencing guidelines:
 - (a) the National Commissioner of Police;
 - (b) the National Director of Public Prosecutions;
 - (c) the organised legal profession;
 - (d) the judiciary;

- (e) the Commissioner;
 - (f) the Director-General of Welfare and Population Development;
 - (g) the Director-General; and
 - (h) as far as is practicable any person who, or organization which, in the opinion of the Council, has special knowledge or expertise relevant to the establishment of sentencing guidelines or the review of existing guidelines.
- (7) Draft sentencing guidelines must be published together with a call for comment within a set time frame.
- (8) The Council must consider any such comment before a sentencing guideline is finalized.

11. Coming into force of sentencing guidelines.

- (1) Sentencing guidelines that have been established or revised by the Council must be published by notice in the *Gazette*.
- (2) Such guidelines become applicable in terms of section 6 on a date specified in such notice.

12. Reports and information

- (1) The Council must provide annually a report to Parliament that includes -
 - (a) a statistical overview of all sentences that have been imposed and that are still in force;
 - (b) projections of the estimated cost of continuing to implement such sentences in the future;
 - (c) as far as is practicable, information on the efficacy of sentences in reducing crime;
 - (d) a statistical overview of the development of the use of community penalties as sentencing options and their effectiveness; and
 - (e) a consolidated list of all the guidelines that it has developed.
- (2) The Council must publish annually, electronically or otherwise, information on sentencing, including a consolidated list of sentencing guidelines that will assist the courts in imposing sentences in terms of this Act.

PART III**CHAPTER 3****SENTENCING OPTIONS****INTRODUCTION**

3.3.1 Before a sentencing officer can start considering the most appropriate sentence in a particular case, the types of sentences that may legally be imposed have to be determined. At present, section 276 of the Criminal Procedure Act, 51 of 1977, makes provision for different types of sentencing options. This section is the general enabling statutory provision as far as the various forms of punishment in criminal trials are concerned.

3.3.2 The Commission is of the view that the proposed Sentencing Framework Bill should simplify and clarify the sentencing options that are available, by enacting a modified version of the existing section 276. It should not, like its predecessor, provide for common law punishments, as for reasons of legality the courts should not have the power to create such new penalties. On the other hand, specific acts may need to create additional penalties, such as forfeiture. For this reason allowance is made for the provisions of “any other law”.

3.3.3 In the simplified list of sentences the Commission recommends that the declaration as a habitual criminal be omitted. The foreign experts who were consulted advised strongly against such a sentence, as it is contrary to the desert-based philosophy of the framework as a whole and could result in grossly disproportionate sentences. In any event, there is a general provision for the previous convictions of an offender to be taken into consideration. Moreover, the provision for the indefinite detention of dangerous criminals, which has been retained,¹ is an effective means of dealing with those habitual offenders who are also dangerous.

3.3.4 The Commission also recommends that the sentence of periodical imprisonment be abolished. The information presented to it was that this sentence was hardly used in practice. New penalties, such as the house detention aspect of correctional supervision, make it even less likely that periodical imprisonment will be a useful sentencing option in the future.

3.3.5 The question of suspended sentences also needs to be addressed in general terms: The suspension of sentences has long been a prominent feature of South African

¹ See section 18(2) of the proposed Bill.

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

3.3.6 The Commission considered whether suspended sentences still have a role to play in a new system where community penalties may be imposed directly and where the primary principle of sentence is that the punishment must fit the crime. It was also concerned that suspension could increase the inequalities between sentences, as a suspended sentence does not have nearly the same penal impact on the offender as an unsuspended sentence of the same degree of severity. In the end it was persuaded that suspended sentences do have a part to play, particularly in keeping first offenders out of prison and in giving them an opportunity to attempt to reform. However, suspension of sentences on a large scale should not be allowed to distort the mechanisms that are being set in place to ensure equal punishments. Various mechanisms are proposed to limit the distorting effect of the suspended sentences. In setting a sentencing guideline the Sentencing Council may decide not to allow the suspension of a particular sentence at all. Only imprisonment and fines may be suspended. Moreover, in the case of imprisonment, a maximum of five years of the sentence may be suspended.

3.3.7 The architecture of this chapter reflects a major change from the overall structure of the draft Bill that accompanied the discussion paper. As now proposed, the provisions relating to individual sentencing options are grouped together. Thus, for example, the provisions for suspension of sentence are not stated in general terms as is done in the extraordinarily complex section 297 of the current Criminal Procedure Act. Instead, there are specific provisions dealing with the suspension of imprisonment - and later with the suspension of a fine under the general heading of the fine. Breaches of conditions of suspension and failures to meet the requirements of specific sentences are also dealt with separately. This was done on the advice of the foreign experts in order to simplify the law.

3.3.8 The justifications for the individual sentencing options that have been developed further will be discussed when the detailed provisions of the draft Bill that deal with them, are outlined below.

RECOMMENDATION

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

13. Sentencing Options

- (1) Subject to the provisions of this Act and any other law, a court may pass one or more of the following sentences upon any person convicted of an offence if justified by the sentencing principles referred to in section 3 or allowed by a sentencing guideline applicable to the offence:
- (a) imprisonment;
 - (b) a fine;
 - (c) a community penalty;
 - (d) reparation; and
 - (e) a caution and discharge.

IMPRISONMENT

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

3.3.11 The Commission recognizes that the current provisions of the Criminal Procedure Act relating directly to imprisonment are highly technical. In the new Act the provisions dealing with imprisonment should be different. Of key importance is that the Act should recognize that imprisonment is a drastic penalty. It is also expensive to implement. Although its use should not be avoided where there is no other option, provision must be made for alternatives to be used where possible and where this can be done without jeopardizing community safety.

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

3.3.13 Life imprisonment is the longest prison sentence that a court may impose.² As far as the courts are concerned it lasts for the whole of the natural life of the prisoner.³ Life imprisonment has been expressly provided for in the Criminal Procedure Act by the Criminal Law Amendment Act of 1990, but the Supreme Court has always been empowered to impose it.⁴ It may only be imposed by the High Court because of the jurisdictional limitations of the other courts. Technically it may be imposed for any common law offence but with regard to statutory offences it is only allowed as a legitimate sentencing option if there are specific provisions for its imposition. Before the abolition of the death penalty life imprisonment was considered to be an alternative for the death penalty, should the latter not be the only proper sentence. Even then, life imprisonment was imposed only in cases of extreme seriousness where the protection of society was imperative.

3.3.14 Since the abolition of the death penalty life imprisonment is the most severe sentence that the courts can impose.⁵ In *S v T*⁶ the court explained that the sentence of life imprisonment authorises the State to keep offenders in prison for the rest of their natural lives. Unless this result is considered to be appropriate this sentence should not be imposed. The question is when is this option appropriate? From case law it appears that this option is not limited to exceptionally extraordinary circumstances.⁷ It is clear though, that the crime has to be very serious and that mitigating factors should have little effect on the blameworthiness of the offender.

3.3.15 Some presiding officers have been concerned that the release policy of the Department of Correctional Services may have the effect that, despite the imposition of a life sentence, the offender may be released after having served only a few years of the sentence. If life imprisonment is an appropriate sentence, its imposition should not be avoided merely because the administrative machinery of the executive allows for the early release of the offender.⁸ In any event, when the new Correctional Services Act 111 of 1998 comes into operation all prisoners will have to serve 25 years before they can be considered for release.⁹ Only if the prisoner is older than 65 years of age will release be considered after

² See Part I paragraph 1.41.

³ *S v Mdau* 1991 (1) SA 169 (A).

⁴ *S v Mzwakala* 1957 (4) SA 273 (A).

⁵ *S v Martin* 1996 (1) SACR 378 (W).

⁶ 1997 (1) SACR 496 (SCA) at 498.

⁷ *S v Ngcongco* 1996 (1) SACR 557 (N).

⁸ *S v Mhlongo* 1994 (1) SACR 584 (A).

⁹ Section 73(6)(b)(iv) of Act 111 of 1998.

15 years. Moreover, the release of prisoners sentenced to life imprisonment, unlike other sentences, will be considered by the court that imposed the original sentence. The court itself thus has the power to extend the term actually served beyond the 25-year minimum.

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

3.3.17 The Commission recommends that the power to impose the life sentence be qualified only by the requirement that it must be limited to cases where it is justified by the extreme gravity of the offence. This qualification follows a similar provision in the Statute of Rome, which establishes life imprisonment as the most severe penalty that the new International Criminal Court will be able to impose, even for crimes against humanity such as genocide.¹⁰

3.3.18 Prison sentences with labour have been outlawed in South Africa for many years. (Sentenced prisoners may be compelled to work but this is governed by the Correctional Services Act.) Nevertheless, to put the issue beyond doubt, there is a provision to ensure that this remains the position.

RECOMMENDATION

3.3.19 The Commission recommends the inclusion of the following provision dealing with imprisonment in general:

IMPRISONMENT

14. Imprisonment

- (1) Imprisonment may not be imposed where a community penalty or a fine is a sentencing option allowed by a sentencing guideline for a particular offence or, if in terms of the sentencing principles they would be options as sentences, unless imprisonment is required in order to protect society against the offender.

¹⁰ Article 77(1)(b) of the Rome Statute for the International Criminal Court (A/Conf.18309, 1998).

- (2) Imprisonment may be for life or for a fixed term, except that no person may be sentenced by any court to imprisonment for a period of less than seven days unless the sentence is that the person concerned be detained until the rising of the court.
- (3) Imprisonment for life is the most severe sentence and may be imposed only where the offence is extremely serious.
- (4) A reference in any law to imprisonment with or without any form of labour as a punishment must be construed as a reference to imprisonment only.

15. Suspension of imprisonment

- (1) Up to five years of a sentence of imprisonment may be suspended in whole or in part for a period not exceeding five years on condition that the person sentenced to imprisonment:
 - (a) does community service; or
 - (b) makes reparation; or
 - (c) complies with a specified order or orders referred to in section 33 without being subject to a community penalty.
- (2) Where a sentencing guideline has been set for the category or sub-category of offence for which the sentence of imprisonment is being imposed, the sentence may be suspended only to the extent allowed by such guideline.

16. Amending conditions of suspension

The court that has suspended a sentence of imprisonment, whether differently constituted or not, or any other court of equal or superior jurisdiction, may on good cause shown amend or cancel any condition of suspension or add any other competent condition.

17. Failure to comply with conditions of a suspended sentence of imprisonment

- (1) If it appears that any condition imposed in terms of sections 15 or 16 has not been met, the person concerned may upon the order of any court -
 - (a) be warned to appear before the court that suspended the operation of the sentence or any court of equal or superior jurisdiction; or
 - (b) be arrested and brought before such court.
- (2) The court that suspended the sentence, whether differently constituted or not, or any other court of equal or superior jurisdiction, must enquire whether the person has failed to meet such a condition and into the circumstances of such failure.
- (3) If such court finds that such condition has not been met due to circumstances beyond the control of the person, it may act in terms of section 16.

- (4) If such court finds that such condition has not been met due to circumstances within the control of the person, it may amend or cancel any condition of suspension or add any other competent condition or put the suspended sentence into operation in whole or in part.
- (5) When acting in terms of subsection (4) the court must consider the possible partial fulfillment of the conditions of suspension.

DANGEROUS CRIMINALS

3.3.20 At present provision is made for declaring a person a dangerous criminal and the Criminal Procedure Act prescribes an indefinite sentence in such a case.¹ The provision was introduced relatively recently, in 1993, to replace the outmoded legislation that dealt with the detention of so-called psychopaths. The Commission accepts that potentially indefinite detention for truly dangerous criminals, who represent a danger to the physical well-being of other persons and against whom the community should be protected, is a justifiable exception to the general rule that sentences should be determined primarily by the seriousness of the offence committed.² The Commission therefore proposes that a simplified version of the existing provision be re-enacted as a variation of the sentence of imprisonment. In two important respects there should be substantive modifications to what is currently contained in the Criminal Procedure Act.

- Only persons who have been convicted of offences that involve serious physical injury and who have been sentenced to unsuspended terms of imprisonment of five years or more should be liable, in addition, to being declared dangerous criminals. In practice, current legislation is usually applied to the same effect, but it is nevertheless important to ensure statutorily that someone who commits a lesser, non-violent offence does not run the risk of being detained indefinitely.
- A careful analysis of the idea underlying the indefinite detention of dangerous criminals shows that it has two elements, namely punishment for serious crimes of violence and further detention, which is not punishment in the narrow sense but a form of preventive detention. The Commission's view is that these two elements should be distinguished in legislation, so that someone is not detained when they have served the penal element of their sentence and may no longer be dangerous. It proposes to do so by requiring that the court review the continuing dangerousness of the offender at the time

¹ Sections 286A and 286B.

² See Part III chapter 1 paragraph 3.1.9 above.

the offender would have been considered for conditional release had only a fixed-term sentence been imposed. Of course, the court at this point may decide to continue the detention. The result is that the power to detain dangerous criminals indefinitely is not undermined, but the safeguards are strengthened.

RECOMMENDATION

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

18. Declaration as a dangerous criminal

- (1) Where a High Court or a regional court sentences a person convicted of an offence that involved serious physical injury or the immediate threat of such injury to a fixed term of unsuspended imprisonment of five years or more, the court may, in addition, declare such person a dangerous criminal if it is satisfied, after having conducted any additional inquiry that may be required and followed the procedure specified in section 19 if appropriate, that there is a substantial risk that the person concerned may commit a further offence involving serious physical injury to any other person.
- (2) Where a court declares a person a dangerous criminal such person is, subject to the provisions of section 20, detained in prison for an indefinite period.

19. Inquiry into a potentially dangerous criminal

- (1) If it appears to a court having jurisdiction that a person may be a dangerous criminal in terms of section 18 and that psychiatric testimony may assist the court in determining whether this is the case, the court must direct that the matter be enquired into and be reported on in accordance with the provisions of this section.
- (2) Before a person is subjected to an inquiry under subsection (1) the court must inform him or her of its intention and explain the content and gravity of the provisions of this Act relating to dangerous criminals.
- (3)
 - (a) Where a court orders an inquiry under subsection (1), the inquiry must be conducted and reported on by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court, and by a psychiatrist appointed by the person concerned.
 - (b) A psychiatrist appointed under paragraph (a), other than a psychiatrist appointed by the person concerned, must be appointed from the list of psychiatrists referred to in section 79 (9) of the Criminal Procedure Act: except that where the list does not include a sufficient number of

psychiatrists who may conveniently be appointed for an inquiry under this Act, a psychiatrist may be appointed although his or her name does not appear on such list.

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

20. Further detention of a dangerous criminal

- (1) A person who has been declared a dangerous criminal and who -
 - (a) has served the full unsuspended term of imprisonment to which he or she was sentenced; or
 - (b) would, in terms of the Correctional Services Act, have been released conditionally or unconditionally had he or she been sentenced only to such imprisonment;

must be brought before the court that declared such person a dangerous criminal, whether differently constituted or not, or any other court of equal or superior jurisdiction.

- (2) Such court, after considering a report from a Correctional Supervision and Parole Board and any other information, must determine whether there is still a substantial risk that such person may commit a further offence involving serious physical injury to any other person.
- (3) If the court finds that there is still such a substantial risk it must -
 - (a) confirm that the person is a dangerous criminal and that the detention of the person in prison continues for an indefinite period; and
 - (b) order that such person be brought before the court within a fixed period that may not exceed five years.
- (4) If the court finds that there is no such substantial risk it must release the person concerned unconditionally or on such conditions as it deems fit.
- (5) At the expiration of a further period of detention as ordered in terms of subsection (3) the provisions of subsections (1), (2) and (3) apply with the necessary changes.
- (6) The jurisdiction of the regional court is deemed not to be exceeded by any further periods of detention.

