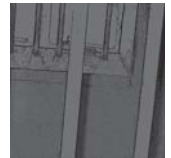


RESEARCH ON THE SENTENCING FRAMEWORK BILL



REPORT 4

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1

Introduction

In 1996 the Minister of Justice requested the South African Law Reform Commission¹ (hereafter referred to as ‘the Commission’) to investigate all aspects of sentencing. At the end of 2000, the Commission published its findings in *Report: Sentencing (A new sentencing framework)*² (hereafter referred to as the *Report*).

Since its publication, the Commission’s *Report* has largely been gathering dust. The fact is that some of the *Report*’s recommendations have proved controversial. The Department of Justice and Constitutional Development, in particular, finds some proposals unacceptable and, until those concerns are addressed, it is unlikely that the Commission’s proposals will find their way into our statute books. Nevertheless, the *Report* clearly provides an alternative to the current sentencing system which does not appear to be developing in a sustainable direction.

It is the purpose of this research project to establish whether any proposals can be put forward that will find wider support from all stakeholders of the criminal justice system than the Commission’s proposals received. Proposals will also need to be justifiable from a theoretical perspective.

The introductory section of this report deals with this purpose statement and also explains the research methodology of this project. It closes by explaining the involvement of the Open Society Foundation for South Africa (OSF-SA).

1 Then still known as the South African Law Commission. The name was changed by S 5 of the Judicial Matters Amendment Act 55 of 2002, as from 17 January 2003.

2 It is most readily accessed at www.doj.gov.za/salrc/index.htm (*Project 82*).

Chapter 2 contains a summary of the most important of the Commission's recommendations. These recommendations form the foundation for the current report. It is not the intention to revisit the Commission's recommendations, except where they may have been overtaken by subsequent events or developments. The second part of Chapter 2 contains a brief discussion of the developments in the sentencing landscape since publication of the *Report*.

In Chapters 3 and 4 the Commission's recommendations regarding the basic sentencing principles are discussed in detail. The findings of this research project in connection with each of these recommendations are highlighted and then followed by my specific recommendations.

Chapter 5 deals with the Commission's recommendations regarding specific sentencing options, following roughly the same method. Many of the changes to the current sentencing options, proposed by the Commission, are ultimately not supported.

Research methodology

In terms of OSF-SA's brief, this research was to be conducted primarily through interviews with important stakeholders in the criminal justice system. These interviews had to use the Law Commission's proposals as the point of departure. To this end a ten-page summary was drawn up of the Commission's proposals, and distributed to stakeholders with whom interviews were arranged. A copy of this document is included as the Appendix.

I had interviews with the following stakeholders (the approximate numbers involved are provided in brackets):³

- Judges, from the Supreme Court of Appeal to provincial divisions (at least 11).
- Regional magistrates from North West, Gauteng and KwaZulu-Natal (at least 40).
- District magistrates from Western Cape and Gauteng (3).
- Directors in the Department of Justice and Constitutional Development (2).
- Members of the Justice and Constitutional Development portfolio committee of Parliament (2).
- Members of the attorney's profession in KwaZulu-Natal and the Western Cape (at least 40).
- Staff from the Human Rights Commission.
- Staff from the Legal Aid Board.
- Members of the National Prosecuting Authority (2).
- Academics with an interest in sentencing (4).

3 Exact figures are often not available. In several instances I spoke to groups of people. I did not record the number of individuals in such groups and provided a minimum number according to my impression. In some instances no number is provided if a number will affect the confidentiality of the interview.

- A number of other interested and influential stakeholders, not included in any of the previous categories.

From the outset I spoke to people in an atmosphere of confidentiality. Although no undertaking was made not to disclose their identity in this report, I feel that it would be inappropriate to do so, and so no names appear in this report.

A typical interview consisted of briefly explaining both the purpose of the research and how the interview relates to it. This was followed by a discussion of the various proposals made by the Commission. Since the interviewee was normally given the summary (Appendix A) in advance, we could focus on those issues about which the interviewee had specific comments in the interview itself. Interviewees could focus on what they felt strongly about (favourably or otherwise), and time was not wasted discussing proposals about which they felt neutral. It often became necessary to highlight specific implications of some of the proposals, when it became clear that such implications were not foreseen by the interviewee. For example, while everybody is in favour of the principle that the sentence should be determined by the seriousness of the crime,⁴ they often failed to understand the implication this has in the case of the sentencing of repeat offenders.⁵

There was never any doubt that stakeholders would have diverse and widely different views on the ills of the current system and the ways in which these ills should be addressed. Indeed, stakeholders often had very clear personal views on what they believe must be changed in the current system. However, when it comes to what should actually replace those ‘ills’, they were less certain. This is not surprising. It is difficult to have strong opinions on reform when one has little or no experience of the proposed new procedures and measures. Interviewees were, therefore, uncertain about the practical effect of most of the proposals. They do not know what to expect, are justifiably concerned about unexpected side effects, tend to be conservative and would rather remain with what they know. As a result I obtained less material of substantial value for sentencing reform than I hoped for, but gained much insight into the politics of sentencing reform. Few stakeholders know much about other kinds of sentencing systems and even fewer have any experience of the workings of such systems. People who are involved in some way with the theory and practice of sentencing itself often made useful contributions, but this was rarely true of stakeholders on the fringes of sentencing practices. In several instances I experienced considerable difficulty finding someone with whom to conduct an interview. Even judges who are sentencers themselves sometimes felt they could not contribute as they felt insufficiently qualified regarding the material.

4 *Report* clause 3(2) of the Draft Legislation.

5 See *The effect of previous convictions*.

The involvement of OSF-SA

OSF-SA,⁶ through its Criminal Justice Initiative, has over the past three years commissioned two research reports on sentencing practice in South Africa. The first deals with the influence of *minimum* sentencing on levels of crime and the prison population.⁷ The second discusses the influence of sentencing *in general* on the prison population.⁸ Following the completion of this research, the Foundation arranged an international conference on sentencing reform, and invited a number of renowned international experts on sentencing to attend. The reports emanating from the conference proceedings and the two research projects were published during 2006 as parts 1–3 of an OSF-SA sentencing series. The current report is the fourth and final part of the series and builds on the findings of the previous reports.

It should be stated very clearly from the outset that OSF-SA did not, in any way, prescribe the contents of this report. Instead, it advertised an open call for submissions to do this research, and the terms of reference required the researcher to interview stakeholders in the criminal justice system in an attempt to satisfy the purpose of the project.

6 The role and mission statement of the OSF-SA can be consulted at www.osf.org.za.

7 O'Donovan & Redpath *The impact of minimum sentencing in South Africa* (2006) Open Society Foundation for South Africa, Cape Town.

8 Giffard & Muntingh *The effect of sentencing on the size of the South African prison population* (2006) Open Society Foundation for South Africa, Cape Town.

2

The Commission's proposals and subsequent developments

The Commission's recommendations

Among the most far-reaching of the Commission's recommendations are the following:

- The basic sentencing principles are to be set out in legislation.
- Factors such as deterrence and rehabilitation are no longer to be specific aims of the sentence.
- Sentencing guidelines are to become an important basis of more consistent sentences.
- Sentencing guidelines are to be drawn up by a Sentencing Council.
- The Sentencing Council is to be dominated by a variety of judicial officers.
- Various other tasks are proposed for the Sentencing Council.
- Existing sentence options are to be overhauled, resulting in the addition of 'reparation' as a substantive sentence.
- At the same time, periodical imprisonment, declaration of an offender as an habitual offender and the postponement of sentencing are eliminated as options.
- Victims are to be given a greater role to play through the provision of victim impact statements.

While the Commission's investigations were under way, Parliament passed the Criminal Law Amendment Act 105 of 1997. This Act contains a range of minimum and mandatory sentences

for a substantial number of the more serious offences that are committed in South Africa. This Act, as well as others that changed the factual foundation on which the Commission's *Report* was based, is discussed below.

The sentencing landscape since 1997

At the beginning of 1997, sentencing procedure in South Africa was governed by the Criminal Procedure Act.⁹ This Act contained a list of sentencing options available to sentencing courts.¹⁰ By then, capital and corporal punishment had already been judged unconstitutional and removed from this list. The Criminal Procedure Act also governed most of the procedural arrangements regarding these sentences. Both the list of sentences and the procedural arrangements are virtually the same today as they were in 1997.

In 1997 the extent of the sentencing jurisdiction of the courts was governed by the Magistrates' Courts Act¹¹ for magistrates' courts and the common law for the high courts. District magistrates could generally impose imprisonment of up to one year and fines of up to R20 000, while regional magistrates had the general power to impose up to ten years' imprisonment and fines up to R200 000.¹² In theory, the powers of the high courts were unlimited. However, in practice, the appeal courts held that sentences that are longer than a person's life expectancy may not be imposed. Life imprisonment is, therefore, the longest sentence that can be imposed.¹³

Within the boundaries of these provisions, sentencers enjoyed a wide discretion to determine the dispositional and durational aspect of the eventual sentence. South Africa was (and largely remains) a typical common law jurisdiction in this respect.¹⁴

Two amendments to this position substantially changed the sentencing landscape shortly afterwards. First, Parliament passed the Criminal Law Amendment Act¹⁵ which contains, in S 51 read with Schedule 2, mandatory and minimum sentences for a very wide range of the more serious offences that are committed in South Africa. This legislation, which has become known as the minimum sentences legislation, came into operation on 1 May 1998¹⁶ and only applies to offences committed after this date.¹⁷ Originally intended as a

9 Act 51 of 1977.

10 S 276(1), read with Ss 290 and 297.

11 Act 32 of 1944.

12 S 92(1), as at 1 January 1997.

13 Terblanche *The guide to sentencing in South Africa* (1999) 15.

14 In contrast to the civil law jurisdictions of the European Continent – cf. Blumstein et al. in Tonry & Farrington *Crime and punishment in Western countries, 1980–1999* (2005) 349–351.

15 Act 105 of 1997.

16 Proc R43 GG 6175 of 1 May 1998.

17 *S v Willemse* 1999 (1) SACR 450 (C); *S v Hlongwane* 2000 (2) SACR 681 (W) at 682*i*.

temporary measure, the minimum sentences legislation has been extended repeatedly by the President, most recently until April 2009.¹⁸ This legislation has dominated our sentencing jurisprudence ever since it was first enacted. It has also been declared to be constitutional by the Constitutional Court.¹⁹

Notably, the minimum sentences legislation applies to cases sentenced in the high courts and regional courts only. The delays experienced in these courts with the finalisation of trials meant that the impact of the Amendment Act only became noticeable in the course of 1999. By this time the second important amendment had been passed. From 28 September 1998, the sentencing jurisdiction of the magistrates' courts was increased; in the case of the regional courts, to R300 000 for fines and 15 years' imprisonment and, in the case of the district courts, to R60 000 for fines, and three years' imprisonment.²⁰ Magistrates, in particular, considered the message from Parliament to be clear: sentences for most crimes were too lenient and had to be increased substantially. They responded to this message immediately.²¹

Other important legislation influencing the execution of both imprisonment and certain community-based punishments came into operation in the meantime, in the form of the new Correctional Services Act.²² Most of the provisions affecting the execution of sentences only came into operation on 1 October 2004. Some of the important changes in the law relate to the conditions that might be attached to a sentence of correctional supervision²³ and the process of the release of prisoners and, in particular, those prisoners sentenced to life imprisonment.²⁴

Towards the close of 2007, Parliament accepted the Criminal Law (Sentencing) Amendment Act,²⁵ amending the minimum sentences legislation. Amongst others, these amendments are aimed at giving regional courts the power to impose the life imprisonment prescribed in

18 Proc R10 GG 29831 of 25 April 2007.

19 In *S v Dodo* 2001 (1) SACR 594 (CC). It has already been suggested that the continual extensions might change the finding of constitutionality – Van Zyl Smit in Woolman et al. (eds) *Constitutional law of South Africa* 2ed (2006) 49–14.

20 See S 6 of Act 66 of 1998.

21 Giffard & Muntingh *The effect of sentencing on the size of the South African prison population* (2006) v, 18–21.

22 Act 111 of 1998.

23 This issue has not yet been addressed in reported judgments, but see Terblanche (2007) 20 SACJ 252–254.

24 In terms of S 73(6)(b) read with 73(5)(a), a prisoner sentenced to life imprisonment on or after 1 October 2004 would have to serve at least 25 years in prison before being considered for parole by the court (some exceptions apply). Before these provisions came into operation there was no official minimum term to serve in prison. The Minister of Correctional Services determined release on parole (S 65(5) of Act 8 of 1959).

25 Act 38 of 2007.

S 51(1) for murder and rape with certain prescribed aggravating circumstances. Such powers will obviate the need to commit offenders convicted of these offences in the regional courts for sentencing in the high courts. The Amendment Act also deletes S 53, so that the President need not reconsider extending the legislation on a bi-annual basis. Despite these amendments, it appears from interviews with important stakeholders in government that the government is still committed to restructuring and transforming sentencing, and that these moves should not be seen as a decision to make minimum sentences a permanent feature of the criminal justice system. The minimum sentences legislation has come under criticism from various quarters.²⁶ It does not appear to provide a sustainable future for sentencing development.

Also at the end of 2007, Parliament was considering the Correctional Services Amendment Bill.²⁷ This Bill proposes to amend, once again, the legal framework within which release from prison is to be governed²⁸ and, therefore, to change the effect of courts' sentences. At the same time it is proposed that prisons be renamed 'correctional centres' and prisoners be renamed 'inmates'.²⁹

26 Cf. O'Donovan & Redpath *The impact of minimum sentencing in South Africa* (2006) 2–3, showing that minimum sentences have a negligible impact on crime levels, whereas the current system results in congestion in the courts and an inevitable increased overcrowding of prisons.

27 B 32B–2007.

28 Clauses 55 and 56. It envisages the removal of the minimum periods to be served in prison, as stipulated in the current Correctional Services Act, and replace this with an 'incarceration framework', to be determined by the National Council for Correctional Services and ratified by the Minister.

29 Clauses 1(f) and 1(k) respectively.

3

General principles of sentencing

This section covers the general principles of sentencing. It starts with the investigation by the South African Law Reform Commission and sets out the Commission's research methodology, an important aspect of the Commission's work. The methodology reinforces the authority of its *Report* and shows that the Commission followed an inclusive process. Thereafter, the Commission's various findings and proposals are set out in some detail. Where such findings and proposals constitute a separate issue, the responses from the stakeholders interviewed as part of the current project are noted and discussed. This is followed with updated recommendations, where possible substantiated with additional information.

The Commission's research methodology

In 1996 the Minister of Justice appointed a project committee, with Judge Leonora Van den Heever as chairperson, to investigate all aspects of sentencing. This committee produced an issue paper dealing mainly with mandatory minimum sentences.³⁰ This was as a result of early indications from the government; namely, that it wished to deploy minimum sentences as a temporary measure.³¹ Apart from minimum sentences, the project committee considered little more than restorative justice. For reasons that are not important here, the work of this committee ceased.

30 South African Law Commission *Issue paper 11: Sentencing: Mandatory minimum sentences* (June 1997).

31 South African Law Commission *Discussion paper 91: Sentencing (A new sentencing framework): Project 82* (May 2000) par 1.11.

