



CRIMINAL PROCEDURE SECOND AMENDMENT BILL (PLEA BARGAINING)

*Submission to the Justice & Constitutional Development Portfolio Committee,
National Assembly, 12 October 2001.*

Introduction

The Criminal Procedure Second Amendment Bill seeks to amend the Criminal Procedure Act 1977 by introducing sentence agreements into South African criminal procedure.

The South African Human Rights Commission (SAHRC) welcomes the proposed legislation and supports it in that it will assist and contribute towards the more effective administration of justice. It is anticipated that the proposed legislation will ease the overburdened and clogged criminal justice system and reduce the current backlogs in our criminal courts. This in turn will alleviate the demands placed on the financial resources of the Legal Aid Board to provide legal representation to indigent accused. A more effective criminal justice system wherein criminal cases are speedily and effectively handled can alleviate some of the trauma experienced by victims of crime. It can also provide protection to victims who are intimidated, scared or too traumatized to participate in criminal proceedings. At a broader level a more effective criminal justice system will increase the confidence of the general public in the governments ability to combat crime and will promote respect for the rule of the law.

It is in keeping with the SAHRC constitutional mandate in terms of section 184(1) of the Constitution that this submission is made. In terms of the mandate the SAHRC is to: promote respect for human rights; promote the protection, development and attainment of human rights and monitor and assess the observance of human rights in the republic.

The SAHRC is interested in scrutinizing the legislation from a victim's perspective. The legislation has already been the subject of a South African Law Commission Discussion Paper. During discussion around the legislation it would appear that most attention has been given to the accused' constitutional rights. However, in light of other developments in our law such as the drafting of a Victims Charter, developments in the area of compensation legislation for victim's of crime and sentencing framework agreements it would be wise at this stage to

establish the impact of the proposed legislation on the rights of victims. There are also a few comments that the SAHRC wishes to make with regards to the rights of the accused.

It is trusted that the comments contained in this Submission will be given serious consideration by the Committee and where necessary the relevant amendments to the draft legislation in its present form will be effected.

1. The amendment

1.1. Plea Bargaining versus Sentence Bargaining

Plea-bargaining is popularly and broadly associated with the practice that is carried out in the United States. In a plea-bargain the accused offers a plea of guilty in exchange for some benefit from the state, such as being able to plead to a lesser charge, a lower sentence being imposed or both. However, strictly speaking, plea-bargaining should only refer to the bargaining process concerning the plea. Sentence bargaining would more accurately refer to the process of bargaining by the accused in exchange for some benefit from the State concerning sentence.

1.2. Plea-Bargaining in South Africa

The concept of plea-bargaining, in its narrow sense, as explained above, is already practiced in South Africa. The State has the prosecutorial prerogative and although plea-bargaining is not entrenched in statutory law it is practiced and recognized as lawful by our courts. The South African Law Commission in their *Fourth Interim Report on the Simplification of Criminal Procedure (Sentence Agreements) (Project 73)* thus saw no need to entrench this aspect in our law through legislation.

Sentence bargaining however is not recognized in South African law. In fact, there is a strong ethos that the sentencing prerogative is in the hands of the court and that the Prosecutor and the accused may not enter this arena save to suggest to the court an appropriate sentence. It is this aspect of "plea bargaining" that the amendment seeks to change by introducing legislation that allows that prosecutor to enter an agreement with the accused regarding the plea and sentence. It is thus more accurate to refer to the proposed legislation as sentence agreement legislation.

1.3. The proposed amendment to the Criminal Procedure Act

In summary, the draft legislation provides that the prosecutor and the accused may enter an agreement regarding plea and sentence. However, the Prosecutor may only do so after consultation with the police officials who are investigating the case, having due regard to the nature and circumstances relating to the offence and, if circumstances permit, after affording the complainant the opportunity to make representations regarding the contents of the agreement and the inclusion of a compensation order.

The contents of this sentence agreement, which must include reference to the fact that the accused had been informed of his fundamental rights, are disclosed in open court. Thereafter, the court conducts an inquiry wherein the accused confirms the contents of the agreement and that it was entered into freely and voluntarily.

Should the court be satisfied with the agreement, that the accused may be found guilty of the offence and that the sentence is appropriate, then the accused will be asked to plead. The court will find the accused guilty and impose the sentence as set out in the agreement.

