

# CHAPTER FIFTEEN

## SENTENCING OF ADULT SEXUAL OFFENDERS

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### 1. INTRODUCTION

Recent case law relating to rape has illustrated the tension between individualization and uniformity of sentencing practices by the South African judiciary. The courts have criticized both the rigidity and vagueness of mandatory minimum sentences. This criticism of “uncertainty” reflects a bid to contest the reallocation of sentencing power created by the Criminal Law Amendment Act 105 of 1997. Criticisms levelled against the Act have included the poor drafting of Section 51 - 53 of the aforesaid Act, grossly disproportionate sentences, and alleged efforts by the legislature to curb judicial discretion.

There is ample evidence to suggest that the vague terminology and lack of guiding principles within the Act (i.e. *substantial and compelling circumstances*) has generated discrepancies in both prosecutorial and judicial interpretations of the Act. Though the provisions set out in the Criminal Law Amendment Act (195 of 1997) are only temporary until the Sentencing Framework is complete, the use of legal nomenclature such as substantial and compelling circumstances is likely to be introduced through some similar formulation with regard to mitigating circumstances in this proposed sentencing framework. The development of the Sentencing Framework Bill does not guarantee that the court will be obliged to impose a prescribed sentence. While the sentencing framework may attempt to limit and even

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<sup>1</sup> This submission draws, in part, on Artz, L, & Quenet, D. (2001) “Comments on Discussion Paper 91 on Sentencing: A New Sentencing Framework” submitted to the South African Law Commission Project Committee on Sentencing. D. Quenet is an attorney at the Women’s Legal Centre, Violence Against Women Project.

reconcile the variable measures of discretion by the judiciary through the provision of criteria that justify departure from a prescribe sentence, the court may continue to have wide discretionary powers in cases of sexual assault and other serious offences.

The Sexual Offences Project Committee provides a fair appraisal of sentencing developments through case law, and recognises that the Criminal Law Amendment Act has not achieved its goal in bringing about consistency in sentencing. It has also supported the contention that “strict sentencing is required in order to stem the ever increasing wave of serious and more particularly violent offences”.

The New Sentencing Framework Bill is broad, providing sufficient room for the development of appropriate sentencing guidelines and guideline judgements. However, aspects of the Sentencing Framework Bill require further specification to avoid the criticisms directed at mandatory minimum sentences. The Project Committee on Sexual Offences is in a good position to offer the Project Committee on Sentencing valuable guidelines and principles for sentencing sexual offences.

Recognising that the Committee on Sexual Offences has attempted to limit discussion on sentencing because of the legal reform process surrounding sentencing guidelines, this submission will comment on section 41.15 (evaluation and recommendations) set out in the Sexual Offences discussion paper as well as on the recommendations surrounding sex offender orders in chapter 42 (Part 1). This submission will then alert the Committee on Sexual Offences to provisions within the Sentencing Framework Bill that need attention in order to ensure effective and appropriate sentencing of sexual assault cases (Part 2).

It is important to note that the scope of this analysis is confined to the sentencing of **adult sexual offenders**. Recommendations regarding the sentencing of young offenders is contained in Chapter 15 of this submission.

<b>PART 1</b>
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## SEXUAL OFFENCES:

### CHAPTER 41: THE SENTENCING OF SEXUAL OFFENDERS

It is widely recognised that disparities in sentencing have been related to a number of factors. The Commission has included factors such as judicial resistance to the limiting of judicial discretion, the limited number crimes that the Criminal Law Amendment Act 105 of 1997 encompasses, the lack of clarity and consensus surrounding what constitutes 'substantial and compelling circumstances' and other related difficulties of establishing uniformity in sentencing. It is questionable as whether 'judicial resistance' and interpretation of sentencing guidelines will be adequately dealt with by the new sentencing framework or the interim measures set out in sections 41.15.4.1 – 41.15.4.7 of the discussion paper.

In light of the fact that the interim arrangement surrounding sentencing is the establishment of the Sentencing Council, which has some way to go before being realised, it is of concern that the Sexual Offences Project Committee has largely deferred recommendations surrounding the sentencing of sexual offenders to the Project Committee on Sentencing.

A face-value analysis of the two discussion documents reveals potential areas of incongruity or variance in opinion between the two proposals. These may include:

1. What constitutes a "serious offence".
2. What constitutes a substantial or compelling circumstance or any other mitigating factor that allows the judiciary to depart from a prescribed sentence.
3. The conditions or criteria that prescribe when community-based correctional services may be utilised as a sentencing option.
4. What mandatory minimum sentence(s) should be imposed in cases of sexual assault.
5. The utilisation of dangerous offender assessments.
6. (Other) evidence relating to the interests of the victim at sentencing.

It is recommended that the Project Committee on Sexual Offences attempt to draft preliminary recommendations on the above areas for the Sentencing Committee's consideration as a matter of urgency to guide the development of sentencing practices in relation to sexual offences.

## **CHAPTER 42: OTHER TREATMENT OPTIONS FOR SEXUAL OFFENDERS**

### **Sex Offender Orders**

The Commission's recommendation that sex offender orders be employed where the offender poses a serious risk to a victim or the community is fully endorsed. It is strongly recommended, however, that:

**The order is not used as a sentencing option, but instead as –**

- 1) a condition of release, probation or parole;**
- 2) as part of the offender's bail condition;**
- 3) or to supplement a sentence of correctional service, where the court can order the offender not to contact the victim telephonically, or not to have any other person related to the offender contact, harass or intimidate the victim by any other means.**

### **Failure to Comply with Conditions of Sentence or Sex Offender Orders**

It is widely accepted that the SAPS and Correctional Services Department are under-resourced and that the police and correctional services officers have a limited capacity to adequately monitor whether offenders are complying with the conditions of community corrections or any other order imposed by the court. Accordingly, it is submitted that the victim, or any interested party, should be entitled to bring an application to court to lodge a complaint that the offender has failed to comply with the conditions of the order. It is therefore submitted that a provision in this regard is to be incorporated into the Act.

## PART 2

### REFLECTIONS ON THE SENTENCING FRAMEWORK BILL: MOVING TOWARDS MORE APPROPRIATE SENTENCING IN CASES OF SEXUAL ASSAULT

#### Serious offences

The term “serious offences” is used repeatedly throughout the Sentencing Framework, but is not defined within Section 1. The “seriousness” of offences has had wide interpretation by the courts. **S v Bernard Abrahams**<sup>2</sup> is an example of where seriousness of the offence is adjudicated on the basis that the offence did not threaten society beyond the family unit and where the court was not satisfied that the offence was a serious case of rape. Accordingly, it is quite evident that the term “serious” requires definition.

The Commission should make recommendations as to what constitutes a “serious” sexual offence to guide the development of the Sentencing Framework Bill.

#### Section 2: The Purpose of Sentencing

The purpose of sentencing should not only be to limit the rights of the offender in accordance with the constitution but also to balance the rights of the offender with the rights of the victim when dealing with victims of violent crimes. This will ensure that victims rights, in accordance with Section 12 (1)(c) and Section 7 (2) of the Constitution of the Republic of South Africa, Act 108 of 1996, are protected.

Accordingly, our submission is that Section 2 should read as follows:

**“The purpose of sentencing is to punish convicted offenders for the offences they have committed *and to protect the rights of victims of serious offences by***

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<sup>2</sup> Unreported, case no 88/9/99, High Court, Cape of Good Hope Provincial Division.

**limiting *the offenders* rights and imposing obligations on them in ways that are not contrary to the Constitution...”**

### **Section 3: Sentencing Principles**

- **Section 3(1)(b)**

In determining proportionate sentences when dealing with serious crimes such as sexual assault, regard should be had to the harm the offence causes the victim and not only the harm done to society.

Accordingly, our submission is that Section 3(1)(b) should read as follows:

**“In determining the proportionate sentences regard must be had to the seriousness of the offence committed, *the harm it has caused to the victim and the social harm caused...*”**

- **Section 3 (1)(d)**

When dealing with serious crimes such as sexual assault, previous convictions should not be considered in determining whether the sentence may be modified. Current case law relating to the mandatory minimum sentencing legislation demonstrates that previous convictions or the lack thereof has been used to circumvent the purpose and intent of mandatory minimum sentences.

Accordingly, our submission is that Section 3 (1)(d) should read as follows:

**“The presence .... reasonable extent *except in cases of serious offences*”**

- **Section 3 (3)**

A new clause should be inserted after Section 3(2) to prevent the use of traditional mitigating factors that have been incorrectly utilised by the courts in the application and interpretation of what is regarded as “*substantial and compelling circumstances*”.

This has provided the judiciary with a basis not to apply the mandatory minimum sentence as set out in Section 51 - 53 of the Criminal Law Amendment Act of 1997.