Another group with an interest in sentencing was appointed as a project committee to continue the work of the first project committee. This committee was chaired by Professor Dirk Van Zyl Smit. This second committee was charged with overseeing research and compiling various papers and reports, and it published a discussion paper in May 2000. This paper was widely disseminated throughout the country, followed by a series of workshops.³² During these workshops the members of the committee explained from the origin of the report and highlighted the core issues and recommendations, after which those present had the opportunity to receive feedback and ask further questions. During the final phase, the issues were explored during a workshop involving several international and local sentencing experts.

It should be clear that information and opinions were obtained from as wide a range of opinion-makers as is reasonably possible. *This lends weight and credibility to the report and its recommendations should be taken seriously.* A repetition of the process is unlikely to produce results that are very different.

Diverse opinions on sentencing

As the Commission pointed out a number of times, sentencing is inherently a controversial topic. There are differences of opinion on just about every aspect of sentencing, with almost every member of society having an opinion on the subject. Opinions regarding the ills of the current system vary widely, but opinions regarding the improvement of the current system are probably even more varied. The *Report* indicates that the feedback in response to the various discussion papers was extremely diverse.³³ The Commission considered these differences in detail before coming to the following conclusion regarding sentencing reform:³⁴

[T]he 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.

Since a single correct answer is often not available, ‘clear choices’ have to be made, and these choices informed the Commission’s recommendations.

The Commission’s central findings

The main findings of the Commission are summarised in paragraph 7 of the Executive Summary in the following terms:

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

32 For details of the consultative process, see *Report*, paras 1.42 to 1.47.

33 For example par 1.14 (‘The issue paper elicited a wide variety of responses...’); par 1.20 (‘...a wide range of opinions amongst criminal justice professionals on sentencing practice’).

34 Par 1.6; see also par 1.16.

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.

In order to address the shortcomings of the current system and to achieve the above-mentioned objectives, the Commission proposed different approaches at various levels. At the first level it proposed that the legislature should clearly articulate the basic sentencing principles. This proposal is in keeping with several well known international examples³⁵ and is based on the fact that South African legislation lacks such statutory principles. This would result in a break with the common law, which recognises ‘divergent sentencing principles without establishing a clear relationship or hierarchy’.³⁶ In addition, it is proposed that a Sentencing Council be established, whose main tasks would be the creation of sentencing guidelines and doing research on sentencing. The Sentencing Council would be dominated by judicial officers, and the guidelines would leave sentencing courts with sufficient flexibility to ensure proper individualisation of punishment.³⁷ These interventions were expected to improve consistency in sentencing and to ensure that crimes throughout the spectrum of severity would be punished according to what the crime deserves. The proposals should also result in sentences and sentence lengths that would be within the capacity of the state to enforce in the long term. The proposal of the Sentencing Council is addressed in Chapter 4.

The Commission also considered the full range of current sentencing options and proposed various amendments to the list of possible sentences. These proposals attempt to simplify current options and to give greater prominence to community penalties in general and to reparation in particular, thus improving restorative justice in South Africa. These options are addressed in Chapter 5 of this report. In addition to the sentencing options, victims’ participation would also be amplified through specific provisions regarding the use of victim impact statements³⁸ (addressed in this chapter).

Sentencing principles and goals

The principles of sentencing are briefly explained in the *Report* and then set out in the Sentencing Framework Bill, the draft legislation included within the *Report*. The purpose of sentencing is declared as being ‘to punish convicted offenders for the offences of which they have been convicted’.³⁹ Sentences will have to be proportionate to the seriousness of the offence, not in the abstract but relative to other offences. Proportionality is the central requirement; all further principles are subservient to it.

35 Cf. Ashworth *Sentencing and Criminal Justice* 3ed (2000) 84 (to allow ‘cafeteria approach ... is likely to be productive of considerable inconsistency’); Von Hirsch in Wasik & Pease (eds) *Sentencing Reform: Guidance or Guidelines?* (1987) 44 at 49–51.

36 Executive summary par 9.

37 Executive summary paras 10–12.

38 See *Victim impact statements*.

39 Clause 2 of the Sentencing Framework Bill.

The seriousness of the offence is further refined in the following terms:

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.⁴⁰

In place of the current four ‘purposes of sentencing’,⁴¹ the Commission proposes that every sentencer should attempt to find *an optimal combination* of restorative justice, the protection of society and a crime-free life for the offender.⁴²

Relevant previous convictions may moderately increase the proportionate sentence.

These basic principles are to be used for the determination of all sentences, whether or not sentencing guidelines have been set for the particular offence.

Punishment and proportionality

On the face of it, the recommendation that sentencing should have as its purpose the punishment of offenders for the crimes of which they have been convicted might be seen as innocuous and, even, a statement of the obvious. However, it is a clear statement in favour of retribution (or ‘just deserts’) and proportionality as the foundation for all subsequent sentencing decisions. It also requires a connection between the sentence and the specific offence for which the offender stands before the court.

The statement is at least as notable for what it does *not* state as for what it does state. The following considerations are *not* included as *the* purpose of sentencing:

- Deterrence, whether individual or general.
- Rehabilitation or reform of the offender.
- Restoring the relationship between the offender and the victim.

The proposed role of these purposes of punishment is dealt with below, under *An optimal combination of effects*.

Sentences are also required to be proportionate to the seriousness of the offence. Proportionality is a clear constitutional requirement of sentencing in South Africa. It is a core element of the right⁴³ not to be punished in a cruel, inhuman or degrading way.⁴⁴

40 Clause 3(2).

41 That is, deterrence, prevention, reformation or rehabilitation and retribution – see *S v Rabie* 1975 (4) SA 855 (A) 862.

42 Clause 3(3).

43 In S 12(1)(e) of the Constitution.

44 Cf. *S v Dodo* 2001 (1) SACR 594 (CC) par 37; *S v Makwanyane* 1995 (1) SACR 1 (CC) paras 94, 197; Van Zyl Smit in *Constitutional law in South Africa* 49–16. See also Terblanche *A guide to sentencing in South Africa* (2007) 166–167.

Stakeholders interviewed tended to be in favour of these recommendations, until they were alerted to what is *not* included in the foundational purpose statement, at which point they then gave a more neutral response.⁴⁵ They remained strongly in favour of the requirement of proportionality, not only because it is a constitutional requirement, but also because it has for a long time been a requirement that ‘the punishment should fit the crime’.⁴⁶

The exception to this trend is provided by advocates of restorative justice. The focus of restorative justice is the person harmed and restoring the injustices caused by the crime.⁴⁷ As a result, the emphasis on proportionality does not ‘sit well with a restorative justice approach’.⁴⁸ More is said about restorative justice below.

Internationally, proportionality is nearly universally accepted as a general sentencing principle.⁴⁹ It is founded in popular conceptions of fairness.⁵⁰ Public opinion, where this has been established, shows strong support for proportional sentencing.⁵¹

Sentencing experts are highly critical of attempts to state the foundational purpose of sentencing in a manner aimed at including all sentencing purposes.⁵² The findings are clear about the fact that the only legislative statements that have been successful at supporting more consistent sentencing are those that are specific.⁵³

45 For a further discussion, see *An optimal combination of effects*.

46 Cf. *S v Rabie* 1975 (4) SA 855 (A) 861 (even quoting from Gilbert and Sullivan opera *The Mikado*, from the song ‘The more humane Mikado’: ‘...let the punishment fit the crime, the punishment fit the crime...’).

47 Batley in Maepa (ed) *Beyond retribution: Prospects of restorative justice in South Africa* (2005) 21; Von Hirsch et al. *Restorative justice and criminal justice* (2003) in general.

48 Skelton in Open Society Foundation *Sentencing in South Africa: Conference report* (2006) 18.

49 Cf. Van Zyl Smit (1995) 4 *European journal of crime, criminal law and criminal justice* 369–380 (discussing proportionality in a large number of jurisdictions); Von Hirsch & Ashworth *Proportionate sentencing: Exploring the principles* (2005) 1 (further examples).

50 This connection is also made in *S v Dzukuda* 2000 (2) SACR 443 (CC) paras 9–10.

51 Cf. McCoy & McManimon in Tata & Hutton (eds) *Sentencing and society: International perspectives* (2002) 197 at 214.

52 Cf. Doob in Clarkson & Morgan (eds) *The Politics of Sentencing Reform* (1995) 213–215. See also on the findings of the Australian Law Reform Commission, Freiberg in Tonry & Hatlestad (eds) *Sentencing reform in overcrowded times* (1997) 157.

53 For more information, see balance of chapter.

Recommendations

- It is submitted that the Commission's proposal as to the purpose of the punishment and the dominant requirement of proportionality is sound, both from a local, constitutional and international perspective.
- The proposal can be implemented without the need for further research.
- These and further proposals can easily be structured in such a way that will leave advocates of restorative justice with sufficient scope to continue their activism towards achieving a more restorative approach to criminal justice in South Africa. The current South African landscape is not ready for the full implementation of restorative justice.

The seriousness of the offence

The seriousness of the offence is the most important determinant of the eventual sentence.⁵⁴ According to the Commission's proposals, the seriousness of the offence 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'.⁵⁵ In addition, the seriousness of an offence is not to be determined in isolation, but with reference to other offences. Simply put, this means, for example, that the seriousness of a particular armed robbery should be related to a typical rape and a typical instance of theft or corruption involving a large amount of money and a very serious assault – the relative seriousness of all these crimes will impact on an assessment of the specific seriousness of any one of them.

These two elements determining the seriousness of an offence are widely used internationally.⁵⁶ Much has been written about how harm should be understood, how the degree of harmfulness can be assessed, and how this degree of harm should be related to the offender's culpability.⁵⁷ These discussions will become particularly relevant in South Africa should the proposals regarding the determination of the seriousness of the offence be accepted.

This recommendation was unanimously accepted by all stakeholders. Nobody had any suggestions on how else to measure the seriousness of an offence.

54 Although not always explicitly accepted as such, this is also the current practice in South Africa – cf. Terblanche *A guide to sentencing in South Africa* (2007) 147 ('...no other factor has the same influence on the nature and extent of the sentence').

55 Clause 3(2).

56 Cf., for example, *Solem v Helm* 463 US 277 (1983) 293–294, American Law Institute *Model Penal Code: Sentencing (Tentative Draft No 1)* (2007) §6B.03(2); Frase (2005) 89 *Minnesota Law Review* 580 (regarding the position in the USA); Ashworth *Sentencing and criminal justice* 4ed (2005) 102–103; S 718.1 of the Canadian Criminal Code (sentence to be proportionate to the gravity of the offence and the 'degree of responsibility' of the offender); Canadian Sentencing Commission *Sentencing reform: A Canadian approach* (1987) 154 (proportionality to the gravity of the offence and degree of responsibility of the offender for the offence); Jareborg in Clarkson & Morgan (eds) *The politics of sentencing reform* (1995) 101, 104–106 (the position in Sweden and Finland); S 143(1) of the Criminal Justice Act 2003 (England and Wales).

57 Cf. Ashworth *Sentencing and criminal justice* 4ed (2005) 106–150.

Recommendations

- It is submitted that the Commission's proposal regarding the measures in terms of which the seriousness of the crime should be understood is sound, both from a local and international perspective.
- The proposal can be implemented without delay.

Current and proposed sentencing effects

As summarised earlier, the Commission proposed that every sentencer should, subject to the requirement of proportionality, attempt to find an optimal combination of three sentencing effects: restorative justice, the protection of society, and a crime-free life for the offender. These effects are proposed in place of the current common law position, namely that there are four purposes of punishment, being the well-known deterrence, rehabilitation, prevention and retribution.

This change was necessitated by the fact that the current purposes of sentencing have little value other than as rhetoric. They are frequently cited in sentencing judgments, yet do not have a foundation in fact. The manner in which these purposes of punishment came to be accepted in our law is instructive. The first case where these four purposes were included in the judgment is *R v Swanepoel*.⁵⁸ Davis AJA stated that the effect of the sentence on others could not be discounted – it dates back to the law of Moses and was followed by various common-law writers, such as Beccaria.⁵⁹ In order to meet the objection that the theories of punishment might have changed since these authors made their contributions, the court quoted Salmond:⁶⁰

The ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these aspects the first is the essential and all important one, the others being merely accessory. Punishment is before all things deterrent, and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him.

The court reacted to this quotation, saying that 'this statement' may be an oversimplification of a most difficult problem and closed with 'what the future may bring in this regard I cannot forecast'.⁶¹ This is a far cry from finding that the four stated purposes are also, in South African law, the purposes which should be aimed at through sentencing. However, in subsequent cases, the quotation from Salmond has been used as if it formed the judgment of the court in *Swanepoel* and this case became the *locus classicus* for statements that these four purposes are the purposes of punishment in South Africa.⁶²

58 1945 AD 444.

59 At 454 the following is quoted: 'The end of punishment, therefore, is no other than to prevent the criminal from doing further injury to society, and to prevent other from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impression on the minds of others, with the least torment to the body of the criminal.'

60 *Jurisprudence* 3ed S 28 (8ed appeared in 1930).

61 At 455.

62 *S v Whitehead* 1970 (4) SA 424 (A) at 436 E–F; *S v Khumalo* 1984 (3) SA 327 (A); *S v B* 1985 (2) SA 120 (A) at 124 D–E; *S v G* 1989 (3) SA 695 (A) at 704.

Deterrence

Researchers have for decades attempted to establish the deterrent effect of sentences and, in particular, the added deterrent effect of more severe sentences. On the whole they have been unable to do so. Admittedly, the mere existence of a criminal justice system and the fact that a successful prosecution will probably result in some kind of punishment has a deterrent effect.⁶³ However, the precise deterrent effect of different sentences has proved to be indeterminable and likewise for the extent of the particular sentence chosen.⁶⁴ Walker & Padfield provide the following useful summary of such research:

Research in the last two decades or so has shown that this sort of discouragement affects fewer people, or lasts for less time, than used to be assumed; but it has not justified the statement of some critics that 'deterrents never work'.⁶⁵

and

...[n]aïve claims that deterrent policies are effective – or totally ineffective – have been replaced by the less exciting realisation that *some* people can be deterred in *some* situations from *some* types of conduct by *some* degree of likelihood that they will be penalised in *some* ways; but that we do not yet know enough to enable us to be very specific about the people, the situations, the conduct, or the likelihood or nature of the penalties.⁶⁶

For the same reasons the Constitutional Court was unable to find, in *S v Makwanyane*,⁶⁷ that the death penalty had a greater deterrent effect than long terms of imprisonment. Such evidence does not exist, despite the fact that deterrence is one of the most researched topics in criminological and criminal justice research.⁶⁸

In short: it could not be acceptable for a court to base its finding regarding the form or duration of the sentence on its deterrent effect unless, perhaps, there are *special* reasons why the sentence would *actually* have a deterrent effect in a particular case. Most people

63 Cf. *Tony Sentencing matters* (1996) 8 ('No one doubts that having some penalties is better than having none...').

64 Cf. *S v Makwanyane* 1995 (2) SACR 1 (CC) par 182 (per Didcott J: statistical investigations on the deterrent value of the death penalty above that of other punishment have always been inconclusive) par 202 (per Kentridge AJ: '...the number who were deterred cannot be known'); paras 212, 239, 288, 317, 340s.

