

CHAPTER SIXTEEN
SENTENCING, VICTIM IMPACT STATEMENTS
AND PLEA BARGAINING

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1. THE SENTENCING OF CHILD SEXUAL OFFENDERS

The Project Committee takes cognizance of the Child Justice Bill's provisions regarding the sentencing of child offenders and states that the Child Justice Bill should apply to all child offenders including child sex offenders¹.

However the Project Committee recommends that the specialised sexual offences court have additional powers to make orders to best suit the circumstances of the child sex offender.

It is submitted that this is unnecessary. The Child Justice Bill provides a catch all provision in sections 87(1)(f) and 93(3)(j) to allow for any other sentence "appropriate to the circumstances of the child and in keeping with the principles of this Act". So the orders envisaged by the project Committee could be accommodated through these sections.

In addition section 73(1) obliges any court hearing the case of a child accused to apply the provisions of the Child Justice Bill and this would include the specialised sexual offences courts.

¹ Paragraph 41.13.2 of the discussion paper

Furthermore, it is submitted that the draft Sexual Offences Bill has omitted, in section 28, to make reference to the sentencing of a child offender in terms of the Child Justice Bill. We submit that the word “adult” be inserted between the words “Any” and “person” and that a sub clause be added to read:

“ Any child who is convicted of an offence in terms of this Act, must be sentenced in accordance with the provisions of Chapter 9 of the Child Justice Act, Act xx of 20xx.”

We further submit that the purpose of sentencing and the sentencing principles of the Child Justice Bill are in accordance or similar with the sentencing principles outlined in the Draft Sentencing Framework Bill. The purposes of sentencing² a child offender in terms of the Child Justice Bill are:

- a) to encourage the child to understand the implication of and be accountable for the harm caused;
- b) to promote an individualised response which is appropriate to the child’s circumstances and proportionate to the circumstances surrounding the harm caused by the offence;
- c) to promote the reintegration of the child into the family and community;
- d) to ensure that any necessary supervision, guidance, treatment or services which form part of the sentence can assist the child in the process of reintegration.

We submit that the above principles are echoed in sections 3(1), 3(2), 3(3)(c) of the Draft Sentencing Framework Bill.

2. PLEAS AND PLEA BARGAINING

² Chapter 9 of the Child Justice Bill, section 86

The Criminal Procedure Second Amendment Act 62 of 2001 was published in the Government Gazette on 14 December 2001.³ The purpose of this Act was to amend the Criminal Procedure Act, 1977 to allow a prosecutor and an accused to enter into a plea and sentence agreement and to provide for matters connected therewith. This act seeks to regulate and legalise the operation of plea and sentence agreements which have been taking place in South Africa, even in the absence of legislation.

We agree that while the option of “plea bargaining” is viewed by the public as being “soft on criminals”⁴, a procedure that provides for plea and sentence agreements will have important advantages for the criminal justice system. A system which formalises plea agreements and which makes the outcome of the cases more predictable will make it easier for practitioners to permit their clients who are guilty to plead guilty.⁵ This will certainly assist the courts in securing convictions of perpetrators of sexual offences and will certainly keep the perpetrators within the criminal justice system. In this way lengthy trials which may possibly result in an acquittal (especially when the victim is a child and is the only witness) can be avoided. Due to the nature of and evidence in sexual offence trials, it is often difficult to secure such convictions.⁶ Such a procedure will also protect victims against publicity and against having to be subjected to cross-examination in court.

We agree with the recommendation that provision should be made in the plea bargaining process to consult the complainant or in the case of a minor, the minor complainant and his or her parent, guardian or person in loco parentis.⁷ This is in line with the principles of restorative justice in that the victim is given a say in the process. However, this recommendation fails to stipulate as to which stage in the process the victim should be consulted. It is proposed that a victim is consulted immediately after the prosecution is made aware that the accused wishes to negotiate a plea and sentence agreement (even though these situations might be rare in sexual offences matters). Such consultation must happen before the agreement is finalised. It is also proposed that the process and reasons as to why a

³ Volume 438, Cape Town, No 22933. Published for general information.

⁴ Discussion paper, project 107, page 290

⁵ Executive summary, project 73

⁶ Discussion paper, project 107, page

⁷ Discussion paper, project 107, page 291

plea and sentence agreement is being considered be explained to the victim. The victim's views and objections on the agreement should be obtained and considered.

We further propose that when a plea and sentence agreement is being considered in respect of a sexual offence matter, the purpose and guidelines of the Sexual Offences Act should be kept in mind and applied throughout the process.

3. VICTIM IMPACT STATEMENTS

The common feeling among victims is that once they have laid a charge, they are hardly ever consulted or informed of the process which follows. At most, they are asked, either by the prosecutor or the investigating officer, to come to court on the day of the trial to either be consulted and to give evidence. The accused, on the other hand, has the luxury of consulting with his legal representative often before the trial and sometimes on more than one occasion. Victims often feel like outsiders to the process and have therefore demanded procedural rights in order to form part of and be acknowledged in the legal process.

The Commission sees the need for the introduction of Victim Impact Statements and hence supports the inclusion of a clause on victim impact statements, in either oral or written form, in the draft Sentencing Framework Bill.

We agree that victims be provided with the right to submit victim impact statement either orally or in written form. However, the provision of victim impact statements should be voluntary and victims should not be forced to submit these statements should they not wish to. The absence of a victim impact statement in a particular case should not result in a negative inference being drawn or to the conclusion that the crime did not cause any harm, loss, emotional suffering, etc, to the victim.

Further, when the victim is a child, it is recommended that the services of a child psychologist be made available (where possible) to assist in explaining and describing the impact of the harm and emotional trauma suffered by the child as a result of the offence. Most times, neither parents nor family members of the child, may be able to comprehensively explain the extent of harm suffered by the child.