COMMITTAL TO A TREATMENT CENTRE

3.3.22 The sentence of committal to a treatment centre is a further exception to the principle that the offence should determine the punishment. It is explicitly oriented to the treatment and rehabilitation of the individual. The Commission was concerned that it could be used as a means of imposing what could be in fact disproportionately harsh punishments. However, the constraint that it applies only to an offender who objectively is dependent on drugs and the procedural requirements of a probation officer's report, as well as the fact that the provision has been used conservatively in the past, persuaded the Commission to allow it to be continued as a variation of the sentence of imprisonment. As an additional safeguard the Commission recommends the inclusion of an additional requirement that the period of committal to a treatment centre should not exceed the term of imprisonment that the seriousness of the offence would justify.

RECOMMENDATION

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

21. Committal to a treatment centre

- (1) A court that convicts a person of any offence for which a term of imprisonment would be imposed if it applied the sentencing principles referred to in section 3 or followed a sentencing guideline applicable to the offence, may, subject to subsection (2), order that the person be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act 20 of 1992.
- (2) The court must determine a period of detention that does not exceed the term of imprisonment the court would have imposed had it not made such an order.
- (3) An order may be made in terms of subsection (1) if the court is satisfied from the information placed before it, which must include a report of a probation officer, that such person is a person as described in section 21 (1) of the Prevention and Treatment of Drug Dependency Act 20 of 1992, and for the purposes of the said Act such order is deemed to have been made under section 22.
- (4)
 - (a) Where a court has ordered that a person be detained at a treatment centre under subsection (1) and the person is later found not to be fit for treatment in such centre, the person may be referred back to the court for re-sentencing.
 - (b) Whenever a court reconsiders a sentence in terms of paragraph (a) it has the same powers as it would have had if it were considering sentence after conviction, except that the time spent at the treatment centre must be regarded as part of the sentence that has already been served.

THE FINE

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

3.3.25 Serious consideration needs also to be given to a formalized system for relating the fine to the ability of the accused to pay. In this regard the so-called unit- or day-fine system is particularly attractive as it presents a model for linking desert and personal circumstances. In this system the seriousness of the offence is reflected in units of days. The accused is then fined an amount that is calculated by multiplying the day-units by their daily income minus deductions for basic needs.³ The system works well in a number of continental European

³ See H Thornstadt "The Day Fine System in Sweden" 1985 *Criminal Law Review* 306; Judith Greene "The Unit Fine: Monetary Sanctions Apportioned to Income" in Andrew von Hirsch and Andrew Ashworth (eds.) *Principled Sentencing* (2 ed 1998) 268.

jurisdictions where sophisticated information on individual income is easily available.

3.3.26 In the discussion paper the Commission doubted whether such a system could be introduced in South Africa. However, the foreign experts, as well as Professor Stephan Terblanche of the University of South Africa, put forward a strong case for the introduction of a simplified unit fine system. It was argued that a unit fine system was particularly important in a framework where the seriousness of the offence was the primary determinant of punishment. Guidelines developed in terms of fine units rather than monetary amounts were held to be inherently more just than guideline fines set in global amounts that did not take the spending power of the offender into consideration.

3.3.27 The Commission accepts these arguments. It finds however, that South African conditions will not easily allow for a day fine system that requires precise knowledge of the daily surplus of each offender. Instead, it recommends that the Sentencing Council create broad means categories to which fine units of a specified value will be related. Sentencers will then have to follow a simple two-step process in setting fines. First, they will have to determine the number of fine units that are appropriate to the offence in terms of the general principles relating to the seriousness of the offence. Thereafter they will have to determine the means category into which the offender falls. The actual fine is set by multiplying the number of fine units with the value of the units set for the relevant means category. In practice, sentencers can be provided with tables to assist them in making these simple calculations.

RECOMMENDATION

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

FINES

22. Fines

- (1) A fine may be imposed for any offence, unless any law expressly provides that a fine may not be imposed or a relevant sentencing guideline does not provide for it.
 - (2) In determining an appropriate fine a court must first consider the punishment element of the fine in terms of the seriousness of the offence and then relate this to the means of the person who is being fined.
 - (3) In establishing the amount of the fine where the Sentencing Council has set the value of fine units for the means categories the court must -
 - (a) determine the seriousness of the offence in terms of a number of fine
-

- units in accordance with the provisions of section 3, or section 5 if there is a relevant sentencing guideline, and record this number;
- (b) determine the means category referred to in subsection (4) into which the sentenced person falls and record the level of this category; and
 - (c) set the fine by way of multiplying the number of the fine units determined in terms of paragraph (a) with the value of the fine unit set for the relevant means category.
- (4) The Sentencing Council must set means categories and the value of a fine unit for each such category.
 - (5)
 - (a) The Sentencing Council must publish by notice in the *Gazette* the means categories and the value of a fine unit for each such category.
 - (b) These values become applicable on a date specified in such notice.
 - (6) This section does not apply to admission of guilt fines determined in terms of sections 57 or 57A of the Criminal Procedure Act.

23. Alternative to a fine

Whenever a court convicts a person of any offence punishable by a fine it may, in imposing a fine, impose any other sentence as an alternative, except that -

- (a) the alternative may not be more severe than the punishment that may be imposed for such an offence; and
- (b) where the fine is imposed in terms of a sentencing guideline, the court may only impose an alternative sentence allowed by the guideline.

24. Suspension of fines

- (1) The implementation of a fine may be suspended in whole or in part for a period not exceeding five years on condition that the person concerned meets one or more of the following conditions:
 - (a) does community service;
 - (b) makes reparation; or
 - (c) complies with a specified condition or conditions referred to in section 33 without being subject to a community penalty.
- (2) Where a sentencing guideline has been set for the category or sub-category of offence for which the fine is being imposed the sentence may be suspended only to the extent allowed by the guideline.

25. Amending conditions of suspension of fine

The court that has suspended a fine, whether differently constituted or not, or any other court of equal or superior jurisdiction, may on good cause shown amend or cancel any condition of suspension or add any other competent condition.

26. Failure to comply with conditions of a suspended fine

- (1) If any condition imposed in terms of sections 24 or 25 is not complied with, the person concerned may upon the order of any court -
 - (a) be warned to appear before the court that suspended the operation of the sentence or any court of equal or superior jurisdiction; or
 - (b) be arrested and brought before such court.
- (2) The court that suspended the sentence, whether differently constituted or not, or any other court of equal or superior jurisdiction, must enquire whether the person has failed to meet such a condition and into the circumstances of such failure.
- (3) If such court finds that the condition has not been met due to circumstances beyond the control of the person it may act in terms of section 25.
- (4) If such court finds that the condition has not been met due to circumstances within the control of the person it may amend or cancel any condition of suspension or add any other competent condition or put the suspended sentence into operation in whole or in part.
- (5) When acting in terms of subsection (4) the court must consider the possible partial fulfillment of the conditions of suspension.

27. Payment of fines

- (1) Where a person is sentenced to pay a fine, whether with or without an alternative sentence, the court may in its discretion enforce payment of the fine, whether in whole or in part –
 - (a) by allowing the accused to pay the fine on the conditions and in installments as it deems fit;
 - (b) if money is due or is to become due as salary or wages from any employer of the person concerned, by ordering such employer to deduct a specified amount from the salary or wages so due and to pay over the amount to the clerk of the court or registrar in question.
- (2) The clerk of the court or the registrar may, subject to the approval of a magistrate or judge in chambers, vary the conditions and installments according to which fines are paid.
- (3) A court that has acted in terms of subsection (1), whether differently constituted or not, or any court of equal or superior jurisdiction, may on good cause shown reconsider any decision that it has made on the payment of the fine and replace it with a new order authorised by subsection (1).

28. Recovery of fines

- (1) Whenever a person is sentenced to pay a fine, the court passing the sentence may issue a warrant addressed to the sheriff or messenger of the court authorizing him or her to recover the amount of the fine by attachment

and sale of any movable property belonging to such person.

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

29. Failure to pay a fine

- (1) Whenever a court has imposed upon any person a fine without an alternative sentence and the fine is not paid in full or is not recovered in full, the court that passed sentence may -
- (a) warn such person to appear before it; or
 - (b) issue a warrant directing that such person be arrested and brought before the court.
- (2) When such person is brought before court the court may impose any other sentence that may have been imposed if the court were considering sentence after conviction, except that the court must take into consideration any part of the fine that has been paid or recovered.
- (3) (a) A court that sentences a person to a term of imprisonment as an alternative to a fine, may, where the fine is not paid, at any stage before the expiration of the period of imprisonment, order the release of the person concerned and deal with that person in terms of section 27 .
- (b) A court that has acted in terms of paragraph (a), whether differently constituted or not, or any court of equal or superior jurisdiction, may at any time-
- (i) further suspend the fine on any existing or additional conditions that the court may regard as expedient; or
 - (ii) revoke its decision and recommit the person concerned to serve the balance of the term of imprisonment.

COMMUNITY PENALTIES

3.3.29 Sanctions that are implemented in the community have for some years been key elements in South African sentencing practice. Initially, such sentences were imposed indirectly, primarily as conditions of suspension or postponement of sentences of imprisonment. Since 1991 it has been possible to impose correctional supervision directly as a community based sentence.¹

¹ See sections 276(h) and (i) and 276A, which were inserted in the Criminal Procedure Act by Act 122 of 1991.

3.3.30 The Commission had several intimations in the course of the response to its issue paper on restorative justice that it should consider the expansion of the scope of the community-based sanctions already on offer. In order to assist it in the evaluation of these requests it also conducted further comparative research. This research revealed, not surprisingly, that specific legislative provision was made in other jurisdictions for a wide range of community-based sentences, including participation in victim-offender mediation and family group conferencing, which are prominent forms of restorative justice.

3.3.31 The Commission considered whether the current provisions for correctional supervision in the Criminal Procedure Act could be modified to meet the emerging needs for community-based sentences in South Africa. On the one hand, they are flexible and allow various forms of mediation and compensation to be ordered. On the other hand, this flexibility is a potential problem. It does not give the sentencing court a clear indication of what community sentences should entail. It is also dubious from the point of view of the rule of legal certainty, as the sentencer is not constrained by sufficiently clear rules.² It is even more problematic that those responsible for the implementation of the sentence of correctional supervision can manipulate it in such a way that the sentence as served may be significantly different from what the sentencer had intended.

3.3.32 Fortunately, the Correctional Services Act 111 of 1998 has set out to curb some of these abuses by creating a closed list of conditions that could be imposed in community penalties, including correctional supervision. The Commission proposes to build on this legislative initiative. It is of the view that the sentencing option of correctional supervision provided for in the Criminal Procedure Act should be retained. However, its core conditions should be spelt out clearly to ensure that it has sufficient 'bite' for a sanction that is part of the guideline system. In addition, the introduction of a closed but more comprehensive list of supplementary conditions that can be combined with correctional supervision will introduce a measure a legal certainty while allowing for conditions specific to the needs of the offender and the community.

3.3.33 As the conditions proposed for correctional supervision are relatively onerous the Commission also recommends the introduction of a further community penalty of community service. Unlike correctional supervision, it will not be combined with house detention. However, the optional conditions that may be set for correctional supervision may also be added to a sentence of community service.

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

3.3.34 The more detailed provision for the community penalties of correctional supervision and community service will entrench principles of restorative justice in our criminal justice process. Restorative justice represents a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems that caused them. It is also, more widely, a way of dealing with crime generally in a rational and problem-solving way. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control.

3.3.35 In the light of these desiderata the Commission also recommends that the procedure for imposing community penalties be made more flexible. Ideally, comprehensive pre-sentencing reports are required in every case, but the reality is that this is not always feasible, particularly in rural areas. The courts should have the discretion to dispense with some of the details that have been required hitherto. In addition, these reports may be provided by a wider group of competent people than in the past.

RECOMMENDATION

3.3.36 The Commission recommends the following provisions in relation to community penalties:

COMMUNITY PENALTIES

30. Community Penalties

- (1) A community penalty may be imposed on a person convicted of any offence, unless a law expressly provides that a community penalty may not be imposed or a relevant sentencing guideline does not provide for it.
- (2) The community penalties are
 - (a) correctional supervision; and
 - (b) community service.

31. Correctional supervision

- (1) Correctional supervision requires that the person concerned must be placed under the supervision of a correctional official and subject to house detention and the performance of community service.
- (2) The Court imposing correctional supervision must specify –
 - (a) the period of house detention, which may not exceed three years;
 - (b) the hours to which the person is restricted daily to his or her dwelling;

- (c) the number of hours of community service that the person is required to serve, up to a maximum of 24 hours per month; and
 - (d) the type of community service to be performed.
- (3) In exceptional circumstances correctional supervision may be imposed without a requirement of community service.

32. Community Service

- (1) Community service requires that the person concerned perform without remuneration 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 interest of the community.
- (2) The Court imposing community service must specify –
- (a) the number of hours per month of community service that the person is required to serve, which may not exceed 1000 hours in total; and
 - (b) the type of community service to be performed.
- (3) A person sentenced to a community penalty may be ordered to contribute to the cost of the penalty.

33. Additional conditions to community penalties

- (1) Community penalties may be accompanied by conditions that the person –
- (a) is restricted to one or more specified magisterial districts;
 - (b) lives at a specified ascertainable address;
 - (c) refrains from using or abusing alcohol or drugs;
 - (d) takes part in treatment, development and support programmes;
 - (e) refrains from committing a specified criminal offence or class of criminal offences;
 - (f) refrains from visiting a specified place;
 - (g) seeks employment;
 - (h) takes up and remains in employment;
 - (i) refrains from making contact with a specified person or persons;
 - (j) participates in mediation with the victim or in a family group conference;
 - (k) refrains from threatening a specified person or persons by word or action; and

- (l) is subjected to a specified form of monitoring.
- (2) Community penalties may not include any condition other than those listed in subsections (1) and (2), but the court may, subject to the provisions of the Correctional Services Act, elaborate on the conditions.

34. Requirements for imposing community penalties

- (1) Community penalties may only be imposed after a report by a probation officer, a correctional official, social worker or other person designated by the court to provide a report, has been placed before the court.
- (2) A report referred to in subsection (1) must, unless the court rules that it can dispense with one or more of these requirements, contain -
 - (a) recommendations on the orders and conditions on which the sentence should be imposed;
 - (b) recommendations on how the conditions can be used to achieve the objectives of the sentence;
 - (c) the reasons why the accused is a person suitable to undergo a community penalty;
 - (d) a proposed programme for the person concerned;
 - (e) the reasons why the person concerned would benefit from the sentence;
 - (f) information on the family and social background of the person concerned; and
 - (g) any matter that the court may request the probation officer or correctional official, social worker or other designated person to consider.

35. Change of conditions of community penalties

The court that imposed a community penalty may on good cause shown, on application by the Commissioner or the person serving the sentence, amend or cancel any condition of the penalty or add any other competent condition.

36. Failure to comply with community penalties

- (1) If it appears that any condition or order imposed as part of a community penalty has not been met, the person concerned may upon the order of any court -
 - (a) be warned to appear before the court that imposed the community penalty or any court of equal or superior jurisdiction; or
 - (b) be arrested and brought before such court.
- (2) The court that imposed the community penalty, whether differently constituted

or not, or any court of equal or superior jurisdiction, must enquire whether the person has failed to meet such condition or order, and into the circumstances of such failure.