65 Walker & Padfield *Sentencing: Theory, law and practice* 2ed (1996) 96.

66 Op cit 101.

67 1995 (2) SACR 1 (CC).

68 For an analysis of much of the research, cf. Von Hirsch et al. *Criminal deterrence and sentence severity: An analysis of recent research* (1999); Blumstein et al. (eds) *Deterrence and incapacitation: Estimating the effects of criminal sanctions on crime rates* (1978); cf. also Beylveld *A bibliography on general deterrence* (1980) (containing 43 pages of references to research on general deterrence up to 1980).

feel common sense decrees that if a sufficient number of criminals are punished sufficiently severely, they will get the 'message' and will stop offending out of fear of the impending punishment (in other words, the deterrent effect of the punishment will begin to operate). This is also the foundation of most minimum sentencing schemes. This belief also fuels all political 'get-tough-on-crime' policies. Regardless of the lack of evidence, many politicians would rather support an unproven policy that resonates with their constituency than to be labelled 'soft on crime'.

People supporting the notion of the deterrent effect of punishment do not stop to consider that there is no evidence for this ideal. An analogy with the home can be drawn: different children respond differently to different forms of discipline and punishment often has the least effect on the most troublesome child.

The Commission's proposals include no reference to deterrence as part of the new sentencing framework. In its *Report* the Commission explained that deterrence is best achieved simply by fair sentences.⁶⁹

The lack of proof of the additional deterrent effect of a more severe punishment is also a thread in the second research report commissioned by the OSF-SA.⁷⁰ This topic was also discussed in some detail at the OSF-SA conference. All the arguments against deterrence as an additional sentencing consideration permeated the presentation of Professor Michael Tonry, one of the most renowned international scholars on all matters of sentencing. He showed, with examples from many Western criminal justice systems,⁷¹ that incarceration rates are a matter of policy and have no significant effect on crime rates.⁷² Crime rates have been going up and down over the last decades in most Western countries. The extent of these increases has not been influenced by the reaction of the relevant government to either increase the use of imprisonment (as in the USA), to maintain the use of imprisonment (as in Germany) or to reduce the use of imprisonment (as in Finland).⁷³

Stakeholders ultimately accepted the Commission's recommendations, but usually not before a discussion along the lines of the above exposition. Acceptance that the certainty of detection

69 Par 3.1.7.

70 O'Donovan & Redpath *The impact of minimum sentencing in South Africa* (2006) 30–33.

71 Including the USA, Germany, Finland and France – *Conference report* 4–5.

72 Tonry *Conference report* 6 (minimum sentence advocates claim they deter and promote consistency, but this is not supported by available evidence).

73 The compelling nature of the evidence produced by Tonry caused at least one speaker to accept that there is no proof of the additional deterrent effect of longer sentences for rape (cf. O'Sullivan 'Gender and sentencing proceedings in South Africa' *Conference report* 65). However, in her view long sentences were still justified by the additional protection it affords to society, but see balance of chapter in connection with 'protecting society'. It is notable that some more recent sentencing statutes recognise this reality by not referring to deterrence any longer – cf. S 38 of the Canadian Youth Criminal Justice Act 2002.

and successful prosecution is the true deterrent to crime is growing, following the declaration by Chaskalson P in *S v Makwanyane*,⁷⁴ even if this process of acceptance is still rather slow.

Rehabilitation

One of the ongoing debates amongst practitioners and academics is the extent to which a criminal can be rehabilitated through the process of sentencing or punishment.

It has been shown repeatedly that punishment does not change behaviour.⁷⁵ Criminality is not an illness; it is a choice. Even in the case of mental illness, the offender has a choice to commit crime or not. Of course, there are degrees of mental illness. At the top end of the spectrum mental illness would cancel out the offender's culpability, with the result that that offender will not be held liable for his or her actions.⁷⁶ But these instances are rare. Most other mental illnesses leave the offender with a real choice to commit crime or not, even if the choice would be more difficult than in the case of a person with sound mental health. It has been proven that those prone to offending suffer from mental illness to a significantly greater extent than the general population.⁷⁷ Studies in Australia and Canada point towards major depression and substance abuse disorders as dominant examples of such mental illnesses.⁷⁸ Treatment of such illnesses might well reduce the offender's disposition towards crime.

How, then, could rehabilitation be a meaningful sentencing consideration? If the court is satisfied, through information presented to it, that the offender suffers from some mental illness or that treatment of a criminal's criminogenic factors might be successful in preventing future crime, this information should impact on the decision about the appropriate sentencing option. Options requiring treatment or education, over which the court has control, should be investigated. However, rehabilitation and prison do not go well together and the court has no control over whether any prisoner might be subjected to any programme or not. There are programmes that have been proven to improve the prisoners' ability to make choices against the

74 1995 (2) SACR 1 (CC) par 122.

75 Ogloff 'Prisoner rehabilitation' paper read at ISRCL conference, Brisbane, Australia (Jul 2006) (more than 500 published articles prove this statement).

76 S 78(1) of the Criminal Procedure Act 51 of 1977; Burchell *Principles of criminal law* 3ed (2005) 373 et seq; Snyman *Strafreg* 5ed (2006) 168–170.

77 Ogloff (2002) 9 *Psychiatry, psychology and law* 7 (studies have found figures ranging from 3% to 59% more mental illness).

78 Ogloff (2002) 9 *Psychiatry, psychology and law* 6–7.

commission of further crime.⁷⁹ However, at present the Department of Correctional Services has very limited capacity to implement such programmes.⁸⁰ The Department's renewed focus on rehabilitation,⁸¹ which includes a name change from 'prison' to 'correctional centres',⁸² is unlikely to fundamentally change this position in the foreseeable future.

Knowing that the aforementioned situation is a fact, the Commission steered clear of any reference to the known terms of rehabilitation or reformation as an effect (purpose) of punishment. Instead, it required that the court have regard for the opportunity of sentencing the offender to a sentence which might improve the offender's ability to lead a crime-free life in future.

Stakeholders had little comment on this proposal simply because it was not within their field of expertise or experience.

Prevention (incapacitation)

It has to be accepted that a sentence of imprisonment prevents a prisoner from carrying out any further crimes in society, for as long as he/she remains locked up, even if such prevention does not benefit other inmates.⁸³

It is a different matter altogether whether the imprisonment of large numbers of criminals actually reduces the extent of criminality in a country. As Zimring and Hawkins found:

Estimating the crime prevention benefits to be obtained by restraint is in fact a complicated process and one that requires detailed knowledge of the psychology of both the potential offender and the potential victims of crime.⁸⁴

79 Cf. Cilliers & Smit (2007) 20(2) *Acta Criminologica* 83 at 86; Ogloff & Davis (2004) 10 *Psychology, Crime & Law* 229; the 'risk-need-responsivity approach' is explained at 234 ('The principles emphasise the need to assess the offender's level of risk for re-offending and to match the intensity of intervention to the level of risk (i.e. the risk principle). Particular attention must be paid to targeting intervention to the dynamic variables or factors that have been found empirically to relate to re-offending (i.e. the need principle). Finally, the idiographic and nomothetic variables that may impinge on treatment need to be identified and accommodated in the rehabilitation process [i.e. the responsivity principle].')

80 Cf. Cilliers & Smit (2007) 20(2) *Acta Criminologica* 83–101 (deducing from available social work services [one professional to 595 cases] that 'individual sessions are neither cost-effective nor very therapeutic' [p 96] and from available psychological services [one psychologist to 11 223 cases] that 'successful intervention is virtually impossible' [p 97]).

81 Department of Corrections *White paper on Corrections* (2004).

82 Correctional Services Amendment Bill B32B–2007, clause 1(f).

83 Zimring & Hawkins *Incapacitation: Penal confinement and the restraint of crime* (1995) 44.

84 *Incapacitation: Penal confinement and the restraint of crime* (1995) 42.

They use the example of imprisoning X, who would have committed 100 drug sales if he/she was still working in his/her community. But removing X does not mean that 100 less drug sales will take place in that community. X's associates may take over from him/her, or someone totally new might find a gap in the market.⁸⁵ The resultant crime reduction is also heavily affected by questions such as whether the offender commits a wide variety of offences or is very active in committing a specific crime, whether he/she offends alone or in a group, whether the whole group is arrested or only one individual, and so on.⁸⁶ In the end they found from their own research in California that policies focussed on high incarceration rates had a limited effect on overall crime rates.⁸⁷

It is widely accepted that the mere fact that a person has committed a serious offence means that that person presents a higher than normal risk of repeating criminal behaviour. For this reason, the 'protection of society' remains a valid effect to be sought through the sentencing of the criminal and the Commission recommended it as such.

The Commission's proposal does not contain any limitation regarding the seriousness of offences against which society is entitled to protection. Clearly the need is greatest in connection with violent crime. It is not unreasonable to argue, however, that virtually every offence (including minor ones) has the protection of society or some section of society as its final aim. For example, even a parking meter is aimed at distributing a scarce resource amongst all road users and the offence of parking without putting money into the meter is ultimately aimed at protecting road users against a single person simply occupying a parking spot. But such protection could hardly have been what the Commission had in mind. It means that a line has to be drawn somewhere on the scale of crime severity and that the protection of society should only become a factor in the sentencing of criminals who commit crimes above that line.

Another valid example is the current law on the declaration of an offender as an habitual offender. One of the considerations in determining whether this should be done in a particular case is that the community should be protected against the offender.⁸⁸ Courts have applied this protection in connection with some really petty offences,⁸⁹ although nowadays this is

85 Op cit 43.

86 Zimring & Hawkins *Incapacitation: Penal confinement and the restraint of crime* (1995) 43–59.

87 Zimring & Hawkins *Incapacitation: Penal confinement and the restraint of crime* (1995) 126–127. Cf. also Ashworth *Sentencing and criminal justice* 4ed (2005) 268 ('It is therefore clear that the preventive effects of custody are frequently overstated').

88 In terms of S 286(1) of the Criminal Procedure Act, 1977.

89 Cf. *S v Dyani* 2004 (2) SACR 365 (E) 366 (D was convicted of theft of clothing worth R190 and declared an habitual criminal because of his previous convictions; the sentence was amended on appeal, but for a rather technical reason); *S v Nawaseb* 1980 (1) SA 339 (SWA) (the magistrate imposed the sentence for theft of property worth R180).

frowned upon. The emphasis today is on the severity of the sentence based on the seven-year minimum term of detention.⁹⁰

Stakeholders were unanimous in their opinion that the protection of society should be an effect to strive for during sentencing.

Restorative justice

Restorative justice is included in the list of effects that a sentence should achieve in view of the stated objective that an ideal sentencing system should allow for restorative initiatives.⁹¹ Few stakeholders had any strong opinions on this topic, although restorative justice advocates would like to see an even stronger statement in favour of restorative justice. In this regard, Skelton, at the International Conference, favoured a greater number of sentencing options than that proposed by the Commission. These are dealt with in Chapter 5.

An optimal combination of sentencing effects

Current sentencing theory simply states these four purposes of punishment should be considered as part of the sentencing process. There is no indication where in the process it should be included or what should happen if these purposes effectively exclude one another. Some judgments have linked the purposes of punishment to the interests of society,⁹² but this is by no means common. By requiring an 'optimal combination' of the stated effects of the sentence, the Commission got around a similar situation developing under the proposed new framework.

In the course of the current project it was noted that 'an optimal combination' is not a sufficiently useful guide of sentencers' discretion. The legislature could provide additional guidance, such as that restorative justice should be the priority in dealing with less serious offences (i.e., the majority of offences); that the promotion of a crime-free life should be the

90 *S v Niemand* 2002 (1) SA 1 (CC) par 9 (it should be clear '...that detention for at least seven years is the *right protection* of the community against him/her...'), par 24 ('[t]he rationale behind such declaration is the acceptance of the fact that there are certain persistent and intractable offenders who *are not only nuisances* but have a tendency to commit crimes repeatedly, consequently making themselves a menace to society. It then becomes imperative that such persons be removed from society for the purpose of rehabilitating them (sic). In this way the protection of the public against such offenders is achieved'); *S v Van Eck* 2003 (2) SACR 563 (SCA) par 9 ('the Court must be 'satisfied' both that the accused habitually commits crimes and that those crimes *are of such a nature* that the community should be protected from the accused for at least a period of seven years...'; in this case V had 43 previous convictions, and committed 14 counts of fraud involving an amount of just over R3 000); *S v Wayi* 1994 (2) SACR 334 (E); *S v Masisi* 1996 (1) SACR 147 (O) at 152 (the sentence is a harsh sentence). Cf. also Terblanche *A guide to sentencing in South Africa* (2007) 238.

91 See Exec sum par 7.

92 This is also the approach I followed in *A guide to sentencing in South Africa* (2007) 155.

focus of crimes within the next band of seriousness; and that the protection of society should be emphasised in case of the most serious or violent offences. On the other hand, if the courts have to interpret the words ‘an optimal combination’, the result might well be that, as the need to protect society against the offender increases, the possibility of including any aspect of restorative justice or a crime-free life for the offender is likely to diminish. The opposite is also true: if justice would be served by restorative justice conditions, there will be pressure on the court to devise a sentence to give such effect, even if this means steering away from the imprisonment that might be indicated by the seriousness of the crime alone.

It will always be difficult to determine the ideal scope of guidance to be included in legislation. It is reasonable to state that the Commission’s proposal should be accepted as the minimum guidance that should be provided in this respect. In the end the policy-makers may decide that more guidance is needed, in the interests of greater consistency. However, such additional pointers must always fit in with the rest of the scheme proposed by the Commission. In the course of this research, I became convinced that an incremental approach to sentencing reform is the better option for South Africa. Such approach has a better chance at preventing the situation where sentencers simply ignore the reforms, or that they constantly look for ways to circumvent them. For this reason I consider the Commission’s proposal, although the minimum guidance that is needed, also sufficient to start with.

Recommendations

- It is submitted that the Commission’s proposal that every sentencer should attempt to find an optimal combination of three effects of the sentence, namely restorative justice, the protection of society and a crime-free life for the offender, is sound. However, there is room for more specific guidance of the sentencers’ discretion.
- The proposal can be implemented without delay. Should the legislature consider more specific guidance of the discretion to be needed, some additional research might be required. However, this research should not be allowed to delay implementation unduly.

The effect of previous convictions

It is the recommendation of the Commission that an explicit provision be included in the Sentencing Framework Bill, that *relevant* previous convictions should only *moderately* modify the sentence proportionate to the seriousness of the offence.⁹³

The Commission referred⁹⁴ to the problems experienced by authors looking for a sound theoretical explanation as to why the presence of previous convictions would justify a higher sentence than that demanded by the seriousness of the offence (proportionality). The main difficulty lies in the fact that the offender has already been punished for those previous offences.⁹⁵ Increasing the current sentence means that the offender gets a double punishment,

93 Par 3.1.6; clause 3(4).

94 Par 3.1.6 is summarised in this discussion.

95 Cf. Australian Law Reform Commission *Sentencing (ALRC 44)* (1988) par 172.

representing 'a form of double jeopardy'. Some theorists

...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.⁹⁶

The Commission did not find it necessary to resolve this difficult issue. Few people are concerned that it would be unfair to increase the proportionate sentence in the case of a repeat offender. However, the Commission maintained that the seriousness of the offence should be 'the primary consideration' in determining an appropriate sentence and that previous convictions 'should merely be a modifier of the appropriate sentence'.