Should however the court be of the opinion that a lesser or heavier sentence would have been appropriate then the court shall inform the prosecutor and the accused accordingly. Thereafter, the court may either impose a lesser sentence after providing an opportunity to the Prosecution to lead evidence on sentence; alternatively, the Prosecution or the accused may withdraw from the agreement. In this event, the trial will begin *de novo* and the sentence agreement shall not form part of the court record.

2. Commentary

2.1. Victims can make representations “if circumstances permit” Section 105(1)(b)(iii)

There is only a duty on the Prosecution to allow an opportunity to the complainant to make representations regarding the contents of the agreement and the inclusion in the agreement of a compensation order *if circumstances permit*. By granting a broad discretion to the Prosecutor, this provision fails to recognize the rights of victims within a victim-centric approach to criminal justice. Rather, it allows for the victim to be denied the opportunity: to receive information; be informed of major developments in the case; and the right to provide information on how the crime has affected the victim and her or his family.

This provision appears to be contrary to the *Draft Victim’s Charter* that was released by the *Department of Justice and Constitutional Development in August 2001*. The Draft Victims Charter promotes a victim-centric approach to crime prevention. This type of approach dates back to thinking within the Department of Justice since 1996 and is included in the National Crime Prevention Strategy.

In the Foreword to the Draft Victims Charter, the Minister states the following:

“Since the start of the debate on improved treatment of victims, we have listened to what victims say and we have learned from their experiences. It has been determined that victims often want more information on what is likely to happen and to be kept up to date with developments in their

cases. They want to be treated with respect when they attend court as witnesses and they want to know that their interests are being taken into account.” (***Foreword by the Minister of Justice and Constitutional Development in Draft Victims Charter, August 2001***)

The Draft Victims Charter seeks to set out clearly the services that victims of crime can expect to receive. It also explains the roles of key role players and how interaction with these role players should improve the treatment of victims of crime.

The Draft Victims Charter makes the following statements that are of relevance to a discussion on Section 105(1)(b) (iii)

“The prosecutor

95. Assigned to your case, will provide you with the opportunity for meaningful consultation prior to major case decisions; ...”

The wording “*if circumstances permit*” is vague and it is unclear under which circumstances a Prosecutor will be entitled not to consult with the victim. As sentence bargaining by its very nature implies that the accused receives some benefit from the State in exchange for a plea of guilty, it is to be taken that in most instances, the benefit received will be at the expense of the victim. For example, the accused will plead to a lesser charge and thereby receive a lesser sentence. From a victim’s perspective a sentence agreement would in many instances amount to a major case decision. Some victims may favor the speedy processing of their case as it would lessen the trauma caused by the crime and consequently not mind being not consulted, other victims may not. However, where the discretion to consult lies with the Prosecution the victims’ right to be consulted is compromised.

The Draft Victims Charter also sets out a victim’s right to receive information:

“You have the right to receive information

If you report a crime you can expect that the police will inform you-
89. that you may also request to be informed of the following:

- g. Any decision to withdraw or alter the charges substantially. ...”

For some time to come, it is highly unlikely that victims of crime will gain sufficient knowledge of the Victims Charter to fully appreciate the nature of their rights contained therein especially where these rights can only be accessed upon request. It is further unclear as to who, the police official or the Prosecutor, would determine what constitutes a substantial alteration to the charge.

By failing to inform the victim that the charge has been altered to entice a sentence agreement from the accused, the victim is denied the right to receive

information pertaining to his or her case. The alteration of a charge could also impact negatively upon the right to dignity of the victim in that the State and possibly the community are not recognizing the harm visited upon the victim by the accused by labeling it appropriately.

Submission

The words “ ... if circumstances permit, ...” should be removed from the draft legislation. Alternatively, the legislation should place a positive duty on the Prosecution, especially in cases dealing with serious crimes, to provide the victim an opportunity to be involved in the sentence agreement. Should the victim not wish to participate in the process or not be available, the Prosecutor must state so with reasons in the sentence agreement.

2.2. Victims voice at sentencing

The Victims Charter also makes specific reference to the opportunity that should be afforded to victims to make an impact upon the sentencing of the accused.

“If you go to court you can expect that

The prosecutor

77. will give you the chance to explain to him/her how the crime has affected you or you family and to disclose details of any loss or harm that you have suffered as a result of the crime, and will take these circumstances into account before he/her takes any decision on an acceptance of a plea on a lesser charge. The effect that the crime has had on you/your family will be disclosed to the court or you will be given the opportunity to give evidence in court and/or a probation officers report will be submitted to the court during the sentencing stage; and
78. at the consultation stage will allow you to disclose to him/her additional facts that are not in the statement, and he/she will disclose this to the defense prior to trial if relevant. ...”

If the Prosecutor has a discretion to receive representations for the victims regarding sentencing then this right contained in the Draft Victims Charter fails to be recognized.

The right to give input by victims at the sentencing stage has also been recognized by the *South African Law Commissions Report on Sentencing (A New Sentencing Framework) (Project 82)*. The Report states that “... at the sentencing stage the rights of victims of crime requires that special attention be paid to the evidence from victims...” and that “...(c)learly a legislative duty may be placed on prosecutors to take this aspect of their role seriously.” (SALC, Project 82, pp 86).

The Report goes further to say that victims should be given a voice at the sentencing stage and recommends the introduction of victim impact statements as a method to place information related to sentencing before the court.

“Recommendation

3.4.25. 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 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 are disputed, the victim must be called as a witness for the statement to be taken into account by the court.” **(SALC, Project 82, pp88)**

Again, the discretion granted by the proposed legislation to Prosecutors to obtain representations from the victim regarding the contents of the sentence agreement appears to be contrary to developments taking place elsewhere in the field of criminal procedure.

2.3. “... all other facts relevant to the agreed sentence. ...” Section 105A(2)(b)

It may be argued that Section 105A(2)(b) makes provision for the interests of the victim to be taken into account. This section states that the sentence agreement must include “... all other facts relevant to the agreed sentence. ...” Again the wording of this provision is wide and does not specifically place a duty on the Prosecutor to include in the sentence agreement a victim impact statement or sufficient evidence relating to the impact of the crime on the accused. In the circumstances, information and evidence from the victim is subject again to the Prosecutors discretion.

Submission

The proposed legislation should make provision for the inclusion of a victim impact statement in the sentence agreement. Further, should such a statement not be available or should the victim wish not to make a statement, the Prosecutor should give reasons in the sentence agreement when stating this.

2.4. The court may “... direct relevant questions, including questions about the accuseds’ previous convictions, to the prosecutor and the accused....” - Section 105A(7)

At the stage of considering the agreed sentence the court is entitled to direct questions to both the Prosecutor and the accused. The proposed legislation does not provide for the court to direct questions to the victim. This provides further opportunities for the victims voice to be heard at the trial of the accused to be denied.

Submission

This subsection should state that the court is entitled to direct relevant questions to the victim when considering the sentence that is set out in the sentence agreement. This would provide some measure of protection to the victim that her voice would be heard at the sentencing stage. It would also encourage the Prosecution to include a victim impact statement in the sentence agreement. In turn, it would be far wiser in many cases for the accused to allow the introduction of an uncontested victim impact statement rather than allow the victim to testify in the witness stand.

2.5. Compensation for victims - section 105A(1)(b)(iii)

Sentence agreements can include agreements for compensation in terms of section 300 of the Criminal Procedure Act. However, the victim is only given the opportunity to make representations in this regard if circumstances permit – section 105A(1)(b)(iii). Should the Prosecutor exercise this discretion and fail to provide this opportunity to the victim, then the victim is denied the opportunity of making use of the provisions of section 300 of the Criminal Procedure Act.

The draft legislation runs contrary to developments in the area of compensation for victims in South Africa. The South African Law Commission recently published for comment *Discussion Paper 97 on Sentencing (A compensation Scheme for Victims of Crime in South Africa) (Project 82)* .The Discussion Paper firmly recognizes the need for respecting the rights of victims. In its recommendations it states that an incremental approach is needed for the establishment of a victim compensation scheme in South Africa, as at this stage it would not be practicable. However, it does recommend that for certain categories of crimes that a victim compensation fund be established (SALC, Discussion Paper 97, pp 210). Given that the Discussion Paper proposes an incremental approach to the establishment of a victim compensation scheme it

follows that any new legislation ought to promote access by victims to gaining compensation. The draft legislation effectively denies the victim the right to claim compensation at the discretion of the Prosecution who may decide that circumstances do not permit to allow the victim to make representations.

Further, if a compensation fund is established for victims of certain categories of crime in South Africa, then a sentence agreement that provides for the accused to plead to a lesser charge could result in the victim being denied access to the fund. This would be a blatant denial of respect for victims rights.

Given what has been stated about, it is clear that the victim has an important interest in participating in the sentence agreement process. The proposed legislation does not adequately protect the victims participation in the process.

Submission

The words if circumstances permit ought to be removed from the subsection. The legislation should provide that victims have been informed of their right to compensation in terms of section 300 of the Criminal Procedure Act. The legislation should provide further that the sentence agreement must inform the court that the victim was aware of her rights and of her decision. The victim should be encouraged to provide reasons for choosing not to make use of these provisions.

2.6. Dangers of excluding the victim from the sentence agreement process

2.6.1. Lack of confidence in the criminal justice system

There is currently a general lack in confidence amongst the public in the ability of the criminal justice system to operate effectively and to successfully prosecute and punish those responsible for crime. In order to promote confidence it is important that a transparent system of justice for victims of crime is developed. Should sentence agreements take place behind closed doors and the victim is excluded from the process there is the potential that the credibility of the system will be brought into question.

2.6.2. Perception that human rights and the criminal justice system favors the accused

There is also a current perception amongst the public that human rights and the criminal justice system favors the criminal at the expense of the victim. By excluding the victim from the process, the perception is further enhanced. The very nature of sentence agreements, namely that the accused offers to admit guilt in exchange for a reduction in charge or sentence or both promotes the notion that this is a further manner in which the criminal justice system protects the "criminal" at the expense of the victim. Sentence agreements will be viewed as serving the interests of the accused and not of the victim if the victim is excluded from the process.

2.7. Abuse of the system

Given the pressures of work experience by prosecutors particularly in lower courts it is possible that the system could be abused. This highlights the need for the Prosecutor to be in contact with the victim and the investigating officer to determine whether the facts agreed to in the sentences agreement are accurate. Should this be the case, the presiding officer would have more certainty that there has been a degree of buy-in to the system from the victim. Should the accused merely enter a plea of guilty and there is no sentence agreement the presiding officer would be alerted to the fact that the victim has not been contacted.

Submission

Sentence agreements should be overseen and monitored by senior officials such as the Senior Public Prosecutor. Junior prosecutors should be excluded from concluding such agreements. This submission may be included in the Directives issued by the National Director of public Prosecutions referred to in section 105A(1)(a).

2.8. Rural concern

The legislation does not address the fact that in smaller rural towns there is often only one court with one magistrate. Should the Court reject a sentence agreement and the matter begins *de novo* either the trial would have to be transferred physically to another court, or, a magistrate from another area would have to be brought in to hear the matter. Either way, it would be clear to the presiding officer that a prior sentence agreement had been entered into and that the court had rejected it. This would undoubtedly prejudice the accused in the conduct of the trial and the right to be presumed innocent until proven guilty.

Submission

The concern is a valid one for which the answer is not clear.

2.9. Previous convictions

2.9.1. Record of previous convictions of the accused - SAP 69

In terms of Section 105A(7) the court is entitled to direct questions to the Prosecutor and the accused about previous convictions when considering the appropriateness of the sentence in the agreement. This places a discretion in the hands of the court whether to consider the previous convictions of the accused where the agreement fails to mention the previous convictions. This runs contrary to current criminal procedure practice where the previous convictions, the SAP 69 Report, are always requested by the court at the time of sentencing.

The consideration of previous convictions is an extremely important and relevant factor at the sentencing stage of a trial. The SAP 69 provides valuable information as to whether the accused is a first time offender, a repeat offender or an offender with a disposition towards committing violent crimes. The SAP 69 can also give an indication to what degree the accused is a threat to the community. This information in turn has a large impact on the type and severity of sentence that is imposed on the accused.

Submission

The proposed legislation should be amended to include that the accused's SAP 69 be included as an Annexure to the Sentence agreement.

2.10. Signing of the agreement by the accused - Section 105A(2)(c)

Section 105A (2) provides that the legal representative of an accused may sign the sentence agreement on behalf of the accused. Only where the agreement includes a compensation agreement must the accused sign it personally.

Given the importance of an accused's right to be presumed innocent until proven guilty, the right of an accused to remain silent, and not to be compelled to give self incriminating evidence it would be wise to ensure that the accused signs the document personally. Despite the protections enshrined in the proposed legislation to ensure that the accused is aware of his or her right and has entered the agreement voluntarily, should the legal representative sign the agreement on behalf of the accused there is still the potential of the accused challenging the sentence agreement on the grounds that he was not adequately informed of the contents.

Submission

The proposed legislation should be amended to include that the accused must sign the sentence agreement.

Conclusions

The proposed legislation provides an opportunity to government to promote and enforce victims rights in South Africa. This would be in line with the many other developments in this area and that are currently gaining momentum. The South African Human Rights Commission accordingly urges that serious consideration is given to scrutinising this legislation from a victim-centric approach and that the necessary amendments are effected.

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