- (3) If such court finds that such condition or order has not been met due to circumstances beyond the control of the person it may act in terms of section 35.
- (4) If such court finds that such condition or order has not been met due to circumstances within the control of the person it may amend or cancel any such condition or order or add any other competent condition or order or impose any other competent sentence afresh.
- (5) When acting in terms of subsection (4) the court must consider the possible partial fulfilment of the community penalty.

REPARATION

3.3.37 The general introduction to this report has already recognized the increased emphasis that should be placed on reparation for the victims of crime in any new sentencing arrangement in South Africa.³ Reparation covers both restitution and compensation. Restitution, in the narrowest sense, means the restoration of an item of property to its lawful owner. Compensation goes further and encompasses the making good of damage resulting from the commission of a crime.

3.3.38 The proposals set out in this report seek to encourage both forms of reparation. It has been noted, however, that a general compensation scheme for all victims was beyond the scope of the current inquiry and that it was being examined separately. Moreover, compensation linked to pre-trial diversion is also not the subject of an investigation into sentencing. These qualifications aside, there remains much that the sentencing system itself can do in respect of reparation for the victims of crime. The imposition of sentences of which restitution and compensation are elements is one way of intervening for the sake of the victim. In the discussion paper the proposal was that this should be done by way of sentences of community corrections or as a condition of suspension of other sentences. The discussion paper also proposed that restitution and compensation orders be made quite separately from the imposition of sentence.

3.3.39 In the consultation process that followed the publication of the discussion paper there was considerable discussion of these proposals, which were seen as unnecessarily complicated. One of the international experts, Professor Arie Freiberg of the University of Melbourne, in particular, recommended strongly that consideration be given to reparation as

³ Paragraph 1.17.

a direct sentence. Such a sentence has been mooted in Victoria in Australia.⁴ More significantly, it exists, in the form of the compensation order, as a sentence of the court in England, where it has gained widespread acceptance.⁵

3.3.40 This Commission accepted these suggestions for revision. Accordingly, it now proposes a sentence of reparation that must be considered as part of the substantive penalty in every case. Such a sentence is a radical departure, as inevitably it combines elements of what could otherwise be recovered as civil damages with a criminal penalty.⁶ The Commission recognizes that, although reparation must be considered in all cases, it will not always be feasible to impose it. It will also require that courts show a degree of flexibility. Courts will be required to balance consideration of the means of the offender with the amount that would be regarded as truly reparative. In order to ensure this flexibility and to allow for jurisprudence on the subject to develop, the provisions relating to reparation are stated in general terms and the possibility is left open for a victim also to proceed civilly to recover any further amount that may be due.

RECOMMENDATION

3.3.41 The Commission recommends the following provisions in relation to reparation.

REPARATION

37. Reparation

- (1) A sentence of reparation may be imposed for any offence and must be considered in every case.
- (2) The court may sentence any person convicted of an offence to make appropriate reparation in the form of restitution and compensation to any victim of the offence for -
 - (a) damage to or the loss or destruction of property, including money;
 - (b) physical, psychological or other injury; or

⁴ Law Reform Committee of the Parliament of Victoria *Restitution for Victims of Crime* (Interim Report), 1993. The full proposals were not, however, adopted. See Law Reform Committee of the Parliament of Victoria *Restitution for Victims of Crime* (Final Report), 1994.

⁵ See section 104 of the Criminal Justice Act 1988, which requires a court to consider making a compensation order in every case involving death, injury, loss or damage. The same provision requires the court to give reasons if it makes no compensation order in such a case.

⁶ For a discussion of the conceptual difficulties that arise with such a penalty, see Ashworth, *Sentencing and Criminal Justice* (2 ed, 1995) 256-261.

- (c) loss of income or support;
resulting from the commission of such offence.
- (3) The awards made by regional or district magistrates' courts in terms of subsection (2) may not exceed a fine that such courts may impose.
- (4) In assessing the reparation that a person convicted of an offence may be ordered to pay the court must consider the means of the offender as well as the reparation appropriate for purposes of restitution and compensation.
- (5) Where the court finds it appropriate to impose a sentence of reparation or to suspend the sentence on condition of reparation, and the court is considering the imposition of a fine in addition to such an award, but it appears that the person convicted would not have the means to make reparation and to pay the fine, the court must first impose the sentence of reparation or make reparation a condition of suspension and then consider the further sentence to be imposed.
- (6) (a) Where a sentencing guideline provides for a fine the court may instead of imposing a fine sentence the offender to making reparation by calculating the seriousness of the offence in terms of fine units and determining the amount of reparation in the same way as a fine is set in terms of section 23, except that the amount must not be more than is appropriate for reparation.
- (b) If the amount of reparation is less than the fine that would have been set the court may also impose a fine.
- (7) (a) If a sentencing guideline does not provide for a fine a court may nevertheless impose an additional sentence of reparation.
- (b) Such reparation may be considered when deciding on sentencing options and in determining sentences within the range of increase and decrease that the guideline may allow, but may not be considered as a ground for departing from the guideline.
- (8) Reparation may be imposed on its own or combined with any other sentence, but the overall sentence must reflect the principle of proportionality as contained in section 3.
- (9) In cases where the amount of the damage, injury or loss exceeds an award made in terms of subsection (2) an additional civil action may be instituted.
- (10) Where a court determines the reparation in terms of this section, it must also determine the time for and the method of making reparation.
- (11) Where the victim suffering damage, injury or loss referred to in subsection (2) is not present when sentence is considered, the court may, if it will not cause undue delay, direct that such victim be notified that he or she may attend the proceedings.

38. Payment of reparation

- (1) Where a person is sentenced to make reparation, the court may in its discretion enforce the making of reparation whether in whole or in part –
 - (a) by allowing the accused to make reparation on the conditions and in installments at the intervals it deems fit; or
 - (b) if money is due or is to become due as salary or wages from any employer of the person concerned, by ordering such employer to deduct a specified amount from the salary or wages so due and to pay over such amount to the clerk of the court or registrar in question.
- (2) The clerk of the court or the registrar may subject to the approval of a magistrate or judge in chambers, vary the conditions and installments according to which reparation is to be made.
- (3) A court that has acted in terms of subsection (1), whether differently constituted or not, or any court of equal or superior jurisdiction may, on good cause shown, reconsider any decision that it has made on the making of reparation and replace it with a new order authorised by subsection (1).

39. Recovery of reparation

- (1) Whenever a person is sentenced to make reparation, the court passing the sentence may issue a warrant addressed to the sheriff or messenger of the court authorizing him or her to recover the amount of the reparation by attachment and sale of any movable property belonging to such person.
- (2) The amount which may be recovered in terms of subsection (1) must be sufficient to cover, in addition to the amount of the reparation, the costs and expenses of the warrant and of the attachment and sale in terms of it.

40. Failure to make reparation

- (1) Whenever a court has ordered a person to make reparation and such reparation is not made in full or is not recovered in full, the court that passed sentence may-
 - (a) warn such person to appear before it; or
 - (b) issue a warrant directing that such person be arrested and brought before the court.
- (2) When such a person is brought before court the court may impose such other sentence as may have been imposed if the court were considering sentence after conviction, except that the court must take into consideration any part of the reparation that may have been made or recovered.

CAUTION AND DISCHARGE

3.3.42 The current Criminal Procedure Act does not make direct provision for a caution and discharge as a sentence that can be imposed directly by a court. Instead there is a reference to a caution and reprimand tucked away in s 297(1)(c). (Section 297 is the longest section of

the Criminal Procedure Act and deals with “Conditional or unconditional postponement or suspension of sentence and caution or reprimand.”)

3.3.43 The Commission believes that there is a clear need for a sentence to deal with those cases where there has been a conviction but the offender does not deserve any further punishment. Hence there should be a specific provision dealing with a caution and a discharge.

3.3.44 Like any other sentence, a caution and discharge can only be imposed after conviction. This means that in the normal course of events the conviction will be recorded. In some instances this may not be appropriate for an offence that has attracted no substantive penalty. Accordingly, there should be specific provision in the case of a caution and discharge for the court in appropriate instances to order that the conviction not be recorded or, if it is recorded, that it not be recognised as a previous conviction.

RECOMMENDATION

3.3.45 The Commission recommends the following provisions in relation to caution and discharge:

CAUTION AND DISCHARGE

41. Caution and discharge

- (1) Where the interests of justice will be served by not punishing a person convicted of an offence such person may be cautioned and discharged, and the court may order that the conviction not be recorded or recognised as a previous conviction.

CHAPTER 4

SENTENCING PROCEDURES

INTRODUCTION

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

PROCEDURE AFTER CONVICTION

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

PREVIOUS CONVICTIONS

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

3.4.4 As the focus of this investigation was on sentencing the Commission concentrated only on whether, and if so at what stage, previous convictions should lapse for the purpose of determining sentence. It did not address the larger issue of whether citizens have, or should have, a right to have all records of their previous convictions expunged. For the purpose of sentence there is no doubt that a previous conviction should have less impact if considerable time has elapsed since the punishment was served for the last crime committed. The point at which it should cease to be regarded as having any impact at all is inevitably somewhat arbitrary. The Commission proposes that this period should be set at ten years, that is, ten years must elapse without any further offence being committed after

the last sentence has been fully served. If there have not been ten 'clean' years of this kind the full record of an ex-offender may continue to be taken into account.

3.4.5 Should the rule that previous convictions must be discounted after ten years (as defined) apply to all offences? Partial exceptions may have to be made for sexual offences or other types of conduct that may recur after a long period. The Commission is of the view that such exceptions should be created by specialised legislation dealing with particular offences rather than in a general framework act.

RECOMMENDATION

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

42. Previous convictions

- (1) After a person has been convicted and before sentence is imposed the prosecution may tender a record of previous convictions alleged against such person.
- (2) The court must ask the person concerned whether the previous convictions referred to in subsection (1) are admitted.
- (3) If the person concerned denies such previous convictions, the prosecution may tender evidence that such person was so previously convicted.
- (4) If the prosecution tenders no evidence of a previous conviction the court may, at the request of a victim or of its own accord solicit evidence of such conviction.
- (5) If the person admits such previous convictions or such previous convictions are proved, the court may consider them in terms of section 3(4).
- (6) Where a period of 10 years has passed from the date of completion of the last sentence and the date of commission of any subsequent offence for which a person is to be sentenced, the last conviction and all convictions prior to that must be disregarded for purposes of sentencing.

43. Evidence relating to proof of previous convictions

- (1) When the prosecution seeks to prove previous convictions in terms of this Act a record, photograph or document that relates to a fingerprint and -
 - (a) which purports to emanate from the officer commanding the South African Criminal Record Bureau; or
 - (b) in the case of any other country, from any officer having charge of the criminal records of that country,

constitutes *prima facie* proof of the facts it contains.

- (2) The admissibility of such record, photograph or document is not affected by it being obtained against the will of the person concerned.

44. Evidence on further particulars relating to previous conviction

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

EVIDENCE ON SENTENCING

3.4.7 The sentencing phase is somewhat different from the rest of the trial. How different it is and to what extent the rules and principles applicable to the trial are still relevant are to a large extent unresolved. Although some principles applicable to the trial still apply at the sentencing stage, for example, the right of the accused to be represented and the rule that evidence should be given under oath, the sentencing phase is different in that this stage is not characterised by the same clinical exercise that is part of determining the guilt of the accused. There are no fixed issues and formal evidential burdens. Facts are less important while impressions assume more significance. Considerations such as motive, which are irrelevant at the trial stage, are now much more important and relevant. Because of the nature of sentencing, the sentencing phase requires a much more flexible approach and it should not be hampered by rigid evidentiary rules. In addition, the sentencing phase requires a much more active role by the presiding officer, which is more consistent with an inquisitorial approach than an adversarial one.

3.4.8 Section 274 of the Criminal Procedure Act provides that a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The accused may address the court on any evidence received under this section as well as on the matter of the sentence. Thereafter the prosecution may likewise address the court. This provision places the court at the centre of the sentencing stage and it distinguishes between receiving evidence on the one hand and the address by the parties on the other. The sentencing discretion can only be properly exercised on the basis of all the facts relevant to the matter. The court has to decide which evidence has the potential to provide the necessary information and the court has the discretion to allow such evidence. Only then will the court be in a position to form correct impressions and make the

complex value judgement that is required for the imposition of an appropriate sentence. If the necessary information is not forthcoming from the parties, the court is required to obtain that information in order to be able to pass an appropriate sentence.⁷

3.4.9 Prior to the amendment of section 277 of the Criminal Procedure Act,⁸ there was no onus on either party at the sentencing phase, with the exception of the onus on the accused to prove extenuating circumstances following a murder conviction.⁹ Following the amendment of section 277 in 1990 the Appellate Division held in *S v Nkwanyana*¹⁰ that when the sentence of death was a competent verdict, section 277(2) required the state to prove aggravating factors and disprove the existence of mitigating factors beyond a reasonable doubt. Section 277 has subsequently been repealed as the death penalty has been found to be unconstitutional.¹¹ Du Toit *et al.* argue that there is no reason why the standard of proof stipulated in *Nkwanyana* should not be applied at the sentencing phase in respect of other offences.¹²

3.4.10 There are two possible constitutional grounds that can be used in support of the argument of Du Toit and his colleagues, viz. the right to be presumed innocent and the right to freedom and security of person. Chief Justice Lamer noted in the Canadian case of *R v Pearson*¹³ that the presumption of innocence as a rule requiring proof of guilt beyond a reasonable doubt did not apply at the sentencing phase; however, it did apply as a component of fundamental justice. Logically the presumption of innocence cannot be applied as a rule requiring proof of guilt beyond reasonable doubt at the sentencing phase as guilt has already been proved. It is equally difficult to see how the presumption of innocence can be applied as a principle of fundamental justice as there is no justification for continuing to assume innocence.

3.4.11 As Schwartz¹⁴ observes, there is a distinction between procedures applied in proving

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

⁸ See section 4 of the Criminal Law Amendment Act 107 of 1990, subsequently repealed by section 35 of Act 105 of 1997.

⁹ Du Toit *et al* *Commentary on the Criminal Procedure Act* 28-4. See also *S v Siebert* 1998 (1) SACR 554 (A).

¹⁰ 1990 (4) SA 735 (A). See also *S v Khumalo* 1991 (4) 310 (A).

¹¹ *S v Makwanyane* 1995 (2) SACR 1 (CC).

¹² Du Toit *et al op cit* 28-4A; see also *S v Shepard* 1967 (4) 170 (W).

¹³ (1992) 3 SCR 665 (SCC) at [36]-[37].

¹⁴ Schwartz : "Innocence - a Dialogue with Professor Sundby" (1989) 41 *Hastings Law Journal*

criminal liability and the less formal procedures in determining sentence. This, he says, is because “conviction is the basic determination that the defendant has forfeited his freedom and subjected himself to dispositions society makes for its own protection. Sentencing is an altogether different matter”.¹⁵

3.4.12 However, whilst the presumption of innocence may not apply at the sentencing phase, this does not mean that other societal interests do not require the prosecution to prove disputed facts beyond a reasonable doubt. In the South African case of *S v Shepard*,¹⁶ Colman J referring to the application of the reasonable doubt rule at the sentencing phase, stated:

To an accused person the sentence is at least as important as the conviction, and it might seem, in a sense, anomalous to give him the benefit of all reasonable doubts before finding him guilty, and then, when dealing with a question which may make a vast difference to his sentence, to place an onus on him so that the Court, if it finds the probabilities equally balanced in relation to some mitigating factor, will punish him as if that fact did not exist.¹⁷

The Canadian Supreme Court in *R v Gardiner*,¹⁸ in holding that disputed facts relevant to sentencing should be proved beyond a reasonable doubt by the prosecution, quoted the following passage with approval: “[B]ecause the sentencing process poses the ultimate jeopardy to an individual ... in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process.”¹⁹

153 at 159 quoted in SA Law Commission Discussion Paper 90.