The next question is the extent to which the proportionate sentence might be modified by previous convictions. There is no consistent practice in South Africa. It is decided from time to time that the offender should primarily be punished for the committed crime.⁹⁷ However, there are many examples of heavy sentences imposed for rather petty crimes on the basis of the offender's previous convictions, particularly in district courts.⁹⁸ One of the reasons that has been advanced for this aggravating effect of previous convictions is that they reflect the character of the offender and often show this character to be bad and less open to rehabilitation.⁹⁹ However, the most commonly advanced reason is that the offender was not deterred by his or her experience of the previous sentence or sentences and should now be sentenced more severely.¹⁰⁰ Another practical example is found in the minimum sentences legislation. The minimum sentence for the offences described in Part II is 15 years. With one previous conviction the term is increased to 20 years and for two or more previous convictions, 25 years' imprisonment. Similar increases of five years 'per previous conviction' apply to offences contained in Part III, where the first term is ten years' imprisonment. The result is that, for an offender with two or more previous convictions, the minimum sentence increases by 80

96 Par 3.1.6. More points of view are discussed here by the Commission. For one of the most thorough discussions on the theory of sentencing for previous convictions, see Roberts in Tonry (ed) *Crime and justice: A review of research (Vol 22)* (1997) 303–362.

97 Cf. *S v Baartman* 1997 (1) SACR 304 (E) 305d – f (if the crime is petty, it remains so no matter how often it is repeated); *S v Mzazi* 2006 (1) SACR 100 (E); *S v Beja* 2003 (1) SACR 168 (SEC) (the sentence must always be proportional to the crime).

98 Cf. *S v Mzazi* 2006 (1) SACR 100 (E) (the 60-year-old accused sentenced to three years' imprisonment for stealing meat worth R19); *S v Beja* 2003 (1) SACR 168 (SEC) (18 months' imprisonment for theft of an electric cord worth R85); *S v Matlotlo* 2004 (2) SACR 549 (T) (three years' imprisonment for shoplifting an item worth R50, following a plea of guilty, but five similar previous convictions); *S v Chakanetsa* 1981 (1) SA 876 (ZAD) 877 (magistrate's sentence focussed too heavily on previous convictions); *S v Dickson* 1981 (2) SA 807 (E) 809 (magistrate sentenced D to ten years' imprisonment for selling one dagga cigarette); *S v B* 1981 (4) SA 851 (A) 856 (rapist sentenced to life imprisonment because of previous convictions for other offences).

99 Du Toit *Straf in Suid-Afrika* (1981) 87.

100 Cf. *S v Mahachi* 1993 (2) SACR 36 (Z) at 44j.

per cent in the case of Part II offences, and by 100 per cent in the case of Part III offences.¹⁰¹ In none of these examples are the reasons for the extent of the increase known and they were not discussed during the legislative process.

In contrast, the Commission proposes that the sentence which is proportionate to the seriousness of the offence may only be increased *moderately* by *relevant* previous convictions. A similar standard is used in Swedish law.¹⁰² Clearly this is not a standard which eliminates the discretion of the sentencing court as far as the extent of the increase is concerned. Discretion in this regard remains important since, in terms of current precedent, the influence of previous convictions has to be affected by their number, by how soon before the current offence they were committed, by the extent to which they are similar to the current offence, and so on.¹⁰³ Nevertheless, the Commission's proposal clearly requires that the sentence, when viewed objectively, should mainly be determined by the seriousness of the crime. It is submitted that a doubling of the sentence would normally constitute the maximum to which a sentence might be increased *moderately* by previous convictions, regardless of their number. However, one will have to see how the courts will interpret such provision.

It is possible to include more specific legislative guidance regarding the influence that various aspects of previous convictions should have on the determination of sentence. Various examples of such provisions exist in other jurisdictions.¹⁰⁴ However, in my view it would be counter-productive to add such legislation at this stage of our sentencing development. The basic principles regarding relevancy and recency are reasonably well developed and the courts should be given the opportunity to interpret the 'moderate' increase standard.

During the interviews it was noticeable how many judicial officers were caught off guard by this principle. All accepted the principle that the punishment should fit the crime, but many failed to realise that a severe punishment for a petty offence based on previous convictions actually runs counter to the basic principle. Some concern was expressed that this principle would not permit the court to consider the need to protect society against an offender who frequently commits crimes. However, if the offence is serious and it is indicated by the offender's previous convictions that he/she is likely to repeat it, the consideration that the sentence should also have the effect of protecting society should give the court sufficient scope to impose an appropriate sentence.

101 Part IV uses smaller increments, also resulting in a doubling of the minimum sentence for a second or further previous conviction.

102 Chapter 29 S 4 of the Swedish Criminal Code 1988, as discussed by Jareborg in Clarkson & Morgan (eds) *The politics of sentencing reform* (1995) 95–124.

103 Cf. Terblanche *A guide to sentencing in South Africa* (2007) 189.

104 Cf. Von Hirsh & Roberts (2004) *Criminal Law Review* 639–652.

Recommendations

- It is submitted that the Commission's proposal regarding the moderate modification of a proportionate sentence as a result of previous convictions is sound and that it conforms to the constitutional requirements of proportionality and the prohibition against double jeopardy, as well as the other basic principles contained in the Report.
- The proposal can be implemented without delay.

Victim impact statements

The *Report* defines a 'victim impact statement' as a statement *by the victim*, addressed at the presiding officer, for consideration in the sentencing process.¹⁰⁵ In this statement the victim relates to the court what impact or effect the crime has had on the victim in the past and is expected to have in the future. In some instances victim impact statements may also include a suggestion regarding sentencing. The increased importance with which victims are regarded in the criminal process compels, in the view of the Commission, that legislation be passed in this regard. Such legislation should facilitate the admissibility of such victim impact statements, and provide for safeguards against unfairly prejudicing the offender with falsehoods.¹⁰⁶ The *Report* does not define victims, but instead sets out the particulars that a victim impact statement might contain and which would be relevant to the issue, such as damage or loss or destruction of property, any injury, and loss of income or support.

The use of victim impact statements is not a new development internationally and many criminal justice systems have done a great deal of research on these statements.¹⁰⁷ Some judicial officers welcome them, while others want nothing to do with them. This was also clear during the interviews for this research. The concerns of stakeholders who are not keen on victim impact statements are the same as those found elsewhere in the world and consist of the following:

- The victim might prescribe the sentence to the court or, put differently, the court's sentence discretion might be fettered by the victim's suggested sentence.
- The victim impact statement might create a certain expectation with the victim that the court must impose the suggested sentence.
- The victim impact statement might include information that the court has already rejected during the trial.

105 Par 3.4.21.

106 Par 3.2.24.

107 Cf. Roberts (2003) 47 *Criminal Law Quarterly* 365–395. As to the use of VISs in Canadian law, see A Manson *The law of sentencing* (2001) 194–198; Greenspan & Rosenberg *Martin's annual criminal code* 2007 (2006) 1380–1381. Regarding English law, where these statements are referred to as Victim Personal Statements, see, e.g., Banks *Banks on sentencing* (2003) 658–660, Easton & Piper *Sentencing and punishment: The quest for justice* (2005) 181–182.

- There is a question regarding who should be considered a victim. Should it be a direct victim only, or may indirect victims be included?
- Victim impact statements might contain information which could result in the accused's trial becoming unfair and therefore unconstitutional. In particular, the victim might include irrelevant allegations concerning the offender.

Given the neglected position of victims in our law, coupled with comments it received in response to the *Issue Paper*,¹⁰⁸ the Commission believed that a legislative response to victim impact statements is justified. Some of this formalisation is aimed at preventing the victim from prejudicing the offender with inaccurate information and, if the statement is challenged by the defence, declaring the statement impermissible unless the victim testifies in person.¹⁰⁹ Some of the concerns mentioned above should be resolved by these proposals. They are contained in clause 47, which reads as follows:

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.

Some stakeholders commented that the court should have the final responsibility to obtain victim impact statements, rather than the State, as proposed in clause 47(1). One stakeholder, who has a great deal of research experience on the issue, made the comment that the legislation should, ideally, give some guidance about the effect that the victim impact statement should have on the sentence. In other words, courts should be guided so that the situation does not arise that some sentencers adapt their sentences to suit the victim completely, while others totally disregard the statement regardless of what it contains.

108 See footnote 29 above.

109 Par 3.2.24.

There is much to be said for the comment that the prosecutor should not have the final responsibility to obtain victim impact statements. In terms of the Department of Justice's *Service charter for victims of crime in South Africa*, victims

...may also, where appropriate, make a statement to the court or give evidence during the sentencing proceedings to bring the impact of the crime to the court's attention.¹¹⁰

Rather than burdening the prosecutors or courts with the additional function of obtaining victim impact statements, it is submitted that the Department should provide other structures to give victims the right of providing victim impact statements. This is not a function that fits naturally with the roles of the prosecution or presiding officers. Clause 47 should be amended to shift the focus from obtaining the victim's statement to guiding the courts towards considering such statement in the process of determining the sentence. In this connection there is much assistance to be gained from section 722 of the Canadian Criminal Code. For example, section 722(1) reads as follows:

For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.

Whether additional legislative guidance should be included regarding the role of the statement in the determination of the sentence is, as noted under *An optimal combination of sentencing effects*, difficult to establish. It is submitted that the following recommendation is sufficient, especially given that the sentencing courts are also bound to have regard for the primary sentencing principles.

Recommendations

- It is submitted that the Commission's proposal regarding the need for statutory provisions regarding victim impact statements is sound and confirmed by international practice.
- Clause 47(1) should be amended as follows:
 - (1) For the purpose of determining the sentence to be imposed on an offender, the court shall consider any statement, prepared as envisaged in subsection (2), of a victim regarding the impact of the crime on the victim and, where practicable, 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.
- Clause 47(3) should be deleted.
- The proposal can be implemented without delay.

110 Department of Justice and Constitutional Development *Service charter for victims of crime in South Africa* (2007) 9 (available at www.doj.gov.za/VC/docs/2007%20Service%20charter%20ENG.pdf – accessed 4 January 2008).

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The proposed Sentencing Council

One of the central recommendations of the Commission is the establishment of a Sentencing Council. The main responsibility for this Council would be the setting of sentencing guidelines. The Council would also have to do research on sentencing practices and theory, and produce various publications. Other proposed functions are to create judicial training programmes, to set the monetary values of unit fines and to develop community or other penalties.

I will start this section by setting out the Commission's full set of proposals regarding the establishment of the Sentencing Council, followed by various stakeholders' reactions to these proposals. These explanations will set the foundation for the conclusions and recommendations that follow.

Motivation for a Sentencing Council

One of the critical problems with the current sentencing system is the lack of consistency. The Commission remarked as follows:¹¹¹

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.

111 Par 1.8(a).

In order to achieve more consistent outcomes, some form of sentencing guidelines is essential. But which body or institution should be entrusted with the development of sentencing guidelines?

Legislation is not the answer. It is, of necessity, too general to cater for all the individual permutations. Mention has been made of the mandatory minimum sentences that are prescribed by the legislature through the Criminal Law Amendment Act, 1997. Typical of legislation, however, is that it provides a crude system, badly suited for the sentencing of individual cases.¹¹²

Nor is the judiciary a likely source of guidelines. Despite a long history of appellate review of sentences, one has to conclude that, whatever principles have been laid down over the last 60 years or so, they hardly serve as guidelines. By 2000 it was still considered a core legal principle that the sentencing court should be left with as much discretion as possible to determine an appropriate sentence.¹¹³ Some shift in emphasis has taken place recently, with some judgments from the Supreme Court of Appeal stressing that much guidance is to be gained from past decisions on the question of an appropriate sentence.¹¹⁴ The obvious problem with such an approach is that it does (can) not distinguish between bad and good past sentencing decisions. In addition, judicial officers usually lack the overall picture of crime in the country¹¹⁵ and tend to function within a tradition where they consider themselves bound by the four corners of the case before them. The courts are, therefore, an unlikely source of a solution to the problem of disparity.

As a result, the Commission proposed an administrative body, namely the Sentencing Council, to inform the courts' sentencing decisions. The Commission came to the conclusion that only a body of knowledgeable people, specifically appointed for this purpose, would be able

112 Cf. *S v Ibrahim* 1999 (1) SACR 106 (C) at 114 ('appallingly bad manner in which the sections have been drafted'); *S v Mangesi* 1999 (2) SACR 570 (E) at 583; *S v Swartz* 2002 (1) SACR 591 (NC) at 593e ('onelegante en ondeurdagte stuk wetgewing'); *S v Sukwazi* 2002 (1) SACR 619 (N) at 623g–h ('ill-conceived and badly drafted'); *S v Vuma* 2003 (1) SACR 597 (W) at 599c ('protest at ... the most invasive piece of legislation enacted since the advent of the democratic South Africa'). See also, in connection with past minimum-sentences legislation, *S v Matseare* 1978 (2) SA 931 (T) at 932E–F; *S v Diedericks* 1969 (3) SA 270 (C) at 273D–E.

113 Cf. *S v Kibido* 1998 (2) SACR 213 (SCA) at 216g; *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 523d–f; *S v Makwanyane* 1994 (2) SACR 158 (A) at 160h–i; *S v Moloji* 1987 (1) SA 196 (A) at 218H; *S v Mazibuko* 1978 (4) SA 563 (A) at 570; *S v Pillay* 1977 (4) SA 531 (A) at 534–535; *S v Rabie* 1975 (4) SA 855 (A) at 857D–F. See also *Report* par 2.6(b).

114 *S v Xaba* 2005 (1) SACR 435 (SCA) at par 15; *S v McMillan* 2003 (1) SACR 27 (SCA) at par 11; *S v Jimenez* 2003 (1) SACR 507 (SCA) at par 6.

115 Actually, both the legislature and the judiciary suffer from the problem that they are not in a position to have '...the holistic view of national sentencing requirements that a comprehensive system of guidelines should take into account' – *Report* par 2.11.

to develop guidelines to drive sentences to more consistent outcomes. The development of sentencing guidelines was considered an essential aspect of the whole set of proposals.¹¹⁶

This proposal does not intend to diminish the involvement of all three arms of government in sentencing or in the establishment of sentencing guidelines. In fact, the Commission stressed the need for a proper partnership between the legislature, the judiciary and the executive.¹¹⁷ The role of the legislature would be to set realistic sentencing goals in legislation. The judiciary would use the guidelines as a point of departure for the imposition of just, but consistent, sentences. Obviously, the Department of Correctional Services is responsible for executing sentences such as imprisonment and correctional supervision (community penalties).