It is recommended that this clause should read as follows:

**“If any conviction relates to a serious offence in determining what are substantial and compelling circumstances that decrease significantly the moral blameworthiness of the offender, the Court may not take into account the following factors:**

- 3(3)(1) Lack of evidence of either physical or psychological injury;**
- 3(3)(2) the age of the offender where the offender is 16 years or older;**
- 3(3)(3) offender characteristics including level of education, socio-economic position, culture, marital status, occupation, family status, community or political standing;**
- 3(3)(4) victim characteristics including previous sexual history, social status, occupation or provocative behaviour;**
- 3(3)(5) the lack of use of a dangerous weapon or firearm;**
- 3(3)(6) whether it is the offenders first offence of this nature;**
- 3(3)(7) whether the offender was under the influence of drugs or alcohol;**
- 3(3)(8) the rehabilitation or treatment potential of the offender; and**
- 3(3)(9) institutional factors including the capacity within prisons or other correctional supervision or community based programmes.”**

#### **Section 4: Sentencing Guidelines**

- **Section 4(2)(a)**

In light of the intolerably high levels of and sexual offences currently being committed in South Africa, and the ongoing pervasive nature of offences such as incest, rape and domestic violence, that involve multiple offences over a long period of time, it is recommended that where convictions fall within these categories one previous conviction should not enable the offence to be given a proportionately lesser rating.

Our submission is that Section (4)(2)(a) should be amended accordingly:

**“committed by a person with two or more relevant previous convictions *except where such offences relate to sexual offences or domestic violence then one or more relevant previous convictions and other categories or...*”**

- **Section 4(2)(b)**

When dealing with sexual offences the capacity of the correctional and community based programmes should not be taken into account due to the potential risk of further harm for such victims. We therefore recommend the insertion of the following sentence at the end of Section 4(2)(b).

**“... *except in cases of serious offences, sexual offences or domestic violence.*”**

- **Section (4)(6)(a)**

As the framework of the Sentencing Framework Bill is to create uniformity of sentencing practices, it is imperative that when any departure from the normative sentencing option occurs, written reasons for such departure shall be included. Accordingly, a new clause needs to be inserted after Section (4)(6)(a) should read as follows:

**Section (4)(6)(a)(i) “In cases where the departure goes beyond an increase or decrease of 15 percent then written reasons for such departure are to be provided.”**



- **A New Section (4)(9)**

When guidelines are developed, a new clause should be inserted after Section 4(8) to prevent the use of traditional mitigating factors that have been incorrectly utilised by the courts in the interpretation of substantial and compelling circumstances in terms of Section 51 - 53 of the Criminal Law Amendment Act.

Accordingly, the clause should read as follows:

***“If any conviction relates to a serious offence in determining what are substantial and compelling circumstances that decrease significantly the moral blameworthiness of the offender, the Court may not take into account the following factors:***

- 3(3)(1) Lack of evidence of either physical or psychological injury;***
- 3(3)(2) the age of the offender where the offender is 16 years or older;***
- 3(3)(3) offender characteristics including level of education, socio-economic position, culture, marital status, occupation, family status, community or political standing;***
- 3(3)(4) victim characteristics including previous sexual history, social status, occupation or provocative behaviour;***
- 3(3)(5) the lack of use of a dangerous weapon or firearm;***
- 3(3)(6) whether it is the offenders first offence of this nature;***
- 3(3)(7) whether the offender was under the influence of drugs or alcohol;***
- 3(3)(8) the rehabilitation or treatment potential of the offender; and***
- 3(3)(9) institutional factors including the capacity within prisons or other correctional supervision or community based programmes.”***

- **A new Section 4(10)**

A sentencing guideline or guideline judgment needs to incorporate what a mandatory minimum sentence means. In the cases of serious offences, it is recommended that the minimum mandatory sentence should not be suspended; neither should probation, parole, or any other form of release be granted while the minimum period of incarceration is being served. Accordingly any credits earned against a sentence shall only begin to accrue after the expiration of the mandatory minimum period. The mandatory minimum sentence and guideline shall therefore expressly limit the availability of both parole and “good time” credits earned during incarceration.

Accordingly we submit that Section 4 (10) should read:

***“A sentencing guideline or guideline judgment must specify a mandatory minimum period of incarceration or correctional service before parole is considered.”***

## **Section 5: Sentencing Council**

- **Section 5(2)(c)**

Given the frequency and extent of violence against women and the impact that these crimes have on victims of such offences and the specialized nature of such work, it is recommended that a specialized person from the Directorate of Public Prosecutions Sexual Offences Unit be included.

