Southern African Catholic Bishops' Conference
PARLIAMENTARY LIAISON OFFICE

Submission to the Portfolio Committee for Justice

on the

Criminal Law (Sentencing) Amendment Bill (B15 – 2007)

Introduction

1. The Parliamentary Liaison Office of the SA Catholic Bishops' Conference welcomes the opportunity to make a short submission on this legislation. The Catholic Church does not claim to have any specific competence or expertise in the fields of criminology or penology. However, all sectors of the community have an interest in measures aimed at combating crime; likewise, the community has an interest in measures that assist in the rehabilitation of offenders. It is a tenet of Christianity, as with most faiths, that no-one, no matter how seriously they have offended, is beyond redemption; therefore, punishment must encourage rehabilitation and not leave the offender without hope. At the same time, we also believe that offenders must be duly punished for their crimes and that, the more serious the crime, the more severe the punishment must be.

The Efficacy of Minimum Sentencing

2. Since the Criminal Law Amendment Act 105 of 1977 ("the principal Act") came into effect in 1998, it has been subject to considerable criticism and adverse comment by the Courts and by legal academics. Of all the various questions that have been raised concerning the principal Act, the one which is of most concern is whether or not the imposition of prescribed minimum sentences succeeds in reducing crime.

It appears that there is no evidence to suggest that it does. Prof Dirk van Zyl Smit writes:

> "… it is the certainty of punishment rather than the severity of the sentence that is likely to have the greatest deterrent impact. There is certainly no evidence, empirical or even anecdotal, to suggest that increasing sentences from, say, six to 11 years for rape or robbery deters rapists or robbers generally, or even discourages them individually from committing a crime that otherwise they would not have risked." [1]

[1] *Justice Gained? Crime and Crime Control in South Africa's Transition*, UCT Press, Cape Town, 2004, p 248.

According to the Constitutional Court,

> "The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished."[2]

Commenting on the principal Act three years after its introduction, one of the country's foremost experts on sentencing wrote as follows:

> "The Act has been passed in an attempt to do something about the serious crime problem with which South Africa is faced. The legislature decided that it had to deter potential offenders by prescribing severe punishment. Unfortunately, it can already be stated with certainty that this attempt was a failure. There is no indication of crime rates dropping, whereas the deterrent effects of the Act should have been noticeable immediately."[3]

It is also well-known that the Judicial Inspectorate of Prisons has spoken out against this legislation on various occasions.[4]

3. The question, therefore, is whether there is any need or justification for this legislation if it is not succeeding in its primary objective. Two factors make this question all the more pressing, in our view:

> Firstly, numerous experts, including the Judicial Inspectorate of Prisons, have concluded that the minimum sentence legislation is contributing significantly to prison overcrowding and exacerbating the already dire conditions in some of our prisons. If this is so (and we are not aware of any studies that show the contrary), then we are faced with a situation in which well-intentioned legislation is not only failing in its main objective, but is actually doing more harm than good. Surely Parliament should investigate this aspect thoroughly before passing the legislation?
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> Secondly, it may be argued that government has introduced the present Bill in an effort to be seen to be doing something about crime when, in reality, it knows that the legislation is useless. Surely the efforts of both government and Parliament should be focused on initiatives that might actually make a difference to crime rates? If, after nine years of operation, minimum sentences have had no discernible effect, what is the point of continuing with them?

Specific aspects

4. a) **Repeal of s 51(4)**: this amendment is welcomed, since it removes one of the patently unfair aspects of the principal Act. There was no good reason for forcing the Courts to effectively ignore time served in custody awaiting trial; all the more so when the Act's

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[2] ***S v Makwanyane*** **1995 (1) SACR 1 (CC)** at par [122] *per* Chaskalson P (our emphasis). The same view has been expressed by numerous other Courts; see, for example, ***S v Mofokeng*** **1999 (1) SACR 502 (W)** at 526*h-j* and ***S v Homareda*** **1999 (2) SACR 319 (W)** at 324*d* ff.

[3] Prof SE Terblanche '*Aspects of minimum sentence legislation: judicial comment and the courts' jurisdiction'* in SA Journal of Criminal Justice (2001) 14, 1-19.

[4] See, for example, Judge Hannes Fagan's article on the subject in (2004) 10 SA Crime Quarterly, 1-5.

referral requirements meant that convicted persons could wait for months or even years before having their sentences imposed in the High Court.

b) **Amendments to s 51(6):** these, read with the **repeal of s 51(3)(b)**,make it more likely, in our view, that prescribed sentences, including life imprisonment, will be imposed on youthful offenders as young as 16. This is surely an undesirable step in a country that prides itself on upholding the rights and well-being of children. The advantage of s 51(3)(b) as it currently stands is that, while it allows the imposition of the minimum sentences on children between 16 and 18 years of age, it does not require it, and leaves the matter far more to the discretion of the Court[5]. In our view this is as it should be – the younger the offender the greater should be the discretion of a Court to determine a sentence that is appropriate to the circumstances of the offender. In any event, we suggest that most Courts will simply find the age of young offenders to constitute substantial and compelling reason to avoid imposing the minimum sentence.

c) **Repeal of s 53(1):** this is the section that established the temporary nature of the principal Act. It was always understood that the Act was brought into being as an extraordinary measure in the fight against crime, and that it could be renewed with Parliamentary approval every two years. If the legislation was working, and having the desired outcome of reducing crime, then there would be no need to entrench it permanently on the statute-book, as this particular amendment does. If, on the other hand, it seems that the legislation has not worked, and the indications are that it will not reduce crime, then there is simply no point in having it. Either way, removing it from the effective oversight of Parliament is a retrograde step and an admission of defeat in the fight against crime.

d) **Automatic appeal against life imprisonment:** Paragraph 2.1 of the memorandum to the Bill states that one of its aims is 'to expedite the finalisation of serious criminal cases'. We understand that it has been a complaint of the judiciary that the referral of the most serious cases to the High Court for sentence (after conviction in the regional courts) has caused considerable delays and backlogs. It is unclear how the conferral of an automatic right of appeal against a conviction and its consequent life sentence will speed matters up. Up to now, High Courts have required the leading of sufficient evidence on sentence to enable them to make a proper determination as to the imposition of life imprisonment or other long-term incarceration. Under the new provisions, this will have to happen with due diligence and thoroughness in the regional courts so that, when the matter reaches the High Court on appeal, it can be satisfied that sentence was properly imposed. If not, it may be envisaged that the High Court will refer matters back to the regional courts for the hearing of further evidence; or will entertain applications for the leading of further evidence on appeal. Either way, the delays and backlogs will continue, with more time being taken over cases at regional court level, and an increased appeal roll in the High Court. The stated objective of expediting the finalisation of serious criminal cases seems unlikely to be achieved.

Conclusion

5. When the principal Act was being debated in Parliament in 1997, we commented as follows: "We are concerned that this provision amounts to little more than a pandering to the public, a 'get tough' approach which will have little or no real effect on crime."

[5] See ***S v Blaauw*** **2001 (2) SACR 255 (C)** at 263*e* ff.

Nothing that has happened during the last nine years since the Act came into operation has changed this perception. Rather than fiddling with the well-established principles of sentencing developed by the criminal courts over centuries, we suggest that there are numerous far more practical and effective steps that government could take that would have a direct effect on the criminal justice system. To mention just one: all over the country trials are delayed because of shortages of judges, magistrates, prosecutors, court interpreters and publicly-funded defence lawyers. If proper attention were given to the adequate resourcing of the criminal justice system, rather than the kind of tinkering represented by this Bill and the principal Act, we might expect to see a real impact being made on crime rates.

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