Sentencing guidelines

The *Report* does not define a 'sentencing guideline', although it states that clear provisions are needed as to what sentencing guidelines are.¹¹⁸ In terms of clause 5(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'. A 'normative sentencing guideline'¹¹⁹ is a guideline linked to a specific crime, with sub-categories thereof, stating the norm (point of departure) for calculating the sentence in the specific case.

From the context of the *Report*, therefore, it appears that 'guideline' should be understood in terms of its usual meaning, which would leave the Sentencing Council a wide range of guideline formats to choose from. It is important to keep an open mind on this. The South African Sentencing Council would not be called upon to produce a sentencing grid or matrix (as done in America), or any kind of list of aggravating and mitigating factors with numbers attached. The English way of setting guidelines, using the same format as its guideline judgments, might well be a more acceptable approach to take in South Africa.¹²⁰ Also, it is always possible that the Council might come up with a totally new guideline format; one that is not employed anywhere else at present. However, the *Report* proposes that guidelines should allow for variations of up to 30 per cent, indicating that the guidelines should involve numbers.¹²¹

116 Paras 1.44 and 3.1.13.

117 Executive summary paras 9–15, *Report* paras 2.1–2.15. It was noted that the Deputy Minister of Justice and Constitutional Development announced plans in early November 2007 for a radical overhaul of the criminal justice system, including a strategy that would see 'the Justice Department, Correctional Services, the police and the NPA adopting a single vision and mission' – Quintal *Sunday Independent* 11 November, 2007.

118 Par 2.20.

119 Par 3.1.5.

120 In (2003) 120 SALJ 858–882, I attempted to give a sense of possible guideline formats that might be relevant to the South African context.

121 Paras 3.1.19 to 3.1.21.

Whatever form the guidelines take, they will have to comply with the general principles of sentencing as set out in the draft bill.

The Commission also proposed that the guidelines should include imprisonment, fines and community penalties.¹²² Despite the advantages of having guidelines for all these sentence options, one has to admit that it really would be a daunting task for the Council to come up with guidelines for all these sentences. It would be so daunting, in fact, that there is no functioning example in place anywhere in the world.

Council membership

It is recommended by the Commission that membership of the Sentencing Council consist of the following:¹²³

- Two judges, appointed on recommendation by the Judicial Services Commission.
- Two magistrates, appointed on recommendation by the Magistrates' Commission.
- The National Director of Public Prosecutions or his nominee.
- A member of the Department of Correctional Services, appointed after consultation with the Commissioner of Correction Services.
- A sentencing expert, not in the full-time employment of the State.
- The director of the Council.

Membership of the Council is limited for the sake of manageability. So many people, organisations and institutions have a legitimate claim to be involved in sentencing that including them all in the Council would result in an unacceptably unwieldy body.¹²⁴ This is why the recommendation is to include only the core of the sentencing system in the Council itself. Other interested parties would be accommodated through a process of consultation. This includes, in particular, institutions such as the South African Police Service, the organised legal profession, the Department of Social Development, the Department of Justice and Constitutional Development, or any person or organisation with special expertise relevant to the establishment or reviewing of sentencing guidelines in general, or with respect to a specific offence in particular.

The Commission accepted that the proposal to mainly select Council members from the judiciary would be somewhat controversial. It argued, however, that this would ensure the independence of the Council and the sentencing process, and that it would be the most pragmatic solution.¹²⁵

122 Clause 5(2).

123 Clause 6.

124 *Report* par 3.2.1. It should be noted that the argument was raised, during this research, that the combined membership of the English Sentencing Guidelines Council and Sentencing Advisory Panel is approximately 30. This aspect has not given rise to problems there. Therefore, the local concern about manageability of a larger body might have to be tested.

125 *Report* par 2.10.

Council functions

The proposed functions of the Sentencing Council are contained in clause 8 of the Sentencing Framework Bill. The main function would be the establishment of sentencing guidelines. The Council is tasked to take the initiative in this respect, both with regard to the establishment of guidelines and their review. If certain cabinet ministers or Parliament request the Council to establish or review a guideline, the Council must do so. Any other person may request that the Council establish or review a guideline, but in this case the Council has the discretion to respond or not.

Other important functions are the following:¹²⁶

- Determining the monetary value of unit fines.
- Advising the authorities regarding the development of community penalties or other sentences.
- Providing information on the guidelines and on other aspects of sentencing (this information is to be obtained through research and consultation).
- Facilitating training for judicial officers in the new sentencing framework.

The importance of system capacity

The Commission repeatedly stressed that the sentencing guidelines have to take the capacity of the system into account. For example, when explaining the different needs of the various arms of government, it makes the point that the executive is always confronted with budgetary restrictions but must, nonetheless, meet Constitutional requirements in executing sentences.¹²⁷ More explicitly, it states that ‘the ideal [sentencing] system should ... produce sentencing outcomes that are within the capacity of the State to enforce in the long term’.

This proposal is at once self-explanatory and unfathomable – which of the two, depends on the observer’s perspective. Someone who considers the criminal justice system as a whole and who believes that every element in this system should perform with the same goals in mind will probably find it self-evident that the capacity of the system should be an important criterion. For the legislature and the executive authority the capacity of the system should not be something that can be ignored.¹²⁸ It causes innumerable and sometimes almost unsurpassable problems when legislation provides for alternative sentencing options, but the facilities for their implementation do not exist in practice or are totally inadequate. Recent

126 *Report* paras 3.2.4–3.2.6, clause 8.

127 *Report* executive summary par 1.5.

128 Some of the guideline systems in the USA are specifically designed to control the relevant jurisdiction’s prison population – Minnesota is still considered to be the pioneer in this respect (cf. Spohn *How do judges decide?* (2002) 231). See also New Zealand Law Commission *Sentencing guidelines and parole reform (Report 94)* (2006) 11, 26.

examples include a lack of reform schools for juvenile offenders,¹²⁹ lack of facilities for the supervision of correctional supervision¹³⁰ and a lack of places of safety for children.¹³¹ The same applies to available space in prisons: when the legislature prescribes increasing terms of imprisonment for a whole range of offences, this should only be implemented once the impact on available prison space has been assessed.

Sentencers are often not concerned about the capacity of the criminal justice system at all. There is the well-known (and popular) dictum from *S v Holder*¹³² that overpopulation in prisons has nothing to do with the question of an appropriate sentence. If imprisonment of a particular duration is required by the seriousness of the offence, the argument goes, it should be imposed. At the same time, there have been many indications in judgments surrounding sentencing that judicial officers should steer clear of the business of the executive when imposing sentence.¹³³ It is, therefore, not surprising that many judicial officers consider it inexplicable that they should be expected to take the capacity of the system into account when imposing sentence.

In an ideal world, sentencers would certainly be entitled to assume that sentences contained in legislation can be executed in practice. This is certainly a policy issue which should focus the efforts of both Parliament and the executive. However, when sentencing decisions have the effect that offenders' constitutional rights are directly influenced by courts' decisions, it is hard to argue that system capacity is not the business of the judiciary. Increasingly, therefore, the courts will have to take the Commission's proposal seriously as far as the capacity of the system is concerned.

From guidelines to law

One of the perennial difficulties with sentencing guidelines is how they should come into force. This question also concerned the Commission, but in the end the Commission decided not to give too much attention to this issue. However, the draft legislation proposes that the guidelines must be published by notice in the *Government Gazette*.¹³⁴ This is the vehicle for all levels of official legislation and the means by which notices become law. The date on which such guidelines will become operational should be specified in the notice.

In the interest of the independence of the Council, it is important that Parliament should not be the body to legislate the guidelines. Parliament is too cumbersome for this purpose

129 Cf. *S v Z and 23 similar cases* 2004 (1) SACR 400 (E).

130 Cf. *S v Dial* 2006 (1) SACR 395 (E); *DPP v Director of Public Prosecution, KZN* 2006 (1) 243 (SCA) par 25.

131 *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) par 14 (lack of resources); *Human JQR Children* 2006 (2) par 1.5.9.

132 1979 (2) SA 70 (A) at 76H–77A.

133 Cf. *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 520–523.

134 Clause 11(1).

and too driven by political motives. Legislation often tends to create imbalances in the whole sentencing scheme, because it tends to focus on certain issues at the expense of the whole.¹³⁵ By publishing the guidelines in the *Gazette*, advance notice is given of a sentencing guideline; it would therefore be possible for anybody to point out any 'fatal flaws' inherent in a proposed guideline before such a guideline actually came into force.

A Sentencing Council: Discussion

Sentencing guidelines

Many sentencers are unconvinced about the need for sentencing guidelines. However, a growing percentage of sentencers do consider sentencing guidelines useful. Experience in applying the minimum sentences legislation has caused some to see the value of having some starting points. The legislature and executive stakeholders consider guidelines essential for the transformation of the legal system. This is where they see the role of minimum sentences legislation, since such legislation makes it possible for sentences to be more consistent. Stakeholders from government expressed their concerns that the judiciary uses its independence as an excuse not to transform the legal system or to be transformed as desired by the majority of South Africa's people. The disputes on this topic between the judiciary and the government are well-documented.¹³⁶

Many judicial officers, especially judges, find the whole idea of sentencing guidelines emanating from the legislature unacceptable. Nor do I know of any international example of legislative sentencing guidelines that can be considered a success. This is why the role of the legislature is generally seen as providing basic principles, or a basic framework, within which sentencing is to take place in the courts.

135 *Report* par 2.6(a). There are many examples, but few as striking as Minnesota. Originally, the sentencing system devised there was commended for its rationality – that more serious offences would invariably attract the more severe sentences and small increases in offence severity would not result in a major increase in the sentence length (cf. Frase in Tonry (ed) *The Future of imprisonment* (2004) 83 at 98; Reitz (2005) 105 *Columbia LR* 1082 at 1102. This position changed recently because of amendments brought about by the legislature – Frase in Tonry (ed) *Crime and justice: A review of research (Vol 32)* (2005) 212; Reitz (1997) 91 *Northwestern University Law Review* 1441 at 1485; Terblanche (2006) 39 *CILSA* 1 at 8–9 (the Minnesota Criminal Code of 1963 now prescribes life imprisonment if a weapon is used during rape).

136 Cf. Spigl (August 2005) 18(2) *The Advocate* 16–20; Arendse (April 2005) 18(1) *The Advocate* 22–23; Carpenter (2005) *TSAR* 499–513; Malan (2005) 38 *De Jure* 99–115; Olivier & Balovo (2001) 26 *TRW* 31–50. Cf. also Hartley *Business Day* 8 November 2007; Mabuza *Business Day* 25 October 2007.

It is clear that the establishment of guidelines, in the form of benchmarks or starting points,¹³⁷ lies at, or very close to, the fault line where the roles of the legislature and the judiciary meet. All stakeholders essentially agree that, ideally, the sentence imposed by the court in a specific instance should be determined by the judicial officer and should be the result of at least some exercise of discretion. The disagreement is over the extent of the freedom with which judicial officers should exercise discretion and the exact point at which the role of the legislature should end and that of the courts begin. Given this, I thought it useful to set out, in tabular form, the current roles and the order in which they materialise in practice, as well as any differences that would be brought about by the Commission's proposals.

Table 1: Roles of the Sentencing Council

Outline of sentencing processes	Authority currently involved or responsible	Proposed involvement or responsibility
1. Setting up courts and establishing their particular sentencing jurisdiction	Executive and legislature	Executive and legislature
2. Defining crimes with some indication of punishment	Legislature (statutory offences)	Legislature (statutory offences)
3. Providing a list of sentences that may be imposed	Legislature	Legislature
4. Establishing basic principles to be followed in determining 'appropriate' sentences	Judiciary	Legislature (refined by judiciary)
5. Provision of starting point or guideline	Generally: none Minimum sentences: Legislature	?
6. Determining the sentence in the actual case	Judiciary	Judiciary
7. Execution of sentence	Executive	Executive

This table¹³⁸ indicates why there is conflict between the legislature and the judiciary – the current roles of both bodies simply do not permit a smooth transition from the one authority to the next. Clearly, the question mark represents the main question that needs to be answered through this report. The Commission made a very strong case that sentencing guidelines are an essential element for the integrity of the South African criminal justice system. During the interviews, it became clear that many sentencers accepted that some form of sentencing guidelines is needed.

The Sentencing Council

The substantial number of sentencers who believe that sentencing guidelines are important agree that they will have to be provided by the Sentencing Council, since no other body exists that could perform this function. Sentencers were unanimous on one issue: the majority of members of the Sentencing Council *must be* from the judiciary and magistracy, as proposed by the Commission.

137 These terms are preferred, as they indicate that relevant circumstances that are not accounted for in the guidelines should be taken into account in sentencing when they are present in a particular case.

138 It is submitted that this table is consistent with the findings of the court in *S v Dodo* 2001 (1) SACR 594 (CC) par 33.

It is in respect of this point that the views of the government, i.e., the Department of Justice and Constitutional Development and members of the parliamentary portfolio committee, proved to be irreconcilable with those of the courts. It is useful to set out government's views in some detail. In my interviews within the Department of Justice I was referred to the paper delivered by Mr Deon Rudman¹³⁹ at the international conference arranged by OSF-SA. This paper still reflects the Department's views on the Sentencing Council and highlights four issues the government has with the Commission's proposals:¹⁴⁰

- (1) The view that a proper sentencing framework should not include mandatory sentences is the first problematic aspect. The Department's view is that such sentences can exist parallel with a system of sentencing guidelines. It argued that this is the position in Minnesota and in England.

Discussion: Nothing physically prevents sentencing guidelines from existing parallel to mandatory sentences. Where this is done, as in the examples mentioned by Rudman, however, the basic sentencing system would typically be a guidelines system. Mandatory sentences are always exceptional. For example, in English law mandatory sentences apply mainly in respect of murder, for which life imprisonment is prescribed (or mandatory) for offenders over the age of 21.¹⁴¹ Much the same position applies in Minnesota¹⁴² and in Canada.¹⁴³ There is no example, that I am aware of, where mandatory sentences are employed on a large scale in conjunction with sentencing guidelines. That is the first point. The second is that the mere fact that a particular pattern of sentencing is used in other jurisdictions does not mean that it would be a good idea for South Africa or, indeed, a good idea at all. The use of mandatory sentences is invariably a political decision that goes against the advice of law reform commissions. Examples abound of proposals that were based on sound penological argument and theory, only to be ignored during the legislative process or to be forgotten some years later.¹⁴⁴ I am not aware of a single sound (depoliticised) investigation focussed on sentencing reform that proposed the use of mandatory sentences at all, never mind the use of mandatory sentences in conjunction with something else.

139 Mr Rudman is a Deputy Director-General, primarily responsible for legal reform within the Department.

140 Rudman 'Sentencing policy developments in South Africa, 1994–2006' in OSF *Conference report* (2006) 26 at 37–39.

141 S 1 of the Murder (Abolition of the Death Penalty) Act 1965, read with S 90 and 93 of the Powers of Criminal Courts (Sentencing) Act 2000. Cf. Banks *Banks on sentencing* (2003) 379; Richardson (ed) *Archbold: Criminal pleading, evidence and practice* (2007) 662.

142 Life imprisonment is only prescribed for first degree murder and those offences covered by S 609.3455 of the Criminal Code.

143 Manson *The law of sentencing* (2001) 294–295; S 745 of the Canadian Criminal Code.

144 Cf. Freiberg in Clarkson & Morgan (eds) *The politics of sentencing reform* (1995) 60–63.

- (2) The Department's second problem is that the proposals are unlikely to produce 'uniform sentencing practices', since they allow the sentencing court too much discretion, including the discretion to deviate in the case of substantial and compelling circumstances, different guidelines in different districts, and permission for a 30 per cent upward or downward movement from the guideline.

Discussion: It is assumed that Rudman used the words 'sentencing practices' intentionally and that they are distinct from 'uniform sentences'. The Commission obviously did not advocate uniform sentences. The *Report* clearly acknowledges the need to retain the discretion in determining the final sentence, in order to prevent the inevitable injustices that arise when truly different circumstances are not allowed to result in different sentences. Some differences in sentences are therefore inevitable.¹⁴⁵ Only barbaric systems allow for the same punishments for all, regardless of the circumstances. It bears repeating: the Commission's proposals are only aimed at reducing *unwanted* and *unwarranted* disparity. Returning to sentencing practices: even if sentences differ, this does not necessarily mean that different sentencing practices were followed. Certainly, sentencing practices should essentially be uniform. Such uniformity of approach lies at the foundation of the Commission's proposals regarding the basic sentencing principles, such as the statement of a single purpose for sentencing, the more specific definition of the seriousness of the offence, and doing away with the current broad 'purposes of punishment'. But even then it would be difficult (probably impossible) to remove all discretion from the sentencing practices and the sentencing decision process.

- (3) Thirdly, the Department is concerned whether judges should be involved in a policy-making body that would generate guidelines for the judiciary itself to impose. This concern is especially acute, given that the Council is not accountable to Parliament.

Discussion: It is an open question whether the setting of guidelines is a matter of policy or whether it constitutes a step in the sentencing decision itself. The government itself is not yet clear on this matter. What is clear is that judges are currently heavily involved in setting sentencing policy – every judgment that states (or restates) the basic principles of sentencing is involved in forming policy. This point is also made in the table on page 35. Whether or not the Council should be accountable to Parliament is actually a separate issue. This is a point at which many sentencing councils in the international sphere stood or fell, and is discussed in more detail below.

- (4) The final problem is that the proposed Bill takes away Parliament's power to legislate on sentencing and does not give Parliament an oversight function. Other jurisdictions where sentencing councils have been established have 'oversight and accountability...firmly placed with the legislature'. Minnesota is cited as an example.

145 See also *S v Makwanyane* 1995 (2) SACR 1 (CC) par 54 ('We have to accept these differences in the ordinary criminal cases that come before the courts, even to the extent that some may go to gaol when others similarly placed may be acquitted or receive non-custodial sentences.').

Discussion: The assessment of Parliament's power to legislate on sentencing is, quite simply, incorrect. The *Report* clearly states that Parliament should play a bigger role than is currently the case in establishing basic sentencing principles. When the *Report* also suggests the content of these basic principles, it does so based on the best principles that have so far been found elsewhere in international society. Obviously Parliament may choose to focus on other basic principles. Its power to do so is untouched. Even if a Sentencing Council were established, this would be done on terms decided upon by Parliament. The Commission's proposals attempt to provide and explain certain suggestions, but it is inexplicable how it could be thought that Parliament's powers are affected in the process. Even if sentencing guidelines were to be established, nothing but the Constitution could prevent Parliament from legislating on sentencing, regardless of the existence of the Sentencing Council, or sentencing guidelines. Indeed, nothing but the Constitution could prevent Parliament from passing bad laws.

Findings

The South African criminal justice system could only gain by having a set of properly determined sentencing starting points, covering most of the common offences, based on the basic principles as proposed by the Commission. But could these starting points really emanate only from an administrative body – the Sentencing Council – as proposed in the *Report*?

We need to remember that, internationally, most bodies tasked with the setting of sentencing guidelines have failed.¹⁴⁶ In South Africa, there are many factors that cannot be controlled and many unknowns involved in the whole process. These unknown factors range from the draft legislation that is submitted to Parliament, all the possibilities of amendment during the legislative process until its finalisation as an Act, the people appointed on the Council, the personality and general outlook of the chairperson, the regularity with which the Council meets, the resources that are diverted to the Council in order to perform its functions, the speed at which it can complete and issue guidelines, and whether sentencers will comply with the guidelines or how hard they will work at circumventing them.

146 'There have been many more failed sentencing commissions than successful ones': Tonry (1991) 37 *Crime and Delinquency* 307.

The 'abundance of literature on sentencing commissions'¹⁴⁷ clearly shows that sentencing councils are surprisingly delicate institutions, easily upset and derailed.¹⁴⁸ Virtually every element that has been identified as necessary for a successful council is absent in South Africa. This absence is exacerbated by the divergent views of the judiciary and the government (both legislative and executive branches) on issues such as the membership of the Sentencing Council and its accountability to Parliament. The probability that such a body will fail to produce what it is intended to produce is simply too great, with the result that the Commission's proposal regarding the establishment of a Sentencing Council cannot be sustained.

Recommendations

Where does that leave the recommendations regarding sentencing guidelines? This is a major conundrum and one that has no simple solutions. However, the following suggestions are submitted:

1. The legislature has an important role to play in structuring the sentence discretion. It is submitted that this should be done in the following manner. Firstly, basic sentencing principles, as determined by the Commission after an exhaustive investigation of the issue, should be legislated. Secondly, the legislature should pass legislation which specifically empowers and encourages the appeal courts, notably the Supreme Court of Appeal, to pass guideline judgments,¹⁴⁹ within the constitutional and legislative frameworks discussed above.¹⁵⁰
2. Appellate courts should play a more active role in promoting consistency in sentencing, especially given their vital role in safeguarding the offender's constitutional right to equal treatment in the

147 Freiberg & Gelb in Gelb & Freiberg (eds) *Penal populism, sentencing councils and sentencing policy* (2008) 1.

148 Cf. Tonry *Sentencing matters* (1996) 12 (the US federal sentencing guidelines are considered a failure for the following reasons: The commission's attitude towards the federal judiciary was arrogant and hostile; it did not consult widely enough; inexperience with sentencing; the influence of politics; the harshness of the resultant sentences; the complexity of the system); Tonry in Rex & Tonry (eds) *Reform and punishment: The future of sentencing* (2002) 75 at 88 ('...the success of a system of guidelines depends on the technical knowledge, policy sophistication, political acumen and leadership of the body that creates it... [The] leadership and membership of a sentencing commission are absolutely essential to the success of any guidelines-drafting effort').

149 Ashworth *Sentencing and criminal justice* 4ed (2005) 38 defines guideline judgments as follows: 'A guideline judgment is a single judgment which sets out the general parameters for dealing with several variations of a certain type of offence, considering the main aggravating and mitigating factors, and suggesting an appropriate starting point or range of sentences.' For example, it was held in *R v Millberry* [2003] 2 Cr App R (S) 142 that a starting point of five years' imprisonment is appropriate 'for a single offence of rape on an adult victim by a single offender' involving none of the aggravating features identified later. Examples of these aggravating features, which would result in a starting point of eight years' imprisonment, are rape committed by two or more men, rape following what amounts to a housebreaking, rape by someone in a position of responsibility towards the victim and rape following the abduction of the victim.

150 For a discussion of guideline judgments, cf. *Report* par 1.38; Harvey & Pease [1987] *Criminal Law Review* 96; Terblanche (2003) 120 *SALJ* 868–872.

sentencing sphere.¹⁵¹ The Supreme Court of Appeal has been instrumental of late in requiring courts to follow previous judgments but, ideally, these judgments should be more fundamental and explicit. The Court should explain that this amounts to a change of tack, and that judgments in which the importance of the sentence discretion were given the highest priority¹⁵² have now been overridden. There is nothing in our law at present that prevents the high courts from passing guideline judgments and it is submitted that they should do this.

3. The rejection of the proposed Sentencing Council does not mean that a body with some of the functions envisaged by the Commission (other than the creation of sentencing guidelines for specific crimes) would not be extremely useful and beneficial for our criminal justice system. All the information it could be tasked to obtain is vitally important for determining the health of the current sentencing system and to inform government about the effect and effectiveness of any sentencing reform. There is no need for such an institution to be constituted mainly (or even at all) of judicial officers or sentencing practitioners. There are a number of examples of such bodies and the involvement of lay people in their functioning, including the English Sentencing Advisory Panel¹⁵³ and the Victorian Sentencing Advisory Council.¹⁵⁴

In future, preferably based on advice by an advisory council or in conjunction with sentencing experts, the legislature might well consider passing new penalty clauses for common offences. Many current penalty clauses are noted for their irrationality. The legislature might then decide to follow international examples that prescribe a rational, proportionate band of sentences for the courts to impose. However, whenever legislative provisions are passed that are more specific regarding sentences, it is essential that the legislature adhere to the general principles of sentencing established by the Commission. Sentences must also be related to the sentences that are imposed or prescribed for other offences and the legislature must always consider the state's ability to enforce such sentences in the long run. The legislature will find it extremely difficult to perform this function without substantial input from sentencing experts.

151 Cf. Van Zyl Smit in Woolman et al. (eds) *Constitutional law of South Africa* 2ed (2006) 49–7 et seq; Terblanche *A guide to sentencing in South Africa* (2007) 122–123; Currie & De Waal *The Bill of Rights handbook* (2005) 232–233 (both with respect to 'formal' equality [like cases being treated alike] and 'substantive' equality [disparate treatment to achieve equal outcomes]).

152 Cf. *R v S* 1958 (3) SA 102 (A) and the cases following on that.

153 Cf. Ashworth *Sentencing and criminal justice* 4ed (2005) 33–35. The Panel's home page can be found at www.sentencing-guidelines.gov.uk/about/sap/ – accessed 22 November 2007. The Panel constitutes one element only of the current English sentencing guidelines system – cf. Ashworth (2006) 19 *SACJ* 1–22 (the Panel was constituted in 1999; a Sentencing Guidelines Council was created by the Criminal Justice Act 2003 and tasked with the creation of sentencing guidelines; the Court of Appeal continues to play a vital role).

154 Cf. Freiberg in Gelb & Freiberg (eds) *Penal populism, sentencing councils and sentencing policy* (2008) ch 11.

The approach advanced under points 1 to 3 above will permit sentencing to evolve, rather than to be jerked in a certain direction.¹⁵⁵ It is in line with the general approach of incremental reform, as discussed in Chapter 3 (under *An optimal combination of sentencing effects*).

155 Many of the criminal justice systems that are held in high regard in the international community of sentencing experts have developed over time, rather than in one broad sweep. Cf. Jareborg in Clarkson & Morgan (eds) *The politics of sentencing reform* (1995) 98–99 (work on sentencing reform began in the mid-1970s and only became law in 1989); Grebing in Jescheck & Grebing *Die Geldstrafe im deutschen und ausländischen Recht* (1978) 29–43; Gillespie (1980) 44(4) *Federal Probation* 20; Friedman (1983) 50 *University of Chicago LR* 281, 286–287; Eser (1989) 22 *De Jure* 3.

5

Sentencing options

Proposals

The Commission made many proposals concerning changes to the current list of sentencing options available to the courts. Its basic view is summarised in paragraph 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 [of the Criminal Procedure Act].

The new list of options contains the following: (a) imprisonment; (b) a fine; (c) a community penalty; (d) reparation; and (e) a caution and discharge.¹⁵⁶ Two sentence options fall away. Declaration as an habitual offender does not fit in with a desert-based philosophy, where the seriousness of the crime is the predominant consideration. Previous convictions are accounted for in the rest of the proposals and dangerous criminals are catered for under declaration as a dangerous criminal.¹⁵⁷ Periodical imprisonment is hardly ever used and mostly catered for in provisions for house detention and community penalties.¹⁵⁸ It is also proposed that postponement of sentencing no longer be possible. The Commission found no justification for this measure in its current form.¹⁵⁹ Provision is made for delaying sentencing for a maximum

156 Clause 13.

157 Par 3.3.3.

158 Par 3.3.4.

159 Par 3.4.35.

of six months if such delay would place the court in a better position to pass an appropriate sentence.¹⁶⁰

Reactions regarding sentence options

Fairly early on in the course of stakeholder interviews a number of issues became clear:

1. The stakeholders' interest in the basic sentencing principles and issues surrounding consistency and the Sentencing Council totally dominated the interviews.
2. Although most judicial officers agreed with the Commission's conclusion that some sentence options are infrequently used, many questioned the need to do away with such options. Sentencing options such as periodical imprisonment and the postponement of sentencing provide the courts with many opportunities for creative sentencing, even if these options are used infrequently. The argument was that more sentencing options are better than fewer.
3. Most interviews did not get onto a detailed discussion of the proposals regarding new options such as reparation. However, when reparation was discussed as a new option, it was unanimously supported, even if not always with equal enthusiasm.
4. None of the interviewees knew enough about a day fine system to make useful comments on this suggestion. However, the principle behind such a system, that the penalty units be separated from the means of the offender, did generally find favour.

The reactions from stakeholders on the sentencing options provided further impetus to the concern that wholesale reform of the sentencing framework is too much to implement at once. Despite the theoretical importance of making the sentencing options fit the basic sentencing principles, it is probably not feasible to expect the courts to implement all such changes at once. When the sentencers are uncertain about too many issues, the whole system could come to a standstill. The changes brought about by the minimum sentences legislation and the problems of interpretation that this caused for prosecutors, defence counsel and judicial officers, provide a good example of the difficulties that might be expected from an overall reform of the whole system.

Recommendation

In view of the considerations referred to above, it is recommended that the proposals for change regarding most sentencing options be left for a later date. Those new options that have been proposed by the Commission and which are considered important for a variety of reasons, especially the gradual implementation of restorative justice, are dealt with in more detail below.

¹⁶⁰ Clause 51.

The use of imprisonment

The Commission identified a need for a legislative statement that imprisonment is a drastic and expensive form of punishment.¹⁶¹ The statutory provision should emphasise that ‘...alternatives [are] to be used where possible and where this can be done without jeopardising community safety.’¹⁶² An additional advantage of such a principle in favour of non-custodial sentences would be to limit the use of very short prison sentences. As a result, clause 14 is proposed, which reads as follows:

- (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.

Discussion: The proposal would normally hardly warrant any discussion at all. It is common cause that prisons are a scarce¹⁶³ and expensive resource.¹⁶⁴ It would make much sense for the legislature to urge sentencers to use this resource with restraint. After all, prisons are set up and maintained and prisoners cared for with taxpayers’ monies, through the budgetary legislation passed by the legislature as well. The problem is simply this: the legislature cannot prescribe long terms of imprisonment for certain offences, and at the same time expect sentencers to take seriously a prescription to use imprisonment with restraint. The current minimum sentences legislation shows no restraint in the use of imprisonment.

The introduction of reparation

The Commission proposed the introduction of ‘reparation’ as a new substantive sentencing option. This is such an important alternative sentencing option that serious consideration should be given to its introduction in the near future.

