Submission on the Criminal Law (Sentencing) Amendment Bill [B15-2007]

Submission to the Portfolio Committee on Justice and Constitutional Development, National Assembly, 15 June 2007

Introduction

The Criminal Law (Sentencing) Amendment Bill (the Amendment Bill), 2007 introduces a number of amendments to the Criminal Law Amendment Act 1997 in relation to minimum sentencing provisions in South Africa. Whilst minimum sentencing legislation was introduced in South Africa in reaction to the public outcry over the unacceptably high levels of crime in our society, it has also attracted a fair deal of criticism. Thus far, there have been two constitutional court challenges that have sought to attack the constitutionality of the legislation. Both of these challenges have failed.

Minimum sentencing was initially introduced as a temporary measure pending further developments that would improve the sentencing regime within our criminal courts. It was not introduced with the intention that it would be a permanent feature within our system. The Commission is concerned that this Bill will make minimum sentencing a permanent feature in our law and that there has not been a thorough debate on the issue.

The mandate of the South African Human Rights Commission

The mandate of the South African Human Rights Commission is set out in section 184 of the Constitution and states as follows:

> "Human Rights Commission
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> **Functions of Human Rights Commission**
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> 184. (1) The Human Rights Commission must-
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> (a) promote, respect for human rights and a culture of human rights;

(b) promote the protection , development and attainment of human rights; and

(c) monitor and assess the observance of human rights in the Republic."[1]

In terms of the Commissions anticipated outcomes, as set out in the 2007 / 2008 Strategic Plan, "(t)he SAHRC works towards affirming human dignity by facilitating access to all human rights, with special emphasis on the right to equality, economic and social rights and freedom from crime and violence".

The Commission has included in its latest Strategic Plan the outcome of freedom from crime and violence in acknowledgment of the need to address more actively issues that affect society and communities in this sphere. More specifically, in relation to the Amendment Bill, the commission is concerned about the practical long-term impacts such legislation may have upon the rights of those who are incarcerated in terms thereof[2]. The Commission also questions the desirability of such legislation in terms of whether it supports and promotes the concept of 'restorative justice', which has been adopted by Correctional Services in this country.

The Criminal Law (Sentencing) Amendment Bill, 2007

The Commission will address the following aspects of the Bill in this submission:

- The removal of the provision that allowed for minimum sentencing to be extended every two years
- The removal of the provision requiring a regional court to refer an accused for sentencing in the high court and thereby extending the jurisdiction of the regional courts to hand down life sentences
- Identifying what does not constitute substantial and compelling circumstances in relation to the offence of rape
- Allowing the presiding officer to take into account during sentencing the amount of time an accused has been incarcerated whilst awaiting trial
- Various amendments to the ages at which children convicted of crimes will attract a minimum sentence

Minimum sentencing is leading to court congestion

[1] The Constitution of the Republic of South Africa Act 108 of 1996 section 184.

[2] "It is only if there is a willingness to protect the worst and weakest amongst us that all of us can be secure that our own rights will be protected."*S v Makwanyane and another* 1995 (3) SA 391 at para 88.

It has been found that minimum sentencing legislation has led to court congestion in that:

- The current legislation provides for a split procedure whereby the accused must be referred by the regional court to the high court for sentencing
- More accused are pleading 'not guilty' as there is little space for plea bargaining. However, it must be pointed out that plea bargaining in itself, if managed correctly, ought not to lead to substantially lower sentences and disparities in sentencing generally.
- Because of the harshness of the sentences imposed this has led to an increase in the number of appeals[3].

Thus, the practical impact of mandatory sentencing is that it congests the criminal justice system.[4]

Minimum sentencing is aggravating overcrowding in prisons

The previous Inspecting Judge of Prisons, Hanes Fagan was an ardent campaigner against minimum sentencing. He spoke frequently about how minimum sentencing will exacerbate prison overcrowding in South Africa[5]. The percentage of prisoners serving terms longer than 10 years has increased from 19% in 1998 to 36% in 2004 and this figure is expected to increase[6]. There are concerns that the infrastructure of prisons will be unable to sustain the number of prisoners who are being incarcerated in terms of this legislation.[7] There is no evidence that minimum sentencing serves as a deterrent to reduce violent crime and ensure safer communities.[8] Given the current status quo it can be expected that the continuation of imposing minimum sentences will ensure the persistence of overcrowding in our prisons.

[3] "Incarceration rates are particularly sensitive to the length of sentences rather than the number of sentences", in Redpath, J & O'Donovan, M, "The impact of minimum sentencing legislation in South Africa", in "Sentencing in South Africa", Conference Report 1, 2006, Open Society Foundation for South Africa, p47-8

[4] Ibid

[5] *See doe example* Fagan, H, "Our Bursting Prisons", The Advocate, 2005 Also, "Incarceration rates are particularly sensitive to the length of sentences rather than the number of sentences", in Redpath, J & O'Donovan, M, "The impact of minimum sentencing legislation in South Africa", in "Sentencing in South Africa", Conference Report 1, 2006, Open Society Foundation for South Africa

[6] Ibid

[7] Open Society Foundation for South Africa Conference Report: Sentencing in South Africa, The impact of minimum sentencing legislation in South Africa page 19 www.osf.org.za/publications.

[8] Ibid, p 25.

The Commission is consequently concerned with the impact that overcrowding has on the rights of prisoners who are incarcerated in conditions that negatively impact on their right to dignity.

There is a need for a fair sentencing regime in South Africa

Whilst minimum sentencing is leading to a number of practical challenges for the judicial and criminal justice system in South Africa, this in itself is not a singular rationale for why minimum sentencing should be abolished. Practical issues related to sentencing can be addressed through resources. What is needed is a fair sentencing regime that treats like cases in like manners. Minimum sentencing creates too much rigidity in the system and this can lead to distortions and at times inappropriate sentences being handed down. Minimum sentencing is a convenient mechanism to give effect to the public outcry against violence and crime in South Africa. However, issues of sentencing need to addressed more holistically. There is a need for a robust in depth discussion on appropriate sentencing frameworks in South Africa.

In light of the above, the Commission would prefer for minimum sentencing to be done away with and for there to be a serious debate about appropriate sentencing frameworks in South Africa. The Commission therefore does not support the removal of the provision that allowed for minimum sentencing to be extended every two years.

The South African Law Reform Commission has done extensive work on sentencing frameworks. This works lays a good basis for an in depth discussion and development of sentencing frameworks in South Africa. The Commission strongly recommends that this is done.

The additional comments contained herein therefore address the Bill in the event that Parliament continues to proceed with minimum sentencing legislation.

The removal of the provision requiring a regional court to refer an accused for sentencing in the high court.

This provision in effect extends the jurisdiction of the regional courts to hand down life sentences. It further provides for an automatic right of appeal against such sentence. The Bill also amends the National Prosecuting Authority Act, 1998 in order that prosecution policy is amended to include directives indicating in which instances

prosecutions in respect of offences referred to in Schedule 2 of the Criminal Law Amendment Act, 1997 must be instituted in a High Court of first instance.

Whilst this provision is aimed at putting to an end the current practice of referring an accused, convicted of a crime that attracts a minimum sentence, to the high court for sentencing, it has also raised a number of concerns, including:

- Will the automatic right of appeal lead to greater case backlogs in the high courts?
- Do regional court magistrates have the necessary training and experience to impose these sentences?

Regional courts are not higher courts and therefore giving these courts the power to impose the highest possible sentence is problematic for the commission. Higher courts have the necessary inbuilt checks and balances in order to ensure that a life sentence is handed down in the appropriate manner. These checks and balances do not exist at the lower court levels,

The Commission is further of the view, that giving regional courts the jurisdiction to hand down life sentences with an automatic right of appeal to the High Court will lead to increased court backlogs. It is even questionable as to what it is that the proposed amendment will achieve as a substantial amount of cases that would have come before the high court will still come before the high court by way of appeal. In fact, this may even lead to more work for the judicial system in the future.

Identifying what does not constitute substantial and compelling circumstances in relation to the offence of rape

The courts have interpreted the term 'substantial and compelling circumstances' inconsistently in an attempt to evade the imposition of minimum sentences. In rape cases this has led to the perpetuation of stereotypical assumptions and outdated myths about rape.[9] There have been particular concerns in relation to the sentencing of the crime of rape. In order to address these concerns, the Bill identifies grounds that will not be considered as 'substantial and compelling circumstances. These are:

- any previous sexual history of the complaint;
- an accused person's cultural or religious beliefs about rape; or

[9] *See* O'Sullivan, M, "Gender and sentencing proceedings in South Africa", pp59, in Sentencing in South Africa, Conference Report, 25-26 October 2006, Open Society Foundation

- any relationship between the accused person and the complainant prior to the offence being committed.[10]

Whilst this amendment is welcomed in that it goes some way in ensuring that rape is treated at the sentencing stage with the seriousness that it deserves, the Commission is of the view that a broader debate on sentencing rape perpetrators is needed in South Africa. Sentencing and rehabilitative options in prison should focus on programmes that will ensure that men who have raped do not rape again when they are reintegrated back into society. Courts also need to consider carefully the role of the victims in sentencing and the impact, which the crime has had, and be alive to the fact that the psychological and emotional impact on the victim is not always visible[11].

The Commission is of the view that sentences need to be crafted individually. At the same time, there is a need for consistency within the judicial system and like cases need to be treated in a like manner. However this consistency cannot be achieved through the rigidity that minimum sentencing introduces into the system. For this reason, the Commission supports the introduction of a sentencing framework that would create discretion for the judiciary within a defined parameter.

What is evident form the case law and sentencing remarks is that there is a need for greater judicial training and education on the nature of crimes and, their impact on victims and society.

Allowing the presiding officer to take into account during sentencing the amount of time an accused has been incarcerated whilst awaiting trial

The Amendment Bill repeals section 51(4) of the Criminal Law Amendment Act 1997 and this in effect now allows a presiding officer to take into account at the time of sentencing the amount of time that an accused has already spent incarcerated as an awaiting trial prisoner. Given the current congestion in our courts and delays that are experienced in some cases, this provision is welcomed by the Commission.

[10] *See* clause 1 – section 51(2)(aA)(i) – (iii).
[11] In *S v Masiya*, Langa JP finds that rape and sexual assault is not only an assault on the body, but also the mind. Masiya v the Director of Public Prosecutions (Pretoria) and Another Case CCT 54/06 Decided on 10 May 2007 (as yet unreported)

Various amendments to the ages at which children convicted of crimes will attract a minimum sentence

The Constitution states that: "(e)very child has the right – not to be detained except as a measure of last resort" (Section 28(1)(g)). Minimum sentencing is a first resort measure and is not a measure of last resort where the accused was a child at the time that the offence was committed. It is therefore in conflict with the rights of the child contained in the constitution for minimum sentences to be handed down to persons who were children at the time that the offence was committed. The Commission would thus argue that minimum sentencing provisions ought not be applicable to children.

Conclusion

In 2000 the South African Law Reform Commission (SALRC) was tasked to investigate and report on the creation of a uniform sentencing framework.[12] The SALRC in its Discussion Paper on the matter made three recommendations; first to create an Independent Sentencing Council; second that sentencing guidelines should be set and, finally; that these guidelines must be placed in statutory format. The Commission would urge that more is done to ensure that we develop appropriate sentencing frameworks that are in line with a restorative justice framework.

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[12] The South African Law Commission , Discussion Paper 91 (Project 82) "Sentencing : A New Sentencing Framework" www.doj.gov.za/salrc/dpapers.htm.