¹⁵ At 159. Cf Sundby *op. cit.* who argues that the presumption of innocence does apply at the sentencing stage. However, his argument is based on those exceptions in American criminal law that permit the onus to be placed on the accused in respect of certain defences or exceptions. In contrast, D Dripps “The Constitutional Status of the Reasonable Doubt Rule” (1987) 75 *California Law Review* 1665 at 1703 notes that the decisions of the United States Supreme Court, whilst inconsistent, reflect a less rigorous application of due process safeguards at the sentencing phase (see, for example, *Williams v New York* 337 US 241 (1949)) and argues that consistency would be best achieved by requiring all issues of fact at the sentencing stage to be proved beyond a reasonable doubt.

¹⁶ *Supra*.

¹⁷ At 180G. However, the following comments of Colman J in *S v Shepard supra* at 180H also deserve noting: “But on the other hand, it could hardly be sound policy, or conducive to the proper administration of justice, to place an onus on the state to negative, beyond all reasonable doubt, all mitigating circumstances. A prosecutor is not always able to foresee all the mitigating factors which might be urged in favour of an accused person; and when such a factor is put forward, either in argument or in evidence given by or on behalf of the accused, he is not always equipped to test its factual validity, or to counter the assertion if it is false. And that may be true of matters closely related to the gravity of the offence, as well as matters personal to the accused. See also S Sundby “The Virtues of a Procedural View of Innocence - a Response to Professor Schwartz” (1989) 41 *Hastings Law Journal* 171.

¹⁸ [1982] 2 SCR 368 (SCC) at 415.

¹⁹ From JA Olah “Sentencing: The Last Frontier of the Criminal Law” (1980) 16 CR (3d) 97 at 121.

Consequently, it is possible to argue that the right to freedom and security of person requires that an onus be placed on the State at the sentencing phase at least in respect of establishing the presence of aggravating factors and the absence of mitigating factors. Another approach may be to consider the sentencing stage as a stage of the trial where the ordinary rules of evidence and argument do not necessarily apply. The function of the judicial officer would then be to conduct an investigation into the matter in which case it will no longer be party driven. It should be pointed out that the Court in *Gardiner* also stated that the strict rules that govern evidence at trial do not apply at a sentencing hearing, and, more particularly, that the hearsay rule does not govern the sentencing hearing: "Hearsay evidence may be accepted where found to be credible and trustworthy."²⁰ Thus, it appears that, although the Crown must prove disputed circumstances beyond a reasonable doubt, such proof may be met by the use of hearsay evidence,²¹ although there is some dispute on the issue at least as regards the voluntariness rule in respect of a statement made to a person in authority.²²

The decision to grant or refuse bail to an accused is in many ways similar to that of imposing a sentence. Decisions on the onus of proof during bail proceedings are therefore relevant to the issue of onus at the sentencing stage. According to *S v Mbele*,²³ when section 25(2) of the Interim Constitution came into operation, it was widely accepted that the State had the onus of proof in bail applications. This, according to Leveson J, was wrong and, according to Stegmann J, a revolutionary step. Both judges felt that section 25(2)(d) of the Interim Constitution was never intended to influence a long-standing procedure that the accused had the onus of proof. According to Edeling J in *Prokureur-Generaal, Vrystaat v Ramokhos*²⁴ it was obvious that anybody who wants to claim that the arrested person should be held without bail will not succeed if the court does not or cannot find that the interests of justice require such further incarceration. In this sense there was an onus on the State. This onus was not, however, an onus in the strict sense of the word. In *Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden*²⁵ Eloff JP found that there was no onus in bail proceedings. This was supported by the majority in *Ellish v Prokureur-*

²⁰ *Ibid.*, per Dickson J. (as he then was) at 414 (S.C.R.).

²¹ See, e.g., *R. v. Wilcox* (1988), 53 C.C.C. (3d) (N.W.T.S.Ct.) (hearsay evidence of damage estimates allowed); *R. v. Boyd* (1983), 8 C.C.C. (3d) 153 (B.C.C.A) (at a dangerous offender proceeding, there was no need to prove that the accused's statements to psychiatrists were voluntarily made).

²² See the decision of Anderson J A, dissenting in part, in *Boyd, ibid.*, pp. 158-159.

²³ 1996 SACR (1) 212 (W) AT 215.

²⁴ 1997 (1) SACR 127 (O) at 147.

²⁵ 1994 (2) SACR 469 (W) at 478-480.

Generaal, WPA,²⁶ who found that whether the interests of justice in the context would be promoted or not could not be 'proved', as it involved a value judgement. To speak of an onus of proof ignores this fact. The conclusion therefore is that onus should not be a factor in determining how bail decisions are best made. The same conclusion may be reached in respect of a decision on sentencing.

RECOMMENDATION

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

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

Evidence on sentencing

- (1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the appropriate sentence.
- (2) The court must allow the offender and the prosecutor to call witnesses

²⁶ 1994 (2) SACR 579 (W) at 586-593.

or to adduce evidence relevant to sentencing and may itself call witnesses or adduce evidence.

(3) The court must assist an undefended offender to place facts relevant to sentence before the court.

(4) If witnesses are called the provisions of sections 162, 163, 164, 165, and 166 of the Criminal Procedure Act apply.

(5) Before passing sentence the court must allow the offender and the prosecutor to address it on any relevant evidence and the appropriate sentence.

(6) Any fact relevant to the determination of an appropriate sentence must be proved to the satisfaction of the court.

FINANCIAL EVIDENCE

3.4.17 Both a fine and reparation ideally require detailed information on the financial circumstances of the offender. Often it will be forthcoming from an offender who would prefer a financial penalty. Where such information is not forthcoming the court may require additional powers.

RECOMMENDATION

3.4.18 The Commission recommends the following provisions in relation to financial evidence:

46. Financial evidence

(1) The court may enquire into the financial position of a person convicted of any offence, where it is relevant to the imposition of sentence.

(2) Such inquiry may include -

(a) consideration of the employment, earning ability and financial resources and assets of such person at present or in the future, including any circumstance that may affect his or her ability to make reparation; and

(b) information about any benefit, financial or otherwise, derived directly or indirectly, as a result of the commission of the offence.

(3) (a) The court may require such person to disclose to the court orally or in writing particulars of his or her financial circumstances in the manner and form the court deems fit.

(b) Such information may not be used for any other purposes.

- (4) The court may require that a written report be placed before it containing information concerning the financial status of the person convicted.

EVIDENCE RELATING TO THE INTERESTS OF VICTIMS - VICTIM IMPACT STATEMENTS

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

3.4.20 Of equal importance is that victims should be given a voice at the sentencing stage of proceedings. They may testify directly but this may not be practical and desirable in all cases. An important question is whether they should be allowed to do so indirectly by means of so-called victim impact statements. The need to legislate for victim impact statements was considered in some detail in the Issue Paper on Restorative Justice.²⁷ For purposes of this discussion it will not be repeated. The question here is whether legislation should provide for the admissibility of such statements and, if so, to what extent it should be regulated.

3.4.21 A victim impact statement is a statement made by the victim and addressed to the presiding officer for consideration in the taking of sentencing decisions. A victim impact statement consists of a description of the harm, in terms of the physical, psychological, social and economic effect that the crime had, and will have in future, on the victim.²⁸ Sometimes this statement may include the victim's statement of opinion on his or her feelings about the crime, the offender and the sentence that the victim feels is appropriate.

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

3.4.23 The form, content and means of implementation vary greatly. In the United States of America, for example, some jurisdictions require a written victim impact statement attached

²⁷ See Appendix B. of Discussion Paper 91 "A new sentencing framework".

²⁸ M Hinton, "Valuing the victim. The use of victim impact statements in sentencing." Unpublished paper read at the 8th International Symposium on Victimology 22 - 26 August 1994 Adelaide Australia.

either to the pre-sentence report or as an affidavit that becomes part of the court file. Responsibility for the preparation of a victim impact statement can rest with criminal justice personnel, like the prosecutor, police or probation officer, or with an independent outside organisation like victim service specialists. Victims may also, or in some cases only, provide oral information in court prior to sentencing.²⁹ A victim impact statement may include objective information or both objective as well as subjective evaluations of injury, including psychological harm suffered by the victim.³⁰

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

RECOMMENDATION

3.4.25 The Commission recommends the inclusion of the following provision:

47. Evidence relating to the interests of victims

(1) The prosecution must, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim and, where practicable, furnish the court with particulars of -

- (a) damage to or the loss or destruction of property, including money;
- (b) physical, psychological or other injury; or
- (c) loss of income or support.

(2) A victim impact statement may be made by a victim who, as a result of

²⁹ M McLeod "Victim participation in sentencing" (1986) 22 *Criminal Law Bulletin* 501 and 517 at 503.

³⁰ R Douglas and K Klaster "Systematising police summaries in the motion court: victim impact statements through the back-door". Unpublished paper read at the 8th International Symposium on Victimology 22 - 26 August 1994 Adelaide Australia.

an offence, suffered damage, injury or loss as referred to in subsection (1), or by a person nominated by such victim.

(3) The prosecutor must seek to tender evidence of a victim impact statement where the victim is not called to give evidence and such a statement is available.

(4) If the contents of a victim impact statement are not disputed a victim impact statement is admissible evidence on its production.

(5) If the contents of a victim impact statement are disputed, the victim must be called as witness for the statement to be taken into account by the court.

POST-TRIAL RIGHTS OF VICTIMS

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

RECOMMENDATION

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

48. Victims and release from prison.

(1) Where a person has been convicted of an offence involving violence against another person and is sentenced to an unsuspended term of imprisonment of two years or more, the court must explain to any victim of the crime, including the next of kin of a deceased victim, that they may inform the Commissioner that they wish to be notified of any hearing of a Correctional Supervision and Parole Board where the conditional release of such offender is being considered, so that they may make representations on the risks that such release may hold.

(2) Where a victim is incapable of informing the Commissioner as contemplated in subsection (1) the information may be conveyed by a representative of the victim.

(3) If the victim or a representative referred to in subsection (2) intends to make such representations to the Correctional Supervision and Parole Board, such person must inform the Commissioner of this intention and keep the Commissioner informed of any change of address.

SENTENCING JUDGMENT

3.4.28 The emphasis on truth in sentencing, which is a hallmark of the new partnership on sentencing, is reflected in specific requirements about what every sentencing judgment must contain in addition to a formal statement of the sentence being imposed:

Ideally, reasons should be given for every sentence and the legislation should encourage this. In practice, it may not always be possible. However, legislation should insist that any departure from sentencing guidelines be justified.

Community sentences should be explained in the judgment of the court, for the benefit of both the offender and community.

To ensure that reparation is considered, a note to this effect is required in every judgment.

The court should comment specifically when it wants some factor in the sentence considered by a parole board or similar authority. Such a body cannot retry a case to determine the seriousness of the offence, as that would amount to the offender being placed in a form of double jeopardy. Nevertheless, it should act on an informed view of the decision of the court and, in particular, on any information that the sentencing court thinks may be relevant to a prognosis on the release of the offender.

RECOMMENDATION

3.4.29 The Commission recommends the following provision on the sentencing judgment:

49. Sentencing judgment

Every judgment on sentence must include:

- (a) the sentence imposed;
- (b) the reasons for sentence where there is a departure from a sentencing guideline and wherever practicable in all other cases;
- (c) in the case of a community penalty, a brief explanation of the implications of the sentence;

- (d) a note that reparation has been considered as required by section 37; and
- (e) any comments that the court may wish to bring to the attention of the authorities responsible for the release of a person sentenced to imprisonment.

ANTEDATING OF SENTENCES

3.4.30 Current South African law does not allow for the backdating of sentences of imprisonment to the time that someone was first taken into custody. Only if a new sentence of imprisonment is imposed on appeal to replace an earlier sentence of imprisonment may the new sentence be backdated.¹ On the other hand, current South African case law does allow time served while awaiting trial to be taken into account when determining sentence.² The current position is fraught with uncertainty. As Terblanche explains:

“It is not certain to what extent this should be taken into account. The courts have stopped short of saying that the term of confinement whilst awaiting trial should be subtracted from the term of imprisonment which the court considers appropriate, but in practice this is probably the basic intention.”³

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

3.4.32 It has been suggested that the sentence-based solution would pose practical difficulties. For example, it may be difficult for the Department of Correctional Services to provide accurate information at the sentencing stage about the amount of time that a prisoner had spent in custody awaiting trial on a particular charge. This may be so, but a serious attempt should be made to overcome these difficulties. The alternative of allowing the Department to recalculate sentences seems to have the disadvantage of hiding the true

¹ Section 282 of the Criminal Procedure Act 51 of 1977.

² *S v Hawthorne* 1980 (1) SA 531 (A).

³ SS Terblanche *The Guide to Sentencing in South Africa* (1999) 236-7.

period that the offender will spend in custody overall behind a bureaucratic procedure. If a parole board were to be given a discretionary power to take time served while awaiting trial into account, then one would be back to the current situation where the rule is not clear. In fact the position would be worse, because the discretion would be exercised by a quasi-judicial board rather than in open court. The potential practical difficulties with the solution preferred by the Commission at this stage may, nevertheless, require further discussion. Thought will also have to be given to the implications of antedating of sentences for the calculation of the time at which conditional release must be considered. If an alternative has to be found, it should be some provision that instructs the prison authorities to deduct automatically the time spent awaiting trial from the prison term.

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

RECOMMENDATION

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

50. Antedating of sentences

(1) After the decision has been taken to impose a sentence of imprisonment, whether by applying the sentencing principles directly or by following a sentencing guideline, and the envisaged term of imprisonment has been determined and announced in open court, the coming into effect of the term of imprisonment must be antedated by the number of days that the person concerned has spent in prison prior to the sentence being pronounced on the charge for which he or she is being sentenced.

(2) In determining an appropriate sentence other than imprisonment the court must take into account the time that the person concerned has spent in prison prior to sentence and reduce the severity of the sentence accordingly.

DELAYING SENTENCE

3.4.35 The current Criminal Procedure Act has an elaborate procedure for postponing the imposition of sentence. In the view of the Commission such a procedure is largely superfluous as a suspended sentence or, in some instances, a caution and discharge can generally do what a postponement is designed to achieve. In addition, the foreign experts raised doubts about the constitutional desirability of a system that allowed for long postponements. Nevertheless, the view was expressed that there may be instances where setting a condition for an offender to fulfill for a relatively short period may still be desirable to allow a court to clarify its views on whether such person would respond to a particular sentence.

RECOMMENDATION

3.4.36 The Commission proposes the following provision in respect of the delaying of sentences:

51. Sentence may be delayed

Where a court is of the opinion that it will be better able to decide on an appropriate sentence at a later date, it may delay the passing of sentence for up to six months and set any condition that will enable it to pass an appropriate sentence.

CUMULATIVE AND CONCURRENT SENTENCES

3.4.37 Courts have a choice to allow sentences imposed at the same time to run together or one after another. The provision that the Commission recommends sets out the legal basis for doing so. To a large extent it maintains the existing position, except that courts will have to give separate sentences before considering whether they should run concurrently. This will make the process of effectively reducing the overall time that an offender has to serve more transparent. The proposed provision should be read with section 39 of the Correctional Services Act 111 of 1998, which contains further rules relating to the same topic, including the provision that determinate sentences always run concurrently with a life sentence.

RECOMMENDATION

3.4.38 The Commission recommends the inclusion of the following provision:

52. Cumulative or concurrent sentences

(1) When a person -

(a) has been convicted of two or more offences; or

(b) is serving a sentence or is still subject to conditions of a sentence and is convicted again of another offence;

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

(2) (a) When the sentences imposed in terms of subsection (1) consist of imprisonment the court may direct that such sentences run concurrently.

(b) If the court does not so direct, such sentences commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct.

(3) (a) When the sentences imposed in terms of subsection (1) consist of community penalties the court may direct that such sentences run concurrently.

(b) If the court does not so direct, such sentences commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct.

(c) If the aggregate of sentences of community penalties referred to in subsection (3) exceeds three years, the person concerned must serve a period of not more than three years from the date on which the first of the sentences commenced, unless the court, when imposing sentence, directs otherwise.

(4) (a) When the sentences imposed in terms of subsection (1) consist of fines the court may determine a reduced fine for the offences taken together.

(b) If the court does not so determine such fines must be paid in full.

CHAPTER 5

GENERAL PROVISIONS

3.5.1 There are a number of further provisions that are required to complete the draft Bill. They are of a technical nature. Worthy of emphasis is the provision for different parts of the Act to come into effect at different times. This will, for example, allow the Sentencing Council to be set up and begin its work of developing guidelines before the full new framework has to be applied in the courts.

3.5.2 The Commission recommends as follows in this regard:

53. Warrant for the execution of sentence

- (1) A warrant for the execution of any sentence of imprisonment or community penalties must be issued by the court that passed the sentence or by any other judicial officer of the court in question.
- (2) The warrant for the execution of a sentence of imprisonment commits the person concerned to the prison for the magisterial district in which such person is sentenced.
- (3) A warrant for the execution of a sentence of imprisonment must be accompanied by any comments that the court made in terms of section 49(e).

54. Procedure to execute conditions of suspension

- (1)
 - (a) A court which has suspended a sentence in terms of a condition referred to in section 33 must, if the conditions make it necessary, have served upon the person concerned a written notice directing such person to report on a date and time specified in the notice or, if prevented from doing so by circumstances beyond his or her control, as soon as practicable thereafter, to the person specified in that notice, in order to meet the conditions that have been imposed.
 - (b) A copy of such notice is authority for the person mentioned in it to have the conditions of suspension implemented as imposed.

55. Sentence by judicial officer other than judicial officer who convicted the accused

- (1) If sentence is not passed immediately upon conviction in a lower court, or if, by reason of any decision or order of a high court, it is necessary to vary any

sentence passed in a lower court or to pass sentence afresh, any judicial officer of that court may, in the absence of the judicial officer who convicted the person concerned or passed the sentence and after consideration of the evidence recorded and in the presence of the person concerned, pass sentence or take such other steps as the judicial officer who is absent, could lawfully have taken.

(2) Whenever-

- (a) a judge is required to sentence a person convicted by him or her; or
- (b) any matter is remitted on appeal or otherwise to the judge who presided at the trial of the person concerned,

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

56. Sentence may be corrected

- (1) When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence.
- (2) Where there is an error in the calculation for the purposes of section 50, of the number of days that a person has spent in prison prior to the sentence being pronounced on the charge for which he or she is being sentenced, the court or any other court of equivalent or superior jurisdiction may amend the sentence at any time.

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

- (1) If patrimonial loss may be recovered from a person on the ground of a delict committed by such person while performing community service in terms of this Act as part of a community penalty or as a condition of suspension of sentence, that loss may, subject to subsection (3), be recovered from the State.
- (2) Subsection (1) may not be construed as precluding the State from obtaining indemnification against its liability by means of insurance or otherwise.
- (3) The patrimonial loss that may be recovered from the State in terms of subsection (1) must be reduced by the amount to which the injured party is entitled from any other source by reason of the patrimonial loss.
- (4) In so far as the State has made a payment by virtue of a right of recovery in terms of subsection (1), all the relevant rights and legal remedies of the injured party against the person performing community service pass to the State.

- (5) If any party, as a result of the performance of community service by any person, has suffered patrimonial loss that cannot be recovered from the State in terms of subsection (1), the Director-General may, with the concurrence of the Department of State Expenditure, pay that party, as an act of grace, such amount as he or she deems reasonable.

58. Repeal¹

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

59. Short title and commencement

- (1) This Act is the Sentencing Framework Act, 2000, and takes effect on a date fixed by the President by notice in the *Gazette*.
- (2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

¹ **Note:** the schedule must include, *inter alia*, amendments to the Correctional Services Act. The legislation to be repealed includes Chapter 28 of the Criminal Procedure Act (except for sections 290 and 291 unless they have already been repealed by the proposed new Youth Justice Act) and sections 51 to 53 of the Criminal Law Amendment Act 105 of 1997 and the schedules related to these provisions.

REPUBLIC OF SOUTH AFRICA

SENTENCING FRAMEWORK BILL

(As introduced)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B -2000]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP VONNIS RAAMWERK

(Soos ingedien)

(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W –2000]

Draft Sentencing Framework Bill, 2000

To define the purpose of sentencing, to specify general principles of sentencing, to provide for sentencing guidelines to be established and revised, to provide procedures for applying sentencing principles, to establish a Sentencing Council, to provide for the functions of the Council, its procedures and consultation process, to provide for the coming into force of sentencing guidelines, to specify the sentencing options and their limitations, to provide for procedures necessary for the implementation of sentencing options, to provide for procedures at sentencing, to empower victims by providing for input of victims at the release of offenders from prison, to describe requirements for judgements on sentencing, to provide for antedating of sentences, to provide for cumulative and concurrent sentences and to provide for incidental matters.

Preamble

With the objective of establishing a comprehensive sentencing framework to deter criminal conduct and to make society safer by providing for the consistent and just punishment of offenders with sentences that recognize the human dignity of offenders and of victims of crime.

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

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CHAPTER I

General Principles

1. Definitions

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

“Commissioner” means the Commissioner of Correctional Services.

“Confiscation order” means an order made in terms of section 18 of the Prevention of Organised Crime Act, 121 of 1998

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

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

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

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

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

“Family group conference” means a gathering of people convened by a probation officer or

social worker as condition of a community penalty in order to obtain a restorative response to the offender and the offence.

“Fine unit” means a fine unit as determined in terms of section 22(4).

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

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

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

“A sentencing guideline” means a guideline established or revised by the Sentencing Council and published in the *Gazette*.

“Social Worker” means any person registered as a social worker under the Social Work Act, 110 of 1978, or deemed to be so registered.

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

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

2. The purpose of sentencing

The purpose of sentencing is to punish convicted offenders for the offences of which they have been convicted by limiting their rights or imposing obligations on them in accordance with the requirements of this Act.

3. Sentencing principles

- (1) Sentences must be proportionate to the seriousness of the offence committed, relative to sentences for other categories or sub-categories of offences.
- (2) The seriousness of the offence committed is determined by the degree of harmfulness or risked harmfulness of the offence and the degree of culpability

of the offender for the offence committed.

- (3) Subject to the principle of proportionality expressed in subsection (1) sentences must seek to offer the optimal combination of-
 - (a) restoring the rights of victims of the offence;
 - (b) protecting society against the offender; and
 - (c) giving the offender the opportunity to lead a crime-free life in the future.
- (4) The presence or absence of relevant previous convictions may be used to modify the sentence proportionate to the seriousness of the offence to a moderate extent.
- (5)
 - (a) Except to the extent that other provisions of this Act modify them, the principles contained in this section must be applied in the determination of all sentences within the limits relating to maximum sentences prescribed in legislation and the sentencing jurisdiction of the court.
 - (b) The principles apply notwithstanding minimum sentences that may be set by any law.

4. Departure from sentence proportionate to the seriousness of the offence

The sentence proportionate to the seriousness of the offence referred to in section 3 may be reduced to a reasonable extent where there are substantial and compelling circumstances, other than the degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender for the offence committed, that justify such reduction.

5. Sentencing guidelines

- (1) A sentencing guideline specifies sentencing options and their severity for a particular category or sub-category of offence.
- (2) The sentencing options that may be included in a guideline are -

- (a) imprisonment;
 - (b) a fine; and
 - (c) a community penalty.
- (3) Sentencing guidelines are determined by applying the sentencing principles in section 3 by -
- (a) grading categories or sub-categories of offences according to their comparative seriousness and ranking them accordingly; and
 - (b) prescribing sentencing options and their severity for categories or sub-categories of offences in terms of their ranking of seriousness, which are within the capacity of the correctional system to implement.
- (4) Sentencing guidelines apply nationally but, where the degree of harmfulness of a category or sub-category of offence varies significantly from one magisterial district to another, different sentencing guidelines may be prescribed for specified magisterial districts.
- (5) In determining the severity of a community penalty as a sentencing option sentencing guidelines must specify the number of months of correctional supervision or the number of hours of community service.
- (6) In determining the severity of a fine as a sentencing option sentencing guidelines must refer only to fine units, as the amount of a fine is calculated in terms of section 22.
- (7) A sentencing guideline may provide -
- (a) for an increase or decrease of up to 30 percent in the severity of a sentencing option; and
 - (b) that a part or the whole of a sentence of imprisonment be suspended, if such suspension is permitted by this Act.

6. Applying sentencing guidelines

- (1) When an offender is convicted of an offence that falls within a category or sub-category of offence for which a sentencing guideline has been determined, a court must, subject to subsection 4 impose the sentencing option of the level set by the guideline within the range of any increase or decrease that the guideline may allow.
- (2) Where more than one option is available, a court may impose a combination of such options, provided that the overall severity must not exceed the severity of a single option.
- (3) In deciding on sentencing options and in determining sentences within the range of increase and decrease that the sentencing guidelines may allow, the court must apply the sentencing principles in section 3.
- (4) In order to ensure consistency in sentencing reasonable departures from a sentencing guideline are only allowed -
 - (a) upwards or downwards, in circumstances that increase or decrease substantially the degree of harmfulness or risked harmfulness of the offence or the culpability of the offender; or
 - (b) downwards, where there are substantial and compelling circumstances, other than the degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender, that justify such departure.

CHAPTER 2

Sentencing Council

7. Establishment of the Sentencing Council

- (1) The Sentencing Council is hereby established.
- (2) The Council consists of the following members, appointed by the Minister -

- (a) two judges of the Supreme Court of Appeal or the High Court, appointed on recommendation of the Judicial Services Commission;
 - (b) two magistrates appointed on recommendation of the Magistrates Commission;
 - (c) the National Director of Public Prosecutions, a Deputy National Director of Public Prosecutions or a Director of Public Prosecutions appointed after consultation with the National Director of Public Prosecutions;
 - (d) a member of the Department of Correctional Services of or above the rank of director, appointed after consultation with the Commissioner;
 - (e) a person not in the full-time employ of the State with special knowledge of sentencing; and
 - (f) the Director of the office of the Council.
- (3) The Minister must appoint one of the judges referred to in subsection (1)(a) as chairperson and anyone of the other members as vice-chairperson.
- (4) A member of the Council is appointed for a period of five years and any member whose period of office has expired is eligible for reappointment.
- (5) The Minister may remove a member of the Council from office only on grounds of misconduct, incapacity or incompetence.
- (6) The Minister must replace any member of the Council who ceases to hold the office or position that qualifies him or her in terms of subsection (2) for membership of the Council.
- (7) A member of the Council who is not in the service of the State may receive such allowances as may be determined by the Director-General in consultation with the Minister of State Expenditure.

8. Functions of the Council

- (1) The primary functions of the Sentencing Council are to establish sentencing guidelines and to review existing guidelines in terms of the general principles of, and in the manner prescribed in, this Act.

- (2) The Council must set the monetary value of unit fines as prescribed by section 22.
- (3) The Council may advise, and must advise when requested by the Minister, on the development of community penalties or other sentencing options.
- (4) The Council must facilitate the establishment of a programme of judicial education on sentencing.
- (5)
 - (a) The Minister, the Minister of Correctional Services or Parliament may request the Council to establish a sentencing guideline or to review an existing guideline.
 - (b) If the Council receives a request made in terms of paragraph (a), it must act upon such request, following the same procedures as if it were itself taking the initiative.
- (6) Any person may request the Council to establish a sentencing guideline or to review an existing guideline and the Council may respond to such a request.

9. Support for the Council

- (1) An independent office under the management of the Director must support the work of the Council, and carry out its directives.
- (2) The office consists of the Director, who must be an official of the Department, and such other staff as are necessary for the proper performance of the Council's functions.
- (3) The Director and staff are appointed in terms of the Public Service Act and the salaries of such staff members must be determined by the chairperson in consultation with the Director-General.
- (4) Such staff, if not officials of the Department, are deemed for administrative purposes to be such officials under the control and authority of the Director.
- (5) The Director-General must provide adequate financial and logistical support for the office and the work of the Council, including the consultation and research required by section 10.
- (6) All government departments must provide statistical and other information

required by the Sentencing Council.

10. Procedures and decisions of the Council

- (1) Meetings of the Council are held at the times and places determined by the Chairperson of the Council.
- (2) The Council regulates the proceedings of its meetings and the keeping of minutes.
- (3) A majority of members of the Council constitutes a quorum for a meeting.
- (4) All decisions of the Council are taken by the majority of members present.
- (5) The Council may take decisions about establishing or reviewing sentencing guidelines only after consultation and research.
- (6) The following must be consulted in establishing or reviewing sentencing guidelines:
 - (a) the National Commissioner of Police;
 - (b) the National Director of Public Prosecutions;
 - (c) the organised legal profession;
 - (d) the judiciary;
 - (e) the Commissioner;
 - (f) the Director-General of Welfare and Population Development;
 - (g) the Director-General; and
 - (h) as far as is practicable any person who, or organization which, in the opinion of the Council, has special knowledge or expertise relevant to the establishment of sentencing guidelines or the review of existing guidelines.

- (7) Draft sentencing guidelines must be published together with a call for comment within a set time frame.
- (8) The Council must consider any such comment before a sentencing guideline is finalized.

11. Coming into force of sentencing guidelines.

- (1) Sentencing guidelines that have been established or revised by the Council must be published by notice in the *Gazette*.
- (2) Such guidelines become applicable in terms of section 6 on a date specified in such notice.

12. Reports and information

- (1) The Council must provide annually a report to Parliament that includes -
 - (a) a statistical overview of all sentences that have been imposed and that are still in force;
 - (b) projections of the estimated cost of continuing to implement such sentences in the future;
 - (c) as far as is practicable, information on the efficacy of sentences in reducing crime;
 - (d) a statistical overview of the development of the use of community penalties as sentencing options and their effectiveness; and
 - (e) a consolidated list of all the guidelines that it has developed.
- (2) The Council must publish annually, electronically or otherwise, information on sentencing, including a consolidated list of sentencing guidelines that will assist the courts in imposing sentences in terms of this Act.

CHAPTER 3**Sentencing options****13. Sentencing Options**

- (1) Subject to the provisions of this Act and any other law, a court may pass one or more of the following sentences upon any person convicted of an offence if justified by the sentencing principles referred to in section 3 or allowed by a sentencing guideline applicable to the offence:
- (a) imprisonment;
 - (b) a fine;
 - (c) a community penalty;
 - (d) reparation; and
 - (e) a caution and discharge.

IMPRISONMENT**14. Imprisonment**

- (1) Imprisonment may not be imposed where a community penalty or a fine is a sentencing option allowed by a sentencing guideline for a particular offence or, if in terms of the sentencing principles they would be options as sentences, unless imprisonment is required in order to protect society against the offender.
- (2) Imprisonment may be for life or for a fixed term, except that no person may be sentenced by any court to imprisonment for a period of less than seven days unless the sentence is that the person concerned be detained until the rising of the court.
- (3) Imprisonment for life is the most severe sentence and may be imposed only where the offence is extremely serious.
- (4) A reference in any law to imprisonment with or without any form of labour as a punishment must be construed as a reference to imprisonment only.

15. Suspension of imprisonment

- (1) Up to five years of a sentence of imprisonment may be suspended in whole or in part for a period not exceeding five years on condition that the person sentenced to imprisonment:
 - (a) does community service; or
 - (b) makes reparation; or
 - (c) complies with a specified order or orders referred to in section 33 without being subject to a community penalty.
- (2) Where a sentencing guideline has been set for the category or sub-category of offence for which the sentence of imprisonment is being imposed, the sentence may be suspended only to the extent allowed by such guideline.

16. Amending conditions of suspension

The court that has suspended a sentence of imprisonment, whether differently constituted or not, or any other court of equal or superior jurisdiction, may on good cause shown amend or cancel any condition of suspension or add any other competent condition.

17. Failure to comply with conditions of a suspended sentence of imprisonment

- (1) If it appears that any condition imposed in terms of sections 15 or 16 has not been met, the person concerned may upon the order of any court -
 - (a) be warned to appear before the court that suspended the operation of the sentence or any court of equal or superior jurisdiction; or
 - (b) be arrested and brought before such court.
- (2) The court that suspended the sentence, whether differently constituted or not, or any other court of equal or superior jurisdiction, must enquire whether the person has failed to meet such a condition and into the circumstances of such failure.

- (3) If such court finds that such condition has not been met due to circumstances beyond the control of the person, it may act in terms of section 16.
- (4) If such court finds that such condition has not been met due to circumstances within the control of the person, it may amend or cancel any condition of suspension or add any other competent condition or put the suspended sentence into operation in whole or in part.
- (5) When acting in terms of subsection (4) the court must consider the possible partial fulfillment of the conditions of suspension.

18. Declaration as a dangerous criminal

- (1) Where a High Court or a regional court sentences a person convicted of an offence that involved serious physical injury or the immediate threat of such injury to a fixed term of unsuspended imprisonment of five years or more, the court may, in addition, declare such person a dangerous criminal if it is satisfied, after having conducted any additional inquiry that may be required and followed the procedure specified in section 19 if appropriate, that there is a substantial risk that the person concerned may commit a further offence involving serious physical injury to any other person.
- (2) Where a court declares a person a dangerous criminal such person is, subject to the provisions of section 20, detained in prison for an indefinite period.

19. Inquiry into a potentially dangerous criminal

- (1) If it appears to a court having jurisdiction that a person may be a dangerous criminal in terms of section 18 and that psychiatric testimony may assist the court in determining whether this is the case, the court must direct that the matter be enquired into and be reported on in accordance with the provisions of this section.
- (2) Before a person is subjected to an inquiry under subsection (1) the court must inform him or her of its intention and explain the content and gravity of the provisions of this Act relating to dangerous criminals.
- (3) (a) Where a court orders an inquiry under subsection (1), the inquiry must be conducted and reported on by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court,

and by a psychiatrist appointed by the person concerned.

- (b) A psychiatrist appointed under paragraph (a), other than a psychiatrist appointed by the person concerned, must be appointed from the list of psychiatrists referred to in section 79 (9) of the Criminal Procedure Act: except that where the list does not include a sufficient number of psychiatrists who may conveniently be appointed for an inquiry under this Act, a psychiatrist may be appointed although his or her name does not appear on such list.
 - (c) A psychiatrist designated or appointed under paragraph (a) and who is not in the full-time service of the State, must be compensated for his or her services in connection with the inquiry, including giving evidence, according to a tariff determined by the Minister in consultation with the Minister of State Expenditure.
- (4) The person concerned may, for the purposes of the inquiry, be committed to a psychiatric hospital or other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may determine.
 - (5) When the period of committal in terms of subsection (4) is extended for the first time such extension may be granted in the absence of the person concerned unless he or she requests otherwise.
 - (6) The report on the inquiry must be in writing and submitted to the registrar or the clerk of the court, who must make a copy available to the prosecutor and the person concerned.
 - (7) The report must include a description of the inquiry and a finding whether there is a substantial risk that the person concerned may commit a further offence involving serious physical injury to any other person.
 - (8) If the persons conducting the inquiry are not unanimous in their finding, that must be stated in the report and the individual conclusions recorded.
 - (9) The contents of the report are admissible in evidence at criminal proceedings, except that a statement made by the person concerned at the inquiry is not admissible in evidence against him or her at the criminal proceedings, unless it is relevant to the determination of the question whether the person concerned is a dangerous criminal.
 - (10) (a) If the finding in the report is the unanimous finding of the persons who conducted the inquiry, and the finding is not disputed by the prosecutor or the person concerned, the court may determine the

matter without hearing further evidence.

- (b) If the finding is not unanimous or, if unanimous, is disputed by the prosecutor or the person concerned, the court must determine the matter after hearing further evidence.

20. Further detention of a dangerous criminal

- (1) A person who has been declared a dangerous criminal and who -
 - (a) has served the full unsuspended term of imprisonment to which he or she was sentenced; or
 - (b) would, in terms of the Correctional Services Act, have been released conditionally or unconditionally had he or she been sentenced only to such imprisonment;

must be brought before the court that declared such person a dangerous criminal, whether differently constituted or not, or any other court of equal or superior jurisdiction.

- (2) Such court, after considering a report from a Correctional Supervision and Parole Board and any other information, must determine whether there is still a substantial risk that such person may commit a further offence involving serious physical injury to any other person.
- (3) If the court finds that there is still such a substantial risk it must -
 - (a) confirm that the person is a dangerous criminal and that the detention of the person in prison continues for an indefinite period; and
 - (b) order that such person be brought before the court within a fixed period that may not exceed five years.
- (4) If the court finds that there is no such substantial risk it must release the person concerned unconditionally or on such conditions as it deems fit.
- (5) At the expiration of a further period of detention as ordered in terms of subsection (3) the provisions of subsections (1), (2) and (3) apply with the

necessary changes.

- (6) The jurisdiction of the regional court is deemed not to be exceeded by any further periods of detention.

21. Committal to a treatment centre

- (1) A court that convicts a person of any offence for which a term of imprisonment would be imposed if it applied the sentencing principles referred to in section 3 or followed a sentencing guideline applicable to the offence, may, subject to subsection (2), order that the person be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act 20 of 1992.
- (2) The court must determine a period of detention that does not exceed the term of imprisonment the court would have imposed had it not made such an order.
- (3) An order may be made in terms of subsection (1) if the court is satisfied from the information placed before it, which must include a report of a probation officer, that such person is a person as described in section 21 (1) of the Prevention and Treatment of Drug Dependency Act 20 of 1992, and for the purposes of the said Act such order is deemed to have been made under section 22.
- (4) (a) Where a court has ordered that a person be detained at a treatment centre under subsection (1) and the person is later found not to be fit for treatment in such centre, the person may be referred back to the court for re-sentencing.
- (b) Whenever a court reconsiders a sentence in terms of paragraph (a) it has the same powers as it would have had if it were considering sentence after conviction, except that the time spent at the treatment centre must be regarded as part of the sentence that has already been served.

FINES

22. Fines

- (1) A fine may be imposed for any offence, unless any law expressly provides that a fine may not be imposed or a relevant sentencing guideline does not provide for it.
- (2) In determining an appropriate fine a court must first consider the punishment element of the fine in terms of the seriousness of the offence and then relate this to the means of the person who is being fined.
- (3) In establishing the amount of the fine where the Sentencing Council has set the value of fine units for the means categories the court must -
 - (a) determine the seriousness of the offence in terms of a number of fine units in accordance with the provisions of section 3, or section 5 if there is a relevant sentencing guideline, and record this number;
 - (b) determine the means category referred to in subsection (4) into which the sentenced person falls and record the level of this category; and
 - (c) set the fine by way of multiplying the number of the fine units determined in terms of paragraph (a) with the value of the fine unit set for the relevant means category.
- (4) The Sentencing Council must set means categories and the value of a fine unit for each such category.
- (5)
 - (a) The Sentencing Council must publish by notice in the *Gazette* the means categories and the value of a fine unit for each such category.
 - (b) These values become applicable on a date specified in such notice.
- (6) This section does not apply to admission of guilt fines determined in terms of sections 57 or 57A of the Criminal Procedure Act.

23. Alternative to a fine

Whenever a court convicts a person of any offence punishable by a fine it may, in imposing a fine, impose any other sentence as an alternative, except that -

- (a) the alternative may not be more severe than the punishment that may be imposed for such an offence; and
- (b) where the fine is imposed in terms of a sentencing guideline, the court may only impose an alternative sentence allowed by the guideline.

24. Suspension of fines

- (1) The implementation of a fine may be suspended in whole or in part for a period not exceeding five years on condition that the person concerned meets one or more of the following conditions:
 - (a) does community service;
 - (b) makes reparation; or
 - (c) complies with a specified condition or conditions referred to in section 33 without being subject to a community penalty.
- (2) Where a sentencing guideline has been set for the category or sub-category of offence for which the fine is being imposed the sentence may be suspended only to the extent allowed by the guideline.

25. Amending conditions of suspension of fine

The court that has suspended a fine, whether differently constituted or not, or any other court of equal or superior jurisdiction, may on good cause shown amend or cancel any condition of suspension or add any other competent condition.

26. Failure to comply with conditions of a suspended fine

- (1) If any condition imposed in terms of sections 24 or 25 is not complied with, the person concerned may upon the order of any court -
 - (a) be warned to appear before the court that suspended the operation of the sentence or any court of equal or superior jurisdiction; or
 - (b) be arrested and brought before such court.

- (2) The court that suspended the sentence, whether differently constituted or not, or any other court of equal or superior jurisdiction, must enquire whether the person has failed to meet such a condition and into the circumstances of such failure.
- (3) If such court finds that the condition has not been met due to circumstances beyond the control of the person it may act in terms of section 25.
- (4) If such court finds that the condition has not been met due to circumstances within the control of the person it may amend or cancel any condition of suspension or add any other competent condition or put the suspended sentence into operation in whole or in part.
- (5) When acting in terms of subsection (4) the court must consider the possible partial fulfillment of the conditions of suspension.

27. Payment of fines

- (1) Where a person is sentenced to pay a fine, whether with or without an alternative sentence, the court may in its discretion enforce payment of the fine, whether in whole or in part –
 - (a) by allowing the accused to pay the fine on the conditions and in installments as it deems fit;
 - (b) if money is due or is to become due as salary or wages from any employer of the person concerned, by ordering such employer to deduct a specified amount from the salary or wages so due and to pay over the amount to the clerk of the court or registrar in question.
- (2) The clerk of the court or the registrar may, subject to the approval of a magistrate or judge in chambers, vary the conditions and installments according to which fines are paid.
- (3) A court that has acted in terms of subsection (1), whether differently constituted or not, or any court of equal or superior jurisdiction, may on good cause shown reconsider any decision that it has made on the payment of the fine and replace it with a new order authorised by subsection (1).

28. Recovery of fines

- (1) Whenever a person is sentenced to pay a fine, the court passing the sentence may issue a warrant addressed to the sheriff or messenger of the court authorizing him or her to recover the amount of the fine by attachment and sale of any movable property belonging to such person.
- (2) The amount that may be recovered in terms of subsection (1) must be sufficient to cover, in addition to the fine, the costs and expenses of the warrant and of the attachment and sale in terms of it.

29. Failure to pay a fine

- (1) Whenever a court has imposed upon any person a fine without an alternative sentence and the fine is not paid in full or is not recovered in full, the court that passed sentence may -
 - (a) warn such person to appear before it; or
 - (b) issue a warrant directing that such person be arrested and brought before the court.
- (2) When such person is brought before court the court may impose any other sentence that may have been imposed if the court were considering sentence after conviction, except that the court must take into consideration any part of the fine that has been paid or recovered.
- (3)
 - (a) A court that sentences a person to a term of imprisonment as an alternative to a fine, may, where the fine is not paid, at any stage before the expiration of the period of imprisonment, order the release of the person concerned and deal with that person in terms of section 27.
 - (b) A court that has acted in terms of paragraph (a), whether differently constituted or not, or any court of equal or superior jurisdiction, may at any time-
 - (i) further suspend the fine on any existing or additional conditions that the court may regard as expedient; or

- (ii) revoke its decision and recommit the person concerned to serve the balance of the term of imprisonment.

COMMUNITY PENALTIES

30. Community Penalties

- (1) A community penalty may be imposed on a person convicted of any offence, unless a law expressly provides that a community penalty may not be imposed or a relevant sentencing guideline does not provide for it.
- (2) The community penalties are
 - (a) correctional supervision; and
 - (b) community service.

31. Correctional supervision

- (1) Correctional supervision requires that the person concerned must be placed under the supervision of a correctional official and subject to house detention and the performance of community service.
- (2) The Court imposing correctional supervision must specify –
 - (a) the period of house detention, which may not exceed three years;
 - (b) the hours to which the person is restricted daily to his or her dwelling;
 - (c) the number of hours of community service that the person is required to serve, up to a maximum of 24 hours per month; and
 - (d) the type of community service to be performed.
- (3) In exceptional circumstances correctional supervision may be imposed without a requirement of community service.

32. Community Service

- (1) Community service requires that the person concerned perform without remuneration 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 interest of the community.
- (2) The Court imposing community service must specify –
 - (a) the number of hours per month of community service that the person is required to serve, which may not exceed 1000 hours in total; and
 - (b) the type of community service to be performed.
- (3) A person sentenced to a community penalty may be ordered to contribute to the cost of the penalty.

33. Additional conditions to community penalties

- (1) Community penalties may be accompanied by conditions that the person –
 - (a) is restricted to one or more specified magisterial districts;
 - (b) lives at a specified ascertainable address;
 - (c) refrains from using or abusing alcohol or drugs;
 - (d) takes part in treatment, development and support programmes;
 - (e) refrains from committing a specified criminal offence or class of criminal offences;
 - (f) refrains from visiting a specified place;
 - (g) seeks employment;
 - (h) takes up and remains in employment;
 - (i) refrains from making contact with a specified person or persons;

- (j) participates in mediation with the victim or in a family group conference;
 - (k) refrains from threatening a specified person or persons by word or action; and
 - (l) is subjected to a specified form of monitoring.
- (2) Community penalties may not include any condition other than those listed in subsections (1) and (2), but the court may, subject to the provisions of the Correctional Services Act, elaborate on the conditions.

34. Requirements for imposing community penalties

- (1) Community penalties may only be imposed after a report by a probation officer, a correctional official, social worker or other person designated by the court to provide a report, has been placed before the court.
- (2) A report referred to in subsection (1) must, unless the court rules that it can dispense with one or more of these requirements, contain -
- (a) recommendations on the orders and conditions on which the sentence should be imposed;
 - (b) recommendations on how the conditions can be used to achieve the objectives of the sentence;
 - (c) the reasons why the accused is a person suitable to undergo a community penalty;
 - (d) a proposed programme for the person concerned;
 - (e) the reasons why the person concerned would benefit from the sentence;
 - (f) information on the family and social background of the person concerned; and
 - (g) any matter that the court may request the probation officer or correctional official, social worker or other designated person to

consider.

