Alternative Sentencing Review

by

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The Civil Society Prison Reform Initiative is a joint project of NICRO (National Institute for Crime Prevention and the Reintegration of Offenders) and the Community Law Centre (CLC) of the University of Western Cape.

The aim of CSPRI is to improve the human rights of prisoners through research-based lobbying and advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes. CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity building.

LM Muntingh, NICRO **J Sloth-Nielsen, CLC**

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1. Background

Four out of every 1000 South Africans are in prison[1]. Given the competing priorities for spending in South Africa, money should be spent on the country's developmental needs such as education, health care, housing and job creation. If the government is to spend more money on dealing with crime, it should be in the areas of crime prevention and detection. Instead of warehousing offenders, there is a need to find ways to make them repay the community for their crimes through community service, restitution, and compensation.[2] In this endeavour, community-based alternatives to imprisonment move to centre stage. The Civil Society Prison Reform Initiative (CSPRI) views the promotion of alternative sentencing as a cornerstone of its approach to prison reform. Alternatives to prison sentences are important because they treat offenders as individuals and, in circumstances that are appropriate, offenders are given an opportunity to redress the wrongs they have committed by contributing to society. In most forms of alternative sentencing, this obviates the need to reintegrate them back into the community, as they will have remained there throughout. It also means that they are not exposed to the criminalising influences that abound within a prison environment.

2. The objective of the study

The purpose of this Alternative Sentencing Review is to contribute to the capacity of the CSPRI to further its goal of increasing access to non-custodial sentencing. This is achieved through an analysis of the strengths and weaknesses of the existing legal and structural framework for alternative sentencing and an examination of the impediments to the use of alternative sentences arising from the field research undertaken. The study culminates in a set of recommendations for addressing problems in the imposition of alternative sentences identified through the research, and how the potential for strengthening access to alternative sentences should be realised. The recommendations include general recommendations as well as specific suggestions for pilot projects to promote the use of non-custodial sentencing.

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[1] Judicial Inspectorate of Prisons, **Annual Report** 2002/2003.

3. Research method used

This study adopted a qualitative approach with an aim to explore, compare, and describe. The study was rooted in legal research and analysis. Current law, law that has been passed but not yet implemented and case law were surveyed in order to establish a clear understanding of the legal framework in which alternative sentencing operates in South Africa. Legislative reform was not a focus of the study, as CSPRI commissioned the research on the assumption that the legislative framework for alternative sentencing was adequate. The study found this assumption to be well founded, and consequently no recommendations are made regarding law reform. Published and unpublished literature is reviewed in part 6 and is drawn upon and cited where relevant.

The study report is based primarily on field research, and focuses to a large degree on investigating the practical impediments to the use of non-custodial sentencing. For the field research, interviewees were purposively selected, and interviewed according to a semi-structured interview technique using questionnaires. The information obtained during this process was then thematically analysed. The key impediments to the use of alternative sentences are described, a number of findings are identified and recommendations made.

Interviews were held at national level with representatives of the Department of Correctional Services (Community Corrections) and the Department of Social Development (Probation Services). A representative of the Sexual Offences and Community Affairs Unit of the National Prosecuting Authority was interviewed, as were representatives of the South African Police Service (Social Crime Prevention). An interview was also held with representatives of Justice College, who are responsible for training magistrates and prosecutors in sentencing. From the non-governmental sector, representatives of the Restorative Justice Centre (RJC), the Centre for the Study of Violence and Reconciliation (CSVR) and the National Institute for Crime Prevention and Reintegration of Offenders (NICRO) were interviewed.

The following sites were purposively selected:

- Pietermaritzburg in KwaZulu-Natal,
- Polokwane in Limpopo,
- Benoni in Gauteng, and
- Ga-Rankuwa in North West Province.

At the sites, interviews were carried out with magistrates, prosecutors, probation officers, correctional services officials and non-governmental organisations providing access to community-based sentencing options.

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[2] S Pete "The Good, the Bad and the Warehoused" vol. 13, 2000 **South African Journal on Criminal Justice** 1.

Margaret Roper undertook the site visits and interviews, as well as the majority of interviews with role players at national level. Ann Skelton undertook some of the interviews at national level and authored this report.

4. Terminology and alternative sentencing

There are various terms used in relation to alternative sentencing that people tend to employ inter-changeably, but which do not dovetail precisely with one another. The term "alternative sentencing" is used interchangeably with "non-custodial sentencing", yet both concepts refer to the same thing – sentences that are alternatives to imprisonment and that avoid the use of custody. (However, some alternative sentences are not completely non-custodial – such as the version of correctional supervision that involves a period of imprisonment).

The Department of Correctional Services uses the term "community corrections" to cover all forