

Office of the National Director of Public Prosecutions



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Ms Phumelele Sibisi
Secretary: Portfolio Committee on
Justice and Constitutional Affairs
Parliament
Cape Town

22 August 2007

Dear Ms Sibisi

NATIONAL PROSECUTING AUTHORITY'S FURTHER COMMENT ON LATEST VERSION OF CRIMINAL LAW (SENTENCING) AMENDMENT BILL, 2007

The National Prosecuting Authority (NPA) would like to thank the Portfolio Committee on Justice and Constitutional Affairs (Portfolio Committee) for affording it the opportunity to comment on the latest version of the above Bill.

In studying the latest version of the Bill, the NPA assumes that the Portfolio Committee has accepted the principle amendment contained in clause I (the proposed section 51(1)), namely, to grant the Regional Courts jurisdiction to impose a sentence of imprisonment for life in respect of Part I offences. The NPA wishes to reiterate that it foresees practical problems with the implementation of this amendment, but would do its utmost best to ensure that these cases would be tried in the most appropriate court.



In respect of the new amendments, the NPA wishes to comment as follows:

1. New proviso to proposed section 51(3)(a)

Option 1 is in line with the amendment previously proposed by the NPA. However, the NPA now prefers **Option 2**, since this Option will partly alleviate the problem the NPA has with the repeal of the referral process. The NPA again wishes to refer the Committee to this anomaly.

Section 51(2) provides for minimum sentences to be imposed by the High Court and the Regional Court in respect of offences prescribed in Parts II, III and IV of Schedule 2. If section 52 is going to be repealed (as proposed in clause 2 of the Bill), there will be no referral mechanism. Therefore, if the Regional Court is of the opinion that an offence mentioned in section 51(2) merits punishment in excess of the jurisdiction prescribed for the Regional Court, there will be no mechanism for the Regional Court to refer the matter to the High Court unless the referral provisions are retained. On the one hand the Regional Court is given jurisdiction to impose the ultimate penalty, namely, imprisonment for life. However, in the same breath its jurisdiction is confined once substantial and compelling circumstances are found. The effect thereof is that an accused person who is tried in the Regional Court in respect of Part I offences, is potentially in a more advantageous position than a person who is tried in the High Court for the same offences. This is inconsistent with the equality clause contained in section 9(1) of the Constitution.

2. Proposed section 51(3)(aA)

The NPA supports Option 1.

3. Proposed section 51(3)(b)

In principle, the NPA supports the amendments in this paragraph. However, the NPA is of the view that it must be clear that the finding that no substantial and compelling circumstances

exist, should be made before the court imposes the minimum sentence. The NPA therefore proposes the following amendment:

"(b) Before [If] any court referred to in subsection (1) or (2) [decides to] imposes a minimum sentence prescribed in those subsections upon [a child] an accused person who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it [shall] must be satisfied and make a finding that no substantial and compelling circumstances exist which justify the imposition of a lesser sentence, and enter the reasons for its [decision] finding on the record of the proceedings."

4. New clause 4: Pending proceedings

The NPA supports **Option 1**. The process of allocating a court date (as proposed in **Option 2**), may depend on the availability of courts, legal representatives, the records and various other circumstances. Such a process may be inconsistent with the Constitutional requirement of a fair trial and, in particular, to have the trial begin and conclude without unreasonable delay. Option 1 is based on a principle decision and will bring about legal certainty for the accused person and is not dependent on variable circumstances.

5. New clause 6: Insertion of Schedule 3

The NPA supports the insertion of this Schedule. However, one of the Deputy Directors of Public Prosecutors has indicated that some of the Judges interpret the reference to "assault" narrowly. Such an interpretation might exclude, for example, the offence of attempted murder or assault with intent to do grievous bodily harm. Therefore, it is recommended that the reference to "assault" should be amended as follows:

"An offence involving an assault, when a dangerous wound is inflicted with a firearm."

6. New clause 7: Proposed section 309(1)(a)(ii)

For the sake of uniformity (see section 51(1)), it is proposed that the expression "life imprisonment" be substituted with "imprisonment for life".

7. New clause 5: Requiring the National Director to adopt policy directives that set out which prosecutions must from the outset be instituted in the High Court and not in the Regional Court

The NPA wishes to emphasise that it does not support this amendment. In terms of section 179(5)(b) of the Constitution and section 21(1)(b) of the NPA Act, the National Director has a constitutional duty to prescribe and issue policy directives which must be observed in the prosecution process. This provision is mandatory and once the proposed legislation is approved, the National Director is compelled to issue such new policy directives. The NPA is of the view that it is not desirable to include this provision in the Act. If the principle amendments are approved as proposed in the Bill, the NPA undertakes that the National Director will issue the required policy directives.

Furthermore, the Prosecution Policy was amended during the end of 2005 and now specifically provides for the determination of Policy Directives in respect of, among others, new legislation. The amendment reads as follows:

"8A. PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO SPECIFIED MATTERS

The National Director may supplement or amend this Policy to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest.". (Emphasis added)

In the final instance, the NPA wishes to point out that the provisions of the Constitution and the NPA Act clearly distinguish between a "**prosecution policy**" and "**policy directives**". These

expressions cannot be used in the same breath and this distinction should also be reflected in the amendment. In line with the above distinction, the approved **Policy Directives** and not the **Prosecution Policy**, deal with directives in respect determining the appropriate forum for **specific offences**. The **Prosecution Policy** contains general guidelines to be taken into account in determining the appropriate forum. In this regard, the **Prosecution Policy** provides as follows:

"In determining whether or not a case is appropriate for hearing in the High Court, the following factors, *inter alia*, must be taken into account:

- The nature and complexity of the case and its seriousness in the circumstances.
- The adequacy of sentencing provisions in the lower courts and whether a conviction in the High Court carries a greater deterrent effect.
- Any specific legal provision providing for or any implied legislative preference for a particular forum of trial.
- Any delay, cost or adverse effect that witnesses may have to incur if the case is heard in a particular Court.
- The desirability of a speedy resolution and disposal of some prosecutions in available lower courts, aimed at reducing widespread criminal activity.

The decision regarding the court in which to prosecute an accused person is determined by the complexity and seriousness of an offence, and the need for the NPA to guard against making decisions that will bring the criminal justice system into disrepute."

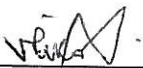
Apart from the above general guidelines, the **Policy Directives** presently provide for specific directives in respect of which offences should be tried in the Regional Court and which offences to be tried in the High Court.

In view of the above and if the Portfolio Committee decides to approve this amendment notwithstanding the NPA's viewpoint, it is recommended that the proposed amendment should be in line with the principles contained in the Prosecution Policy and the Policy Directives, namely, that the required directives in respect of the proposed legislation should be contained in the **Policy Directives** and not the **Prosecution Policy**. Therefore, the NPA proposes that the

Committee should revert back to the proposed sub-clauses (3) and (4) of the original Bill and only amend the first line of sub-clause (3) as follows:

"The policy directives or amendments thereto must include....".

Kind regards

 22-08-2007

Adv VP Pikoli
National Director
of Public Prosecutions