35. Change of conditions of community penalties

The court that imposed a community penalty, whether differently constituted or not, or any other court of equal or superior jurisdiction, may on good cause shown, on application by the Commissioner or the person serving the sentence, amend or cancel any condition of the penalty or add any other competent condition.

36. Failure to comply with community penalties

- (1) If it appears that any condition or order imposed as part of a community penalty has not been met, the person concerned may upon the order of any court -
 - (a) be warned to appear before the court that imposed the community penalty or any court of equal or superior jurisdiction; or
 - (b) be arrested and brought before such court.
- (2) The court that imposed the community penalty, whether differently constituted or not, or any court of equal or superior jurisdiction, must enquire whether the person has failed to meet such condition or order, and into the circumstances of such failure.
- (3) If such court finds that such condition or order has not been met due to circumstances beyond the control of the person it may act in terms of section 35.
- (4) If such court finds that such condition or order has not been met due to circumstances within the control of the person it may amend or cancel any such condition or order or add any other competent condition or order or impose any other competent sentence afresh.
- (5) When acting in terms of subsection (4) the court must consider the possible partial fulfilment of the community penalty.

REPARATION

37. Reparation

- (1) A sentence of reparation may be imposed for any offence and must be

considered in every case.

- (2) The court may sentence any person convicted of an offence to make appropriate reparation in the form of restitution and compensation to any victim of the offence for -
 - (a) damage to or the loss or destruction of property, including money;
 - (b) physical, psychological or other injury; or
 - (c) loss of income or support;resulting from the commission of such offence.
- (3) The awards made by regional or district magistrates' courts in terms of subsection (2) may not exceed a fine that such courts may impose.
- (4) In assessing the reparation that a person convicted of an offence may be ordered to pay the court must consider the means of the offender as well as the reparation appropriate for purposes of restitution and compensation.
- (5) Where the court finds it appropriate to impose a sentence of reparation or to suspend the sentence on condition of reparation, and the court is considering the imposition of a fine in addition to such an award, but it appears that the person convicted would not have the means to make reparation and to pay the fine, the court must first impose the sentence of reparation or make reparation a condition of suspension and then consider the further sentence to be imposed.
- (6)
 - (a) Where a sentencing guideline provides for a fine the court may instead of imposing a fine sentence the offender to making reparation by calculating the seriousness of the offence in terms of fine units and determining the amount of reparation in the same way as a fine is set in terms of section 23, except that the amount must not be more than is appropriate for reparation.
 - (b) If the amount of reparation is less than the fine that would have been set the court may also impose a fine.
- (7)
 - (a) If a sentencing guideline does not provide for a fine a court may nevertheless impose an additional sentence of reparation.

- (b) Such reparation may be considered when deciding on sentencing options and in determining sentences within the range of increase and decrease that the guideline may allow, but may not be considered as a ground for departing from the guideline.
- (8) Reparation may be imposed on its own or combined with any other sentence, but the overall sentence must reflect the principle of proportionality as contained in section 3.
- (9) In cases where the amount of the damage, injury or loss exceeds an award made in terms of subsection (2) an additional civil action may be instituted.
- (10) Where a court determines the reparation in terms of this section, it must also determine the time for and the method of making reparation.
- (11) Where the victim suffering damage, injury or loss referred to in subsection (2) is not present when sentence is considered, the court may, if it will not cause undue delay, direct that such victim be notified that he or she may attend the proceedings.

38. Payment of reparation

- (1) Where a person is sentenced to make reparation, the court may in its discretion enforce the making of reparation whether in whole or in part –
 - (a) by allowing the accused to make reparation on the conditions and in installments at the intervals it deems fit; or
 - (b) if money is due or is to become due as salary or wages from any employer of the person concerned, by ordering such employer to deduct a specified amount from the salary or wages so due and to pay over such amount to the clerk of the court or registrar in question.
- (2) The clerk of the court or the registrar may subject to the approval of a magistrate or judge in chambers, vary the conditions and installments according to which reparation is to be made.
- (3) A court that has acted in terms of subsection (1), whether differently constituted or not, or any court of equal or superior jurisdiction may, on good cause shown, reconsider any decision that it has made on the making of reparation and replace it with a new order authorised by subsection (1).

39. Recovery of reparation

- (1) Whenever a person is sentenced to make reparation, the court passing the sentence may issue a warrant addressed to the sheriff or messenger of the court authorizing him or her to recover the amount of the reparation by attachment and sale of any movable property belonging to such person.
- (2) The amount which may be recovered in terms of subsection (1) must be sufficient to cover, in addition to the amount of the reparation, the costs and expenses of the warrant and of the attachment and sale in terms of it.

40. Failure to make reparation

- (1) Whenever a court has ordered a person to make reparation and such reparation is not made in full or is not recovered in full, the court that passed sentence may -
 - (a) warn such person to appear before it; or
 - (b) issue a warrant directing that such person be arrested and brought before the court.
- (2) When such a person is brought before court the court may impose such other sentence as may have been imposed if the court were considering sentence after conviction, except that the court must take into consideration any part of the reparation that may have been made or recovered.

CAUTION AND DISCHARGE**41. Caution and discharge**

- (1) Where the interests of justice will be served by not punishing a person convicted of an offence such person may be cautioned and discharged, and the court may order that the conviction not be recorded or recognised as a previous conviction.

CHAPTER 4**Sentencing procedures****42. Previous convictions**

- (1) After a person has been convicted and before sentence is imposed the prosecution may tender a record of previous convictions alleged against such person.
- (2) The court must ask the person concerned whether the previous convictions referred to in subsection (1) are admitted.
- (3) If the person concerned denies such previous convictions, the prosecution may tender evidence that such person was so previously convicted.
- (4) If the prosecution tenders no evidence of a previous conviction the court may, at the request of a victim or of its own accord solicit evidence of such conviction.
- (5) If the person admits such previous convictions or such previous convictions are proved, the court may consider them in terms of section 3(4).
- (6) Where a period of 10 years has passed from the date of completion of the last sentence and the date of commission of any subsequent offence for which a person is to be sentenced, the last conviction and all convictions prior to that must be disregarded for purposes of sentencing.

43. Evidence relating to proof of previous convictions

- (1) When the prosecution seeks to prove previous convictions in terms of this Act a record, photograph or document that relates to a fingerprint and -
 - (a) which purports to emanate from the officer commanding the South African Criminal Record Bureau; or
 - (b) in the case of any other country, from any officer having charge of the criminal records of that country,

constitutes *prima facie* proof of the facts it contains.

- (2) The admissibility of such record, photograph or document is not affected by it being obtained against the will of the person concerned.

44. Evidence on further particulars relating to previous conviction

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

45. Evidence on sentencing

- (1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the appropriate sentence.
- (2) The court must allow the offender and the prosecutor to call witnesses or to adduce evidence relevant to sentencing and may itself call witnesses or adduce evidence.
- (3) The court must assist an undefended offender to place facts relevant to sentence before the court.
- (4) If witnesses are called the provisions of sections 162, 163, 164, 165, and 166 of the Criminal Procedure Act apply.
- (5) Before passing sentence the court must allow the offender and the prosecutor to address it on any relevant evidence and the appropriate sentence.
- (6) Any fact relevant to the determination of an appropriate sentence must be proved to the satisfaction of the court.

46. Financial evidence

- (1) The court may enquire into the financial position of a person convicted of any offence, where it is relevant to the imposition of sentence.

- (2) Such inquiry may include -
 - (a) consideration of the employment, earning ability and financial resources and assets of such person at present or in the future, including any circumstance that may affect his or her ability to make reparation; and
 - (b) information about any benefit, financial or otherwise, derived directly or indirectly, as a result of the commission of the offence.
- (3)
 - (a) The court may require such person to disclose to the court orally or in writing particulars of his or her financial circumstances in the manner and form the court deems fit.
 - (b) Such information may not be used for any other purposes.
- (4) The court may require that a written report be placed before it containing information concerning the financial status of the person convicted.

47. Evidence relating to the interests of victims

- (1) The prosecution must, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim and, where practicable, furnish the court with particulars of -
 - (a) damage to or the loss or destruction of property, including money;
 - (b) physical, psychological or other injury; or
 - (c) loss of income or support.
- (2) A victim impact statement may be made by a victim who, as a result of an offence, suffered damage, injury or loss as referred to in subsection (1), or by a person nominated by such victim.
- (3) The prosecutor must seek to tender evidence of a victim impact statement where the victim is not called to give evidence and such a statement is available.

- (4) If the contents of a victim impact statement are not disputed a victim impact statement is admissible evidence on its production.
- (5) If the contents of a victim impact statement are disputed, the victim must be called as witness for the statement to be taken into account by the court.

48. Victims and release from prison.

- (1) Where a person has been convicted of an offence involving violence against another person and is sentenced to an unsuspended term of imprisonment of two years or more, the court must explain to any victim of the crime, including the next of kin of a deceased victim, that they may inform the Commissioner that they wish to be notified of any hearing of a Correctional Supervision and Parole Board where the conditional release of such offender is being considered, so that they may make representations on the risks that such release may hold.
- (2) Where a victim is incapable of informing the Commissioner as contemplated in subsection (1) the information may be conveyed by a representative of the victim.
- (3) If the victim or a representative referred to in subsection (2) intends to make such representations to the Correctional Supervision and Parole Board, such person must inform the Commissioner of this intention and keep the Commissioner informed of any change of address.

49. Sentencing judgment

Every judgment on sentence must include:

- (a) the sentence imposed;
- (b) the reasons for sentence where there is a departure from a sentencing guideline and wherever practicable in all other cases;
- (c) in the case of a community penalty, a brief explanation of the implications of the sentence;
- (d) a note that reparation has been considered as required by section 37;
and

- (e) any comments that the court may wish to bring to the attention of the authorities responsible for the release of a person sentenced to imprisonment.

50. Antedating of sentences

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

51. Sentence may be delayed

Where a court is of the opinion that it will be better able to decide on an appropriate sentence at a later date, it may delay the passing of sentence for up to six months and set any condition that will enable it to pass an appropriate sentence.

52. Cumulative or concurrent sentences

- (1) When a person -
 - (a) has been convicted of two or more offences; or
 - (b) is serving a sentence or is still subject to conditions of a sentence and is convicted again of another offence;

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

- (2)
 - (a) When the sentences imposed in terms of subsection (1) consist of imprisonment the court may direct that such sentences run concurrently.
 - (b) If the court does not so direct, such sentences commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct.

- (3) (a) When the sentences imposed in terms of subsection (1) consist of community penalties the court may direct that such sentences run concurrently.
 - (b) If the court does not so direct, such sentences commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct.
 - (c) If the aggregate of sentences of community penalties referred to in subsection (3) exceeds three years, the person concerned must serve a period of not more than three years from the date on which the first of the sentences commenced, unless the court, when imposing sentence, directs otherwise.
- (4) (a) When the sentences imposed in terms of subsection (1) consist of fines the court may determine a reduced fine for the offences taken together.
 - (b) If the court does not so determine such fines must be paid in full.

CHAPTER 5
General provisions

53. Warrant for the execution of sentence

- (1) A warrant for the execution of any sentence of imprisonment or community penalties must be issued by the court that passed the sentence or by any other judicial officer of the court in question.
- (2) The warrant for the execution of a sentence of imprisonment commits the person concerned to the prison for the magisterial district in which such person is sentenced.
- (3) A warrant for the execution of a sentence of imprisonment must be accompanied by any comments that the court made in terms of section 49(e).

54. Procedure to execute conditions of suspension

- (1)
 - (a) A court which has suspended a sentence in terms of a condition referred to in section 33 must, if the conditions make it necessary, have served upon the person concerned a written notice directing such person to report on a date and time specified in the notice or, if prevented from doing so by circumstances beyond his or her control, as soon as practicable thereafter, to the person specified in that notice, in order to meet the conditions that have been imposed.
 - (b) A copy of such notice is authority for the person mentioned in it to have the conditions of suspension implemented as imposed.

55. Sentence by judicial officer other than judicial officer who convicted the accused

- (1) If sentence is not passed immediately upon conviction in a lower court, or if, by reason of any decision or order of a high court, it is necessary to vary any sentence passed in a lower court or to pass sentence afresh, any judicial officer of that court may, in the absence of the judicial officer who convicted the person concerned or passed the sentence and after consideration of the evidence recorded and in the presence of the person concerned, pass sentence or take such other steps as the judicial officer who is absent, could lawfully have taken.
- (2) Whenever-

- (a) a judge is required to sentence a person convicted by him or her;
or
- (b) any matter is remitted on appeal or otherwise to the judge who presided at the trial of the person concerned,

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

56. Sentence may be corrected

- (1) When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence.
- (2) Where there is an error in the calculation for the purposes of section 50, of the number of days that a person has spent in prison prior to the sentence being pronounced on the charge for which he or she is being sentenced, the court or any other court of equivalent or superior jurisdiction may amend the sentence at any time.

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

- (1) If patrimonial loss may be recovered from a person on the ground of a delict committed by such person while performing community service in terms of this Act as part of a community penalty or as a condition of suspension of sentence, that loss may, subject to subsection (3), be recovered from the State.
- (2) Subsection (1) may not be construed as precluding the State from obtaining indemnification against its liability by means of insurance or otherwise.
- (3) The patrimonial loss that may be recovered from the State in terms of subsection (1) must be reduced by the amount to which the injured party is entitled from any other source by reason of the patrimonial loss.
- (4) In so far as the State has made a payment by virtue of a right of recovery in terms of subsection (1), all the relevant rights and legal remedies of the injured party against the person performing community service pass to the State.
- (5) If any party, as a result of the performance of community service by any person, has suffered patrimonial loss that cannot be recovered from the

State in terms of subsection (1), the Director-General may, with the concurrence of the Department of State Expenditure, pay that party, as an act of grace, such amount as he or she deems reasonable.

58. Repeal¹

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

59. Short title and commencement

- (1) This Act is the Sentencing Framework Act, 2000, and takes effect on a date fixed by the President by notice in the *Gazette*.
- (2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

¹ **Note:** the schedule must include, *inter alia*, amendments to the Correctional Services Act. The legislation to be repealed includes Chapter 28 of the Criminal Procedure Act (except for sections 290 and 291 unless they have already been repealed by the proposed new Youth Justice Act) and sections 51 to 53 of the Criminal Law Amendment Act 105 of 1997 and the schedules related to these provisions.

ANNEXURE A

LIST OF PERSONS WHO COMMENTED ON DISCUSSION PAPER ON A NEW SENTENCING FRAMEWORK

1. Professor CMV Clarkson - University of Leicester
1. Professor A Ashworth- University of Oxford, UK
1. Professor Andrew von Hirsch, University of Cambridge, UK
1. Professor SS Terblanche - Unisa
1. Dr Bill Dixon - Institute of Criminology University of Cape Town
1. Professor A Freiberg - University of Melbourne, Australia
1. Professor DP Visser - University of Cape Town
1. Professor CH Cilliers - National Council for Correctional Services
Professor G Barrie -National Council for Correctional Services
1. Professor Martin Wasik - Faculty of Law - Manchester University UK
1. Lawyers for Human Rights - (Penal reform project)
1. Deborah Quenet - Attorney, on behalf of Violence Against Women, Western Cape Network on violence Against Women, Rape Crisis Cape Town, Union of Jewish Women, Rapcan, and Sex Workers Education Advocacy Taskforce
1. Advocate Kobus van Rooyen, SC -Pretoria Bar (Forwarded by Adv A Louw)
1. Advocate Ron Paschke - Member of the Cape Bar
1. Society of Advocates - Natal
1. Law Society of the Cape of Good Hope
1. Advocate M Witz - Johannesburg Bar
1. Judge JA Heher - on behalf of the Judges of the High Court Johannesburg

1. Judges of the High Court - Durban
1. Judges of the High Court Bloemfontein
1. Judge L van den Heever - Retired Judge
1. A Calitz - Magistrate -Bethulie
1. Magistrate Brakpan
1. Mrs A Roos - Magistrate Evander
1. NAJ van Niekerk - Magistrate Mhala
1. NE Denge - Senior Magistrate Brakpan
1. Mr BT Ngcuka - National Director of Public Prosecutions
1. Mr MS Ramaite - Director of Public Prosecutions - Transvaal
1. RP Stuart - Deputy Director of Public Prosecutions - Pietermaritzburg
1. Director of Public Prosecutions -Venda
1. Adv Slabbert and FW Kahn Director Public Prosecutions - Cape Town
1. Advocate CDHO Nel - Deputy Director of Public Prosecutions Port Elizabeth
1. IS Khoza - National Council for Correctional Services
1. NICRO - National Office Cape Town
1. Gender Project - Community Law Centre - University of Western Cape
1. Mrs EK Mthombeni - Chief Social Worker
1. Mrs L Malepe - Tshwaranang Legal Advocacy Centre to end violence against woman

ANNEXURE B**ATTENDANCE LISTS OF REGIONAL WORKSHOPS****PRETORIA: 12 JUNE 2000**

- | | | | |
|----|------------|-----|---|
| 1. | Allers | C | Magistrates Office Vanderbjilpark |
| 1. | Brink | A | SAPS |
| 1. | Brown | G | Department of Welfare |
| 1. | Cilliers | C H | UNISA Department of Criminology |
| 1. | De Bruyn | D W | Magistrates Office Heidelberg |
| 1. | Denge | N E | Magistrates Office Brakpan |
| 1. | Dissel | A | Criminal Justice Policy Unit Centre for the Study of
Violence and Reconciliation |
| 1. | Du Toit C | | Department of Welfare |
| 1. | Ebrahim | S | G T Z |
| 1. | Els | L | Pretoria Bar |
| 1. | Geldenhuis | T | SAPS Legal Services |
| 1. | Glanz | L | Department of Justice Legal Services
Administration of Courts and Witness Protection |
| 1. | Govender | K | Sentencing Committee Member |
| 1. | Gwebu J T | | Department of Justice Community Services |
| 1. | Heher | J A | High Court Johannesburg |
| 1. | Hlatshwayo | C | Department of Social Services and Population
Development Germiston |

1.	Hlongwane	L	Department of Correctional Services
1.	Ingestedt Prevention	C	United Nations Office for Drug Control and Crime
1.	Jenneker Williamstown	A	Independent Complains Directorate King
1.	Jordaan	C	O S E O
1.	JoubertD		SAPS Legal Services
1.	Juba	J O	
1.	Kathawaroo	R	Johannesburg Bar
1.	Kgasi Klerksdorp	N	National Network on Violence Against Women
1.	Khumula Braamfontein)	P	S H E P (Sexual Harassment Education Project
1.	King	B	Department of Justice Justice College
1.	Kollapen	J	Sentencing Committee Member
1.	Kotze	S	Department of Welfare Victim Empowerment
1.	Kriek	E	Department of Correctional Services
1.	Le Roux	L	Department of Welfare Community Services Benoni
1.	Louw	H	Magistrates Office Johannesburg
1.	Maboea	M	Men for change Wynberg
1.	Makamu	M S	Magistrates Office Benoni
1.	Makhulselo	M J	Liamegethee Safety Home Saulsville
1.	Makoko	T	Dyambu Youth Centre Suurbekom
1.	Malindi E		Correctional Services Legal Services

1.	Mansingh	U R D	Johannesburg Bar
1.	Martini G		Magistrates Office Alberton
1.	Masilela Klerksdorp	E	National Network on Violence Against Women
1.	Matshaba Development	P Germiston	Department of Social Services and Population
1.	Mbusi	S	FA M S A Benoni
1.	Mhlanga	E G	Public Prosecution High Court Thohoyandou
1.	Miller	A	Department of Welfare Victim Empowerment
1.	Mistry Florida	D	Technikon SA Human Rights and Criminal Justice
1.	Mkhabela	T	Bloodriver Advice Office Pietersburg
1.	Mnyatheli	M	O S E O Pretoria
1.	Moima A J		Correctional Services
1.	Morris	M	Department of Welfare Victim Empowerment
1.	Morule L I		Department of Justice
1.	Motene T S		National Network on Violence Against Women Klerksdorp
1.	Motloing	T	Department of Welfare Community Services Benoni
1.	Mthabela	S	Department of Correctional Services
1.	Mudau T P		Magistrates Office Johannesburg
1.	Naude	C M B	UNISA Dept Criminology
1.	Ndivhuho Mahlanga	A	Network on Violence against women Kwa-
1.	Ngwane Braamfontein	C	Centre for study of violence and reconciliation

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|----|----------------------------|-------|--|
| 1. | Nhantshi | B | O S E O |
| 1. | Nijenhuis | H M | University of Pretoria |
| 1. | Owens M | | UNISA Criminology |
| 1. | Paxton CH | | Department of Correctional Services Legal Services |
| 1. | Petersen | V | Member of Sentencing Project Committee |
| 1. | Pfaff | R | G T Z |
| 1. | Phokontsi | I | Parole Board North West Brits |
| 1. | Pitikoe B | | Lawyers for Human Right |
| 1. | Ramagoshi | M | Member Sentencing Project Committee |
| 1. | Schneider | H | G T Z |
| 1. | Schoeman | E M C | Magistrates Office Bronkhorstspuit |
| 1. | Schönteich | M | Institute for Security Studies |
| 1. | Sekoba | L N | Mpumalanga Network |
| 1. | Selahle | K | FAMSA Benoni |
| 1. | Shabangu | PM | Member Sentencing Project Committee |
| 1. | Sithole E B | | Unisa |
| 1. | Snyman | R | Technikon SA |
| 1. | Strobel-Shaw
Prevention | B | United Nations Office for Drug Control and Crime |
| 1. | Terblanche | S S | Unisa Faculty of Law |
| 1. | Tshabalala | S | Department of Welfare Johannesburg |
| 1. | Van der Merwe D P | | Unisa Faculty of Law |

1. Van der Merwe D P Z Magistrates Office Pretoria
1. Van den Berg D J University of Pretoria Department of Criminology
1. Van Vuuren W S A Law Commission
1. Van Zyl Smit D Project Leader Sentencing Committee
1. Vetten L Centre for study of violence and reconciliation
Braamfontein
1. Viljoen C Department of Welfare Community Services Benoni
1. Wessels P Magistrates Office Pretoria North
1. Zvekvic U United Nations Office for Drug Control and Crime
Prevention

DURBAN: 13 JUNE 2000.

1. Bezuidenhout H SAPS Legal Services
1. Byroo R S Department of Welfare
1. Carser A Assessors Magistrates Court Pietermaritzburg
1. Cele N Department of Correctional Services
1. Chetty V R University of Durban Westville Department
Criminology
1. Cornelius L Department of Social Welfare Regional
1. Cowley I NICRO Kwa Zulu Natal
1. Gangabishun S KZN Network on Violence against women
1. Govender L University of Natal Campus Law Clinic

- | | | | |
|----|-----------------------------|-------|--|
| 1. | Govender | K | Member Sentencing Project Committee |
| 1. | Grieves
Pietermaritzburg | M | Department of Social Welfare Regional Office |
| 1. | Jay | J | |
| 1. | Hugo | J | High Court Durban |
| 1. | Khonkhobe | J | Letsatsi Fundraising Academy Kimberley |
| 1. | Kollapen | JD | Member Sentencing Project Committee |
| 1. | Koopman | G | Department of Social Welfare Pietermaritzburg |
| 1. | Levitt | T W | Association of Regional Magistrates Natal Region |
| 1. | Luther | I J J | Regional Court President Durban |
| 1. | Maharaj | M | Magistrates Office Durban |
| 1. | McCall | K | High Court Durban |
| 1. | McKay | J | Human Rights Committee |
| 1. | Meek | C D | Department of Correctional Services |
| 1. | Mfeka | M | KZN Network on Violence against women |
| 1. | Mkhize | B | Department of Welfare |
| 1. | Moodley | | Department of Correctional Services |
| 1. | Morar
Criminology | B | University of Durban Westville Department of |
| 1. | Mowatt | J | University of Durban Westville Faculty of Law |
| 1. | Myiza | S | Department of Social Welfare Pietermaritzburg |
| 1. | Naidoo | N V | Department of Social Welfare Durban |
| 1. | Naiyana | L | |

- | | | | |
|----|----------------------|-------|---|
| 1. | Ndwalane | H L S | Magistrates Office Pinetown |
| 1. | Ngonyama | N | KZN Network on Violence against women |
| 1. | Ngwane | J | Independent Complaints Directorate Westville |
| 1. | Nhlengethwa | D N | Department of Social Welfare Pietermaritzburg |
| 1. | Ntshangase | D S V | Magistrates Office Pietermaritzburg |
| 1. | Osman M | | University of Natal Campus Law Clinic |
| 1. | Padayachee | B | Lawyers for Human Rights Pietermaritzburg |
| 1. | Padayachi | R | Magistrates Office Verulam |
| 1. | Pfaff | R | GTZ |
| 1. | Petersen | V | Member Sentencing Project Committee |
| 1. | Ramagoshi | M | Member Sentencing Project Committee |
| 1. | Rooplall | C | KZN Network on Violence Against Women |
| 1. | Schneider | H | GTZ |
| 1. | Singh
Criminology | S | University of Durban Westville Department of |
| 1. | Singh | P I | Magistrates Office Chatsworth |
| 1. | Shabangu | PM | Member Sentencing Project Committee |
| 1. | Thabethe | N | Assessors Magistrates Court Pietermaritzburg |
| 1. | Timothy | L | NICRO, Kwa Zulu Natal |
| 1. | Van der Westhuizen | R | Department of Welfare |
| 1. | Van Niekerk | S F | Magistrates Office Pietermaritzburg |
| 1. | Van Niekerk | J | Childline Overpost Durban |

- 1. Van Vuuren W SA Law Commission
- 1. Van Zyl Smit D Project leader Sentencing Project Committee

WORKSHOP: ATTENDANCE LIST: CAPE TOWN: 14 JUNE 2000

- 1. Alman H Magistrates Office Wynberg
- 1. Amien M Univ Western Cape Lagal Aid Cender Centre
Bellville
- 1. Barberton C ATREC
- 1. Blascher H Union of Women
- 1. Camerer S, MP New National Party
- 1. Camerer L Member Sentencing Project Committee
- 1. Crisp U Masimanyane Women Support Centre East Londen
- 1. Davis DM High Court Cape Town
- 1. Desai S High Court Cape Town
- 1. Dixon B University of Cape Town Institute of Criminology
- 1. Du Preez R SAPS Cape Town
- 1. Govender K Member Sentencing Project Committee
- 1. Frieth R Network of Violence against women Western Cape
- 1. Khalfe D SAPD
- 1. Kollapen JD Member Sentencing Project Committee
- 1. Lilley M Focus on Elder Abuse INPEA Plumstead
- 1. Michaels A Dept Safety and Security Western Cape

1.	Miller	R	MOSAIC
1.	Parker	M K	Attorney Cape Town
1.	Paschke	R	Member of the Cape Bar Vlaeberg
1.	Petersen	V	Member Sentencing Project Committee
1.	QuenetD Women) Cape Town		Women's Legal Centre (Attorney, Violence Against
1.	Ramagoshi	M	Member Sentencing Project Committee
1.	Rhode	S	Catholic Welfare
1.	Rontsch	R	
1.	Shabangu	PM	Member Sentencing Project Committee
1.	Slabbert	J	Director of Public Prosecutions' Office Cape Town
1.	Snitcher	N	Law Society Cape of Good Hope
1.	Schneider	H	GTZ
1.	Southwell	V	S A Human Rights Commission
1.	Stapelton	A	PRI
1.	Swart	H A J	Magistrates Office Cape Town
1.	Van den Heever	L	Retired Judge of Appeal Cape Town
1.	Van Vuuren	W	SA Law Commission
1.	Van Zyl Smit	D	Project Leader Sentencing Project Committee
1.	Van Wyk		Catholic Welfare
1.	Van den Berg	B	Magistrate Prosecutions Section
1.	Waterhouse	S	Rape Crisis Cape Town

BLOEMFONTEIN: 15 JUNE 2000

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|----|---|-------|---|
| 1. | Chalale | S | Public Prosecutions Free State |
| 1. | Du Plessis | W A | Regional Court President Bloemfontein |
| 1. | Du Toit A F | | Public Prosecutions Free State |
| 1. | Georgi S | | Public Prosecutions Free State |
| 1. | Hattingh | G A | High Court Bloemfontein |
| 1. | Hiemstra | J H S | Public Prosecutions Free State |
| 1. | Kotze | D A | High Court Bloemfontein |
| 1. | Lichtenburg | E K W | High Court Bloemfontein |
| 1. | Malherbe | JP | High Court Bloemfontein |
| 1. | Molotsi P | | Public Prosecutions Free State |
| 1. | Musi | H M | High Court Bloemfontein |
| 1. | Noadala | K M | Regional Court Kimberley |
| 1. | Schneider | H | GTZ |
| 1. | Steenkamp | MDJ | High Court Kimberley |
| 1. | Van Rooyen | R | Magistrates Office Bloemfontein |
| 1. | Van Coller | A P | High Court Bloemfontein |
| 1. | Van Vuuren | W | SA Law Commission |
| 1. | Van Zyl Smit | D | Project Leader Sentencing Project Committee |
| 1. | Visser | G | Public Prosecutions Free State |
| 1. | Magistrates and Regional Court Magistrates from Bloemfontein and surrounding cities | | |
| 1. | Judges from High Court Bloemfontein | | |

ANNEXURE C**LIST OF PERSONS ATTENDING WORKSHOP WITH INTERNATIONAL EXPERTS
HOSTED IN CAPE TOWN 28-30 JUNE 2000**

1. Professor D van Zyl Smit Project leader, Project committee on sentencing

1. Professor RT Nhlapo Full Time Member of the Commission and member of project committee

1. Mr JD Kollapen Member of the project committee and Commissioner of the Human Rights Commission

1. Mr K Govender Member of the project committee

1. Ms ME Ramagoshi Member of the project committee

1. Mr PM Shabangu Member of the project committee

1. Mr AWF van Vuuren Researcher - SA Law Commission

1. Professor SS Terblanche Professor - Faculty of Law, UNISA

1. Mr V Petersen Member of the project committee

1. Mr H Schneider GTZ, Pretoria

1. The Honourable Mr Justice KK Mthiyane Acting Judge of the Supreme Court of Appeal

1. Advocate R Paschke Member of the Cape Bar

1. Professor Hans-Jörg Albrecht Director of the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany

1. Professor Arie Freiberg Department of Criminology, University of Melbourne, Australia

1. Professor Kwame Frimpong University of Botswana

1. Professor James Jacobs Director of the Center for the Study of Crime and Justice New York University School of Law, USA

1. Professor Rod Morgan University of Bristol, UK