Accordingly, it is submitted that Section 5 (2)(c) should include the following clause at the end of the sentence which should read as follows:

***“... Public Prosecutions and a Senior State Advocate from the Sexual Offences Unit of the National Directorate of the Public Prosecutions.”***

- **Section 5(2)(h)**

In Section 5 (2)(h) it is recommended that at least one of the two representatives of the public have specialist knowledge in the area of violence against women due to the pervasive nature of such offences, the impact on society and the complexity of the issue.

### **Section 6: Office of the Sentencing Council**

As no provision has been made for the necessary research to determine the guidelines, assess the trends in judgments and other empirical or legal research as to the impact and effect of such sentences, it is recommended that the Sentencing Council include an additional member to conduct such research.

Our submission is that a new clause is inserted after Section 6(6) to read as follows:

***“(7) A legal researcher, with advanced knowledge of empirical research in crime and criminal justice”.***

### **Section 7: Functions of the Sentencing Council**

One of the functions of the Council should be to evaluate and review the effectiveness of current community correctional programmes (i.e. diversion programmes) and the effectiveness of the community correctional programmes one year after the implementation of the sentencing or guideline judgments.

### **Section 10: Action of the Sentencing Council on Request**

Groups with specialist knowledge relating to specific areas of offences, who have an interest in the issues of a specific offence, should be entitled to make submissions regarding the review or establishment of a sentencing guideline or guideline judgment within that particular field.

It is submitted that the following should be inserted in Section 10(1):

***“... the Minister of Correctional Services, Parliament or any interested party may request...”***

### **Section 12: Guideline Judgments of the Supreme Court of Appeal**

Groups with specialist knowledge relating to specific areas of offences, who have an interest in the issues of a specific offence, should be entitled to make submissions regarding the review or establishment of a sentencing guideline or guideline judgment within that particular field.

Accordingly we submit that Section 12(3) includes the following:

***When the Sentencing Council is notified in terms of subsection (2), it or any interested party may in addition make representations ...***

### **Section 16: Declaration as a Dangerous Criminal**

As this provision is seldom used, despite the number of offences in South Africa that are extremely violent in nature, many criminals qualify as dangerous. It is therefore submitted that in order for Section 16 and Section 17 to be utilized by the judiciary, the declaration or inquiry into the dangerousness of a criminal should be limited to **"extremely serious offences"**.

### **Section 17: Inquiry into a Potentially Dangerous Criminal**

Psychiatric testimony on the dangerousness of an offender tends to focus on the mental and emotional abnormality of accused (psychological disorder), rather than their potential for violent and dangerous behaviour. Prediction of future behaviour is left to the judiciary. The judiciary utilises the diagnostic information provided by the mental health practitioner with his or her own observations of the accused's conduct.

This provision is seldom used despite the number of offences in South Africa that are extremely violent in nature committed by dangerous criminals. It is submitted that in order for Section 16 and Section 17 to be utilized by the judiciary, the declaration or

inquiry into the dangerousness of a criminal should be limited to **"extremely serious offences"**.

In accordance with our submission in Section 16 and for the effective implementation thereof it is recommended that the use of **"may"** in Section 17 (1) is deleted and replaced with the word **"shall"**.

### **Section 19: Declaration as a Habitual Criminal**

- **Section 19(1)**

Due to the impact of sexual offences on victims of such crimes, as well as the sometimes pervasive nature of these crimes - which may involve multiple offences over a long period of time - it is recommended that where convictions fall within these categories the impact on the victim is considered.

Accordingly it is submitted that in Section 19(1) the insertion of **"and the victim"** after community needs to be incorporated.

## **Section 19(2)**

To bring this section in line with the Sentencing Principles set out in Section 3 above, it is recommended that the age of the accused should be “**16**” years and not “**18**”.

## **Section 26: Community Corrections**

On a general systems level, the use of community corrections will result in an appreciable expansion of the criminal justice system, with an increasingly larger number of individuals requiring supervision and control outside of the criminal justice system. The capacity of under-resourced correctional service officials to effectively monitor community-based programmes is indeed questionable. Moreover, the abstractly desirable goals of rehabilitation and restoration of the rights of victims may not be achieved in cases of serious offences against the person. In cases of rape, for instance, there is a lack of conclusive empirical support for the rehabilitative effectiveness of community corrections for adult sexual offenders. Mediation programmes, in particular, do not adequately address the power imbalances between the victims of domestic and sexual offences and the perpetrators of such crimes. Duress and intimidation are not diminished within a mediatory process.

**It is therefore recommended that -**

- a) treatment, development and support programmes set out in section 26(1)(f) are evaluated for their effectiveness in achieving the goals of community corrections in section 26(1); and**
- b) Section 26(3)(g) provides that mediation between victims and offenders is not used as a sentencing option in cases of serious crimes (including domestic violence and rape).**

## **Section 27 – Requirements for Imposing Community Corrections**

As community corrections may impact on the safety and security of the victim of the offence, it is necessary for the probation officer to liaise with the victim. Accordingly

we submit that a new section is inserted after Section 27(2)(g) which will read as follows:

**(h) “A statement by the victim relating to the impact of the crime when dealing with serious offences”**

### **Section 28: Restitution and Compensation Orders**

As many victims of sexual offences suffer from psychological harm and require therapy and or medical attention - such as post exposure prophylaxis where a victim has contracted HIV - injury needs to be extended to incorporate psychological or other injury. Because of the costs associated with litigating a damages action, it is more cost effective both for the victim and the state to give the full import to restitution and compensation orders in this Bill. Traditionally these restitution and compensation orders are limited in its applicability as the current limitation of such orders is R50 000.00. We therefore recommend that no limitation is set when dealing with these claims.

Accordingly we submit that Section 28(1)(b) should incorporate the following:

**“In the case of bodily, *psychological or other injury* to or...” and the insertion of the following after pecuniary damages “*and non pecuniary damages, including loss of income or support, ...*”.**

### **Section 30: Priority of Restitution or Compensation**

In cases of serious offences an order of restitution or compensation should not be regarded as the primary sentence or a mitigating factor in sentencing.

### **Section 46: Evidence Relating to the Interest of Victims**

We endorse the Sentencing Project Committee’s inclusion of evidence relating to the interests of victims by recognising the impact that offences have on victims through substantive law.

## **Section 46(1)(a)**

“Injury” should be expanded to include other injuries that victims may suffer from as a result of the offence. This section is therefore too limited as it currently stands. Furthermore, many victims of sexual violence suffer from psychological injury and trauma. We therefore submit that injury needs to be extended to include either psychological or other injury.

Accordingly, it is submitted that (a) is to read as follows:

***“physical, psychological or other injury, loss or damage resulting from the offence;***

## **A New Section 46(1)(c)**

While we acknowledge the broad discretion which the courts have in determining an appropriate sentence, we believe that victims should be allowed an opportunity to express their opinion in the victim impact statement on the question of an appropriate sentence, as permitted in other jurisdictions. However the victim impact statement is currently limited to the harm suffered by the victim and does not address this issue.

We therefore submit that a new section should be incorporated after Section 46(1)(b)

***“(c) ... the victim’s recommendation of an appropriate sentence”***

## **Section 46(2)**

Furthermore, Section 46(2) should include a person who has a substantial interest in the case to cover the position where the victim is deceased. It is therefore submitted that:

***“A victim impact statement may be made by a person against whom the offence was committed or by a person nominated by such victim or by any***



***other person who has a substantial interest in the case or has suffered harm as a result of the offence.”***

#### **Section 47: Victims and Release of Offenders from Prison**

As victims of sexual violence are often not provided with information relating to the release of offenders, it is submitted that the following words need to be inserted.

Accordingly, Section 47 (1) should read as follows:

***“Where a person has been convicted of an offence involving violence, including sexual offences or domestic violence against another person...”*** .

#### **Section 48: Consideration of Restitution and Compensation**

In accordance with the submission set out in Section 28 the following needs to be inserted in Section 48(1) & (2) which should read as follows:

## **Section 48(1)**

**“...has been requested by the prosecutor or any party that suffered damage or *non pecuniary damage* or loss, consider making...”**

## **Section 48(2)**

**“Where the party suffering damage or *non pecuniary damage* or loss ...”**

## **Section 49: Determining the Amount of Restitution or Compensation**

In accordance with the submission set out in Section 28 the following needs to be inserted in Section 49(2)(c) which should read as follows:

**“*any harm including both physical, psychological or any other harm* done to, or loss suffered by, any person to whom restitution compensation may be ordered.”.**

## **Section 51: Sentencing Judgement**

In order to ensure uniformity of sentencing is maintained, the departure from any guideline judgement must be given in writing. Accordingly, the insertion of a new Section 51(c) after Section 51(b) is to be included which will read as follows:

**(c) “*Written reasons for the departure from a guideline judgement or sentencing guideline shall be given by the Court where it has found that there are substantial and compelling circumstances that increase or decrease significantly, the moral blame worthiness of the offender*”.**