Reparation involves both restitution (restoration of an item of property to the owner) and compensation (making good of damage resulting from the crime).¹⁶⁵ The need for increased emphasis on the interests of victims lies at the basis of the proposal that reparation be created as a substantial sentencing option. Although it is currently possible to compensate victims for loss suffered as a result of crime, such an order can only be imposed as a condition to

161 Par 3.3.11.

162 Ibid.

163 According to the Department of Correctional Services (www.dcs.gov.za/WebStatistics/ – accessed 4 January 2008), on 31 October 2007, there was accommodation for 114 559 prisoners. The total prison population was 163 049, resulting in a level of overcrowding of 142.35%.

164 The current (2006/2007) budget for the Department stands at R9,2 billion – cf. National Treasury *National Budget 2007: Vote 19: Correctional Services* (2007), obtained at www.treasury.gov.za/documents/national%20budget/2007/ene/19%20correction.pdf – accessed 4 January 2008).

165 *Report* par 3.3.37.

another main sentence, whether a suspended sentence¹⁶⁶ or correctional supervision.¹⁶⁷ As a substantive sentence it is the intention that it must be imposed as an *only* sentence and also in a simpler form.

The Commission was convinced by the opinions of international experts that this was a viable route to follow.¹⁶⁸ Reparation is proposed as a sentence that must be considered in every case. It must be related to the means of the offender and, if reparation and a fine can be imposed for the same offence, preference should be given to reparation.¹⁶⁹ Enforcing payment of reparation is provided for in much the same way as the fine,¹⁷⁰ thus providing increased protection for the victim.

Discussion: The proposal was supported almost unanimously and can be implemented with little or no further research.

The introduction of a day fine system

It is proposed that fines be retained as a sentence option. However, a very substantial change is envisaged with the proposal that fines should be calculated through the so-called day fine system. The Commission explained the proposal in the following terms:¹⁷¹

Serious consideration needs ... 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 of¹⁷² 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...¹⁷³ However ... [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... The Commission accepts these arguments.

166 In terms of S 297(1)(a)(i)(aa).

167 In terms of S 276(1)(h) of the Criminal Procedure Act, read with S 52(1)(e) of the Correctional Services Act 111 of 1998.

168 Par 3.3.39.

169 Par 3.3.40; clause 37(1) and (5).

170 Clauses 38 to 40.

171 Paras 3.3.25 to 3.3.27.

172 This should probably be 'or'. In the English experience with a 'unit fine system', the expression of the seriousness of the fine was in units (cf. Thomas in Clarkson & Morgan (eds) *The politics of sentencing reform* (1995) 137–138), but most of the other countries use daily tariffs – Tonry & Hamilton (eds) *Intermediate sanctions in overcrowded times* (1995) 16; in German criminal law (S 40 of Criminal Code) the term *Tagessatzsystem* ('daily rate system') is used.

173 This explanation of the workings of day fine systems is a much simplified version of the actual practice – see below for a more complete explanation.

The unit fine system is not developed further in the Commission's recommendations, but is a task left for the Sentencing Council to perform.

Discussion: Currently, the fixed sum system is used to determine the amount of any fine imposed in South African courts. In its sentence the court expresses the punishment only through the amount of the fine. This sum will be the end result of an application of all the basic sentencing principles. It is the only expression of the court's evaluation of the seriousness of the crime, the person of the offender, and the interests of society. This figure should also be such that it is perceived to be a deterrent, both to the offender and in general. Although the courts are expected to take into account the offender's ability to pay the fine, the fact that the fine amount still needs to contain a sufficient element of deterrence has, in practice, resulted in a situation where the final amount is only adapted for low or high income to a limited extent.¹⁷⁴ For example, on a drunk driving charge, a court might decide that a fine of R5 000 will give expression to all the basic sentencing principles. It might be somewhat lower if the offender is poor and somewhat higher if the offender is rich, but most judicial officers will not vary beyond R4 000 and R6 000 in this process. They will be heavily influenced by the sentiments expressed in *S v Lekgoale*¹⁷⁵ that '...if he has to take the accused's means into account, the fine will sometimes have to be so small that it has no deterrent value to others and it might seem as if the court regarded the offence as a trivial one'.

In the case of a day fine system, the court imposes a number of penalty units in the first step. These units give expression to all the sentencing principles, apart from the offender's financial circumstances. There would be a rough equivalent to the very least duration of imprisonment that could be imposed for such an offence, and the number of daily penalty units. On a drunk driving charge similar to the example used in the previous paragraph, the court might determine that 50 units will give expression to the seriousness of the offence, taking the other sentencing principles into account (including the deterrent effect of the punishment). In the second step the average daily net income of the offender is determined.¹⁷⁶ Should this be R20, the fine will be R1 000 (50 times R20). However, should the net income of the offender be R2 000 per day, the fine will be R100 000 (50 times R2 000). Both the number of penalty units and the income of the offender must be included in the sentence. What is achieved in

174 Cf. Terblanche *A guide to sentencing in South Africa* (2007) 268–269 (a 'pointofdeparture' fine is used, in order to have the necessary deterrent effect, obviously from the perspective [including the financial perspective] of the judicial officer who is exercising the sentence discretion). As recently as 1972 the court in *S v Manwere* 1972 (4) SA 425 (RA) 427 held that wealth is *not* a reason for increasing a fine. However, there are isolated examples of high fines, in particular following sentence agreements reached in terms of S 105A of the Criminal Procedure Act (cf. a fine of R3 million on Mark Thatcher for breaking anti-mercenary legislation – <http://news.bbc.co.uk/2/hi/africa/4169557.stm> – accessed 26 October 2007).

175 1983 (2) SA 175 (B) 176.

176 Various standards could be employed at this stage. The 'average daily net income' of the offender is the standard used in German law – S 40 (II) of the German Criminal Code.

this process is what the Germans refer to as *Opfergleichheit*,¹⁷⁷ in other words, all offenders sacrifice an equal percentage of their wealth.

It is clear that a day fine system results in a much wider range of fines than the fixed sum system, yet the effect of the fines is much more equal.¹⁷⁸ It is ironic that these kinds of systems are more readily applied in countries where levels of income are not nearly as diverse¹⁷⁹ as they are in developing countries such as South Africa. The introduction of such a system in South Africa, if properly applied by the judicial officers, will at the same time enable the courts to impose just fines on the rich and fair fines on the poor.

Serious consideration should be given to the introduction of a day fine kind of system in South Africa.¹⁸⁰ However, this should be done with care. Careful consideration needs to be given to all aspects of such a law, in order to get it right from the beginning. Two of the greatest challenges will be the following:

- Getting a fair sense of the offender's income.
- Educating judicial officers to utilise the new system, instead of imposing a fixed fine as in the past and then working backwards to separate the number of units from the offender's income.

Who should develop the system?

In view of the recommendation against implementing the system along the lines proposed in the Commission's *Report*, the question arises: which body should be involved in the development of this system? A number of options present themselves:

- A knowledgeable consultant could be requested or appointed by the Minister of Justice and Constitutional Development to investigate possible solutions (in conjunction with her Department).

177 Cf. Naucke (1978) 31 *Neue Juristische Wochenschrift* 407; Tröndle & Fischer *Strafgesetzbuch und Nebengesetze* 54 uitg (2007) 313.

178 'Substantive' equality as explain in n 144 above.

179 Day fine systems apply, at the latest count, in Germany, Austria, Denmark, Sweden, Finland, Portugal and Switzerland. France uses a hybrid system. England introduced a unit fine system briefly before it was scrapped within less than a year, mainly for political reasons (cf. Thomas in Clarkson & Morgan (eds) *The politics of sentencing reform* (1995) 144–145), but there have been calls for a reintroduction (cf. Carter *Managing offenders, reducing crime* (2003) 27 – the so-called Carter-review).

180 In view of the lack of statistics in South Africa it is not possible to say how many offenders are likely to be influenced by such a system. Interviews with stakeholders give the sense of a very substantial number. This includes both prisoners who might have been fined, but are not as they have no meaningful means, and those who end up in prison to serve the alternative imprisonment, simply because they cannot afford to pay the fine.

- The Minister could request the South African Law Reform Commission to undertake the investigation.
- The task could be left to a sentencing advisory body, as proposed in this report.

In the meantime, there is nothing in law to prevent anybody from launching a pilot project with a day-fine system in any of the country's courts.¹⁸¹

The sentencing judgment

The Commission proposed a new provision that sets out, in more detail, the information that should be included in every sentencing judgment.¹⁸² The draft legislation also contains a specific reference to including, in the sentence judgment, any information that the sentencer would want the executing authorities to be aware of.¹⁸³ The Commission also emphasised that sentencing judgments should explain any departure from a guideline (benchmark) sentence, should explain community sentences for the benefit of both the offender and community, and should mention that reparation has been considered. In view of the proposals in this report, most of these factors should be seen as ideals to be implemented in the near future.

At least one stakeholder felt strongly about the importance of sentencing judgments as a process by which sentence consistency can be improved. The value of a proper sentencing judgment is probably underrated. Judgments should be used to a greater extent in explaining more precisely how the sentencer reached the conclusion regarding the sentence, rather than the current practice where rhetoric is often merely repeated without any real meaning.¹⁸⁴

Restorative justice

In interviews with advocates for restorative justice, I was referred to the paper delivered at the International Conference by Dr Ann Skelton. Skelton was not very enthusiastic about correctional supervision as a restorative justice sentence, and explained that, without restorative justice elements, this type of sentence is merely an alternative sentence and not restorative justice. Although such a sentence might include victim-offender mediation and family group conferences, it tends to involve victims too late, since the sentence is fixed by the time the victim's needs are established.¹⁸⁵ She did feel that restorative justice processes could be worked into a delayed sentence, as proposed by the Commission¹⁸⁶ and, for that matter,

181 A number of such projects have been running in various American counties at one time or another, also not requiring any statutory amendments – cf. Hillsman in Tonry (ed) *Crime and justice: A review of research (Vol 12)* (1990) 49–98; Hillsman & Greene (1988) 72 *Judicature* 38 at 40.

182 *Report* par 3.4.28.

183 Clause 49.

184 Cf. *S v Isaacs* 2002 (1) SACR 176 (C) at 178 (court complaining about the basic principles being used as a 'ritual incantation').

185 *Conference report* 19.

186 *Report* par 3.4.35.

through the postponement of sentencing.¹⁸⁷ She was more enthusiastic about reparation, but still considered victims to be too passive, given that victim impact statements do not fully meet restorative justice elements.¹⁸⁸

Recommendation

In line with the discussion of restorative justice in Section C,189 it is submitted that the restorative justice debate in South Africa should be continued. It is an exciting development, but the current government focus on severe punishments and the never-ending stream of new statutory crimes being created by Parliament make restorative justice a longer-term project.

187 The current process in terms of S 297(1) of the Criminal Procedure Act, 1977.

188 *Conference report* 19.

189 Particularly p 15.

6

Conclusion

The South African Law Commission's *Report* dealing with sentencing reform published in 2000 provides an excellent compilation of recommendations. If carefully followed, the South African criminal justice system would have, from a theoretical perspective, one of the better sentencing systems in the world. The Commission followed an inclusive process in the course of researching and writing the *Report* and it should therefore be given due consideration.

However, sentencing does not take place in a theoretical environment. It is very much a real, practical issue. This does not mean that there is little room for sentencing theory, but it does mean that theory and reality are sometimes far removed from one another. This is the position in South Africa. Sentencing theory provides a much more accurate picture of the potential of sentencing to cure society's problems of crime. In reality people have much more unrealistic expectations of the potential effect of sentencing and punishment on crime. These expectations are deep-seated amongst members of the public and politicians alike, and judicial officers as well. In view of this situation, I came to the conclusion that the sentencing reforms proposed by the Commission require too much, too fast. If all the proposed reforms are implemented simultaneously, everybody is likely to be left behind. Nothing will change. A more incremental approach to reform is, therefore, preferable.

In summary, this report largely supports the Commission's recommendations as far as the inclusion in legislation of the primary sentencing principles are concerned. In particular, this refers to the primary principles that every sentence should be proportionate to the seriousness of the offence, and that the seriousness of the offence should be determined by the degree of harmfulness of the offence and the degree of culpability of the offender for the offence committed. It also includes the recommendation that, instead of the previous unproven

purposes of punishment, sentences should now be determined with the view towards achieving the optimal combination of restorative justice, the protection of society and a crime-free life for the offender. To a large extent, unrealistic expectations about the abilities of punishment to change criminal behaviour are founded in the old purposes of punishment, in particular deterrence and rehabilitation. A considerable part of the current report is, therefore, set aside for a discussion of these misconceptions.

Next, the Commission proposed the establishment of sentencing guidelines in order to improve the level of consistency of imposed sentences. It is very hard, if not impossible, to dispute the grounds that the Commissions provided for this recommendation and one has to agree with the basic premise that our sentencing system needs sentencing guidelines, in the sense of starting points for the calculation of any sentence. However, when the Commission proposes a Sentencing Council as a *sui-generis* body responsible for drawing up these sentencing guidelines, the proposal is simply too radical and unlikely to achieve the desired effect in the long run. One of the major problems in this respect is the current lack of cooperation, and often lack of respect, between the government and the judiciary.

In place of the Sentencing Council, this report tentatively proposes the following system to provide the much needed sentencing guidelines:

- The legislature should pass legislation containing the primary sentencing principles as advised by the Law Commission, as well as legislation encouraging appeal courts to pass guideline judgments.
- The appellate courts should become more active in passing (guideline) judgments requiring increased consistency from the courts.
- Government should seriously consider establishing a formal sentencing advisory body which, based on research and following the gathering of relevant information, can advise the government regarding sentencing policy.

The Commission also proposed that specific provision be made for the admissibility of victim impact statements. This proposal is supported in a slightly different form, in order to focus sentencers' attention on the fact that the courts must consider such statements in the course of determining the sentence.

The Commission also considered all the sentencing options. It proposed that, while the sentencing system is being overhauled, all sentencing options should be simplified and clarified as well. In the process it made several recommendations. Based on the interviews for this project, the following recommendations are supported:

- A legislative provision is needed to give effect to the principle of restraint when it comes to the imposition of imprisonment. Our criminal justice system is certainly in need of such a principle. However, the legislature could not pass such legislation while, in prescribing imprisonment as in the minimum sentences legislation, it is not complying with the principle itself.

- A new sentence of 'reparation' is proposed. It consists of both restitution and compensation and is founded in the need for increased care for the victims of crime. Support for this new sentence was almost unanimous and it should be instituted without delay.
- It is proposed that the current method of determining the amount of a fine be replaced with a day-fine system. A day-fine system uses a two-step approach in determining the fine amount: first the seriousness of the crime determines the number of fine units; this number is then multiplied by the income of the offender over a set time. The result is fines that are more closely related to the offender's means. However, the Commission did not develop this system and thought it best to leave such development to the Sentencing Council. Since the creation of the Council is not supported in this report, a number of alternatives are proposed, including the South African Law Reform Commission or the formal sentencing advisory body proposed as an alternative to the Sentencing Council, or an individual or group of sentencing experts.
- As far as restorative justice is concerned, the debate should continue and pressure towards its wider implementation should be maintained.
- Periodical imprisonment and the postponement of sentencing should be retained. Although they are infrequently utilised, many sentencers felt that more alternative sentences are better than fewer. However, declaration as an habitual criminal should be eliminated without delay, as it runs counter to the basic sentencing principles.

It is appropriate to close with the words of Justice Langa (as he then was) in *S v Makwanyane* supra par 222:

Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead.

The South African sentencing system is in dire need of reform and the State should take the lead in executing the necessary changes, and to do so as role model for our society.

Appendix

Summary of recommendations by the South African Law Commission

1 What this project is not about

This project is not intended to revisit the Law Commission's investigation. The Commission's findings regarding existing problems with the sentencing system are accepted as such. There are wide differences of opinion regarding just about every aspect of sentencing. The Law Commission considered these differences in depth in their reports and discussion documents, before coming to the following conclusion regarding sentencing reform (par 1.6; see also par 1.16):

[T]he 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.

As a single correct answer is often not available, 'clear choices' have to be made.

The report contains several indications that wide ranges of responses were received (par 1.14: '...The issue paper elicited a wide variety of responses ...'; par 1.20: '...a wide range of opinions amongst criminal justice professionals on sentencing practice'). Simply adding to the list of differences of opinion during this research would serve no purpose.

2 General recommendations

2.1. Purposes of the sentencing system

An ideal system should be seen to [1] promote consistency in sentencing, [2] deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, [3] allow for victim participation and restorative initiatives and, at the same time, [4] produce sentencing outcomes that are within the capacity of the State to enforce in the long term (par 7 of executive summary; par 1.43).

Purpose	Comments
(1) Promote consistency	
(2) Punish serious crime sufficiently severely	
(3) Victim participation	
(4) Capacity of the State	

2.2. New partnership or cooperation of different branches of government

'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' (par 8 of executive summary).

Function	Acceptability of proposal
(1) Courts impose sentence	
(2) Informed by legislation (clear sentencing principles – par 9)	
(3) Informed by administrative branch (seriousness of crime, victims, etc.), e.g., a Sentencing Council – par 10	
(4) Capacity of the State to execute the sentences (The Constitution guarantees the right, inter alia, to adequate accommodation. 'The government therefore cannot design a sentencing system that will allow these rights to be infringed routinely' – par 3.1.15).	

3 Main recommendations

3.1. Stating general principles in legislation

The main principles are that the offence should be met with a sentence that fits the crime (executive summary paras 7, 8 and 14; paras 1.8(b), 1.43, 2.5, 2.12). The sentence should be proportionate to the seriousness of the offence (paras 2.35, 3.1.3, 3.1.4, 3.1.5; cl 3(1)). This recommendation is a clear choice for retribution (or just deserts or proportionality) as foundation for the determination of an appropriate sentence. The ‘seriousness of the offence’ is to be established with reference to two elements, namely the harm caused (or risked) by the offence and the offender’s culpability for that harm (par 3.1.4; cl 3(2)). Rather than the traditional four ‘purposes of punishment’ the sentenced should be aimed at achieving the optimal balance of three new considerations (paras 3.1.8 to 3.1.10). Deterrence is best achieved by fair sentences (par 3.1.7). Previous convictions should only moderately modify the sentence proportionate to the seriousness of the offence (par 3.1.6; cl 3(4)). Finally, a downward departure from this proportionate sentence is permitted in the case of substantial and compelling circumstances (par 3.1.11; cl 4).

Principle	Acceptability of proposal
(1) The sentence should be proportionate to the seriousness of the offence (utilise sentences imposed in other cases).	
(2) Seriousness of offence depends of harm caused (risked) by offence and culpability of offender.	
(3) Optimal combination of: (a) Restoring the rights of victims of the offence – par 3.1.8. (b) Protecting society against the offender – par 3.1.9. (c) Giving the offender the opportunity to lead a crime-free life in the future – par 3.1.10 (cl 3(3)).	
(4) Role of previous convictions: moderate only (focus on current offence).	
(5) Deterrence need not determine sentence directly, is best achieved by sentences that are fair.	
(6) Downward departure in case of ‘substantial and compelling circumstances’.	

3.2. Sentencing guidelines

Why are sentencing guidelines needed? One of the critical problems with the current sentencing system is the lack of consistency:

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 (par 1.8(a)).

In order to achieve more consistent outcomes, some form of sentencing guidelines are required. Legislation is not the answer (it is, of necessity, too general to cater for all the individual permutations) and neither is the judiciary (they lack the overall picture and work in a tradition that the discretion belongs to the trial court, and they provide principles only for the case before them). As a result an administrative body is recommended to inform the courts' sentencing decisions, namely the Sentencing Council. Objections by certain divisions of the High Court against such administrative body was noted (par 1.47).

The development of sentencing guidelines is the key innovation in the proposals, aimed at ensuring consistency and implementation of the proposed framework as a whole (paras 1.44, 3.1.13). Clear provisions are needed as to what sentencing guidelines are (par 2.20). In terms of clause 5(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.' A 'normative sentencing guideline' (par 3.1.5) is a guideline linked to a specific crime, with sub-categories thereof, stating the norm (point of departure) from which the calculation of the sentence in the specific case should be started. Sentencing guidelines are intended to include imprisonment, fines and community penalties (cl 5(2)). The current proposal is that a guideline should permit a range of sentences of up to 30 per cent up and down from the guideline (starting point), and a departure beyond this limit in the case of substantial and compelling circumstances. Even then the departure must be reasonable (paras 3.1.19 to 3.1.21).

Proposal	Acceptability of proposal
(1) Need for sentencing guidelines (starting points for specific crimes or sub-categories of crimes).	
(2) Creation of a Sentencing Council.	
(2a) If not a Sentencing Council, where should such guidelines emanate from?	
(3) Permitting up to 30% range within a guideline.	

(4) Departure beyond the 30% range in case if substantial and compelling circumstances are present. Such departure to be reasonable.	
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3.3 Functions of the Sentencing Council

The envisaged functions of the proposed Council are summarised as follows:

These [basic] principles [in legislation] 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' (par 10 executive summary; see also par 2.9).

Function	Acceptability of proposal (list in order of importance?)
(1) Develop guidelines.	
(2) Do research and consult widely before developing guidelines.	
(3) Collect and publish sentencing data.	
(4) Report on the efficacy and cost effectiveness of the sentencing options.	
(5) Determine the value of fine units.	
(6) Make policy recommendations to develop community penalties.	

3.4 The composition of the Sentencing Council

A small Council is proposed. It is proposed that the majority of the members should be from the judiciary, as they are responsible for sentencing and in this way they will have the major input on the shaping of the guidelines themselves (par 2.11, 3.2.1). The precise composition and other details are pragmatic issues (par 3.2.2).

Proposal	Acceptability of proposal
(1) Small body, rather than representative of all interest groups (par 3.2.1).	
(2) Majority of members from the judiciary.	

3.5 The procedures of the Sentencing Council

The following summary of the proposals regarding the consultation process in the Executive Summary (par 14; see also par 3.2.4 et seq):

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.

Sentencing guidelines come into operation through publication in the *Gazette*, and on a date specified in the notice (cl 11).

Proposal	Acceptability of proposal
(1) Consult widely.	
(2) Must act on an approach by certain Cabinet Ministers and by Parliament.	
(3) May act when approached by any other stakeholder.	
(4) Sentencing guidelines come into operation through a notice in the <i>Gazette</i> .	

4 The sentencing options

4.1 Sentencing options

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 (par 3.3.2).

The resultant list is the following: (a) imprisonment; (b) a fine; (c) a community penalty; (d) reparation; and (e) a caution and discharge (cl 13). Two sentence options fall away. Declaration as an habitual offender does not fit in with a desert-based philosophy, where seriousness of the crime is the predominant consideration. Previous convictions are accounted for in the rest of the proposals and dangerous criminals are catered for under declaration as a dangerous criminal (par 3.3.3). Periodical imprisonment is hardly ever used and mostly catered for in provisions for house detention and community penalties (par 3.3.4).

Postponement of sentencing will no longer be possible. The Commission found no justification for this measure in its current form (par 3.4.35). Provision is made for delaying sentencing for a maximum of six months if such delay would place the court in a better position to pass an appropriate sentence (cl 51).

Proposal	Acceptability of proposal
(1) Scrapping of declaration as an habitual offender.	
(2) Scrapping of periodical imprisonment.	
(3) Scrapping of postponement of sentencing.	
(4) Provision for delay of sentencing.	

4.2 Suspension

The place of and philosophy behind suspended sentences are problematic. They are part and parcel of the current system but have a different penal value compared to an unsuspended sentence. The Commission found as follows:

In the end it [the Commission] 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 (par 3.3.5).

Only imprisonment and fines may be suspended. The maximum period of suspension is retained at five years. The conditions are simplified and related to those conditions that may be imposed for community penalties (cl 15, read with 33).

Proposal	Acceptability of proposal
(1) Retaining the ability to suspend certain sentences.	
(2) Limiting suspension to sentences of imprisonment and fines.	
(3) Using the same conditions as community penalties.	
(4) Not more than five years' imprisonment may not be suspended.	
(5) Period of suspension limited to five years, as before.	

4.3 Imprisonment

The provisions in the proposed Bill are more fundamental than the current provisions in the Criminal Procedure Act, and focus on giving guidance regarding the imposition of imprisonment. The drastic nature of imprisonment should be acknowledged, as well as the cost thereof. Therefore, an alternative punishment should be used whenever possible (par 3.3.11). Other amendments are also proposed.

Proposal	Acceptability of proposal
(1) Include specific guidance regarding when imprisonment might be appropriate (par 3.3.11, cl 14).	
(2) Give fine and community penalties preference (cl 14(1)).	
(3) Imprisonment mainly for the protection of society (cl 14(1)).	
(4) Increase the minimum imprisonment from 4 to 7 days (par 3.3.12).	
(5) Life imprisonment: only when the crime is extremely serious (par 3.3.17, cl 14(3)).	

4.4 Dangerous criminals

The potential indefinite detention of dangerous criminals is a justified exception to the basic approach of desert-based punishment (par 3.3.20). However, the current provisions should be simplified, and the legislation should distinguish the punitive element of the punishment from the preventative element of the dangerous offender, in order to strengthen the safeguards against unnecessary detention (ibid).

Proposal	Acceptability of proposal
(1) Retaining declaration as a dangerous offender.	
(2) Distinguishing the punitive from the preventative elements.	

4.5 Detention in a treatment centre

This sentence is also largely retained in its current form. Why? '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' (par 3.3.22). However, it is now considered to be a variation of imprisonment.

Proposal	Acceptability of proposal
(1) Retaining committal to a treatment centre.	
(2) Retaining the current restrictions.	
(3) Requiring that the court must determine a period of detention that should not be exceeded, based on the term of imprisonment which would otherwise have been imposed (cl 21(2)).	

4.6 Fines

The advantages of fines should be retained. The main reform proposed is with respect to the way in which fines are calculated and related to the offender's ability to pay:

'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... However, ... [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... The Commission accepts these arguments' (paras 3.3.25 to 3.3.27).

The unit fine system is not developed further in the recommendations, but a task left for the Sentencing Council to perform.

Proposal	Acceptability of proposal
(1) Retaining fines.	
(2) Introducing a unit fine system.	
(3) Leaving it for the Sentencing Council to develop a simplified unit-fine system.	
(4) Alternative imprisonment limited to an appropriate sentence for the crime (cl 23(a)).	
(5) Suspension as for imprisonment (cl 24).	
(6) Providing for payment of fine in instalments (cl 27(1)(a)).	

(7) Providing for deduction from salary or wages (cl 27(1)(b)).	
(8) Providing for payment from attachment of goods (cl 28).	
(9) Provision for a failure to pay a fine (if no alternative), as is the case of correctional supervision or committal to a treatment centre (cl 29).	

4.7 Community penalties

Specific provision is made for two forms of community penalty. Correctional supervision is retained, and community service added. The latter is like correctional supervision, but without the home detention aspect (par 3.3.33). In addition the conditions are proposed to come in line with the provisions of the Correctional Services Act, 1998. This retains the flexibility of the sentence, while making it more certain and less prone to manipulation (paras 3.3.31 to 3.3.32). Specific references to restorative justice measures are also included (par 3.3.34). Finally, a wider range of stakeholders are permitted to provide the pre-sentence report, and an open-ended but specific list of issues that need to be dealt with in the report is provided (par 3.3.35; cl 34).

Proposal	Acceptability of proposal
(1) Retaining correctional supervision.	
(2) Adding community service as a specific form of 'community penalty'.	
(3) Aligning the conditions of correctional supervision with that contained in the Correctional Services Act, 1998.	
(4) A wider range of stakeholders may provide the pre-sentence report.	
(5) Issues that should be dealt with in the report, such as a recommendation on the conditions which should be added, why the offender is a suitable candidate, a proposed programme, information on his family background.	

4.8 Reparation

This sentence is created following the finding that increased emphasis must be placed on reparation for victims of crime. It involves both restitution (restoration of an item of property to the owner) and compensation (making good of damage resulting from the crime (par 3.3.37).

It is proposed that reparation be a substantive sentence mostly as the proposals in the discussion paper, where reparation was provided for as a condition of other kinds of sentences (as presently), were seen as unnecessarily complicated. The Commission was convinced by the opinions of international experts that this was the way to go (par 3.3.39). Reparation is instituted as a sentence that must be considered in every case. It must be related to the means of the offender and if reparation and a fine could be imposed for the same offence, preference must be given to reparation (par 3.3.40; cl 37(1) and (5). Enforcement of payment of reparation is provided for in much the same way as the fine (cl 38 to 40), providing increased protection of the victim.

Proposal	Acceptability of proposal
(1) Instituting 'reparation' as a substantive sentence.	
(2) Including both restitution and compensation as part of reparation.	
(3) Considering the means of the offender.	
(4) Enforcing payment in the same manner as fines.	

4.9 Caution and discharge

There is a clear need for this sentence. However, it should be included in the list of available sentences, rather than tucked away in the provision for suspended sentences. It should also be possible for the court to order that the conviction should not be recognised as a previous conviction (paras 3.3.42 to 3.3.44; cl 41).

Proposal	Acceptability of proposal
(1) Retention of caution and discharge.	
(2) Including it in the list of available sentences.	
(3) Provision for an order that the conviction shall not be recognised as a previous conviction.	

5 Further provisions regarding victims of crime

5.1 Victim impact statements

A 'victim impact statement' is a statement by the victim, addressed at the presiding officer for consideration in the sentencing process (par 3.4.21). It explains the effect of the crime on the victim, both present and future, and may also include a suggestion regarding sentencing. The importance of the victim in the criminal process compels provisions in this regard, to facilitate admissibility of such statements, as well as safeguards against prejudicing the offender with falsehoods (par 3.2.24). Instead of

defining victims, the particulars that might be relevant are set out: damage, loss or destruction of property; any injury; loss of income or support.

Proposal	Acceptability of proposal
(1) Placing the onus on the prosecutor to consider the interests of the victim (cl 47(1)).	
(2) Definition of damage or injury.	
(3) If the contents of the statement is disputed the victim must testify in court.	
(4) Silence of the bill with respect to the effect that the victim impact statement should have on the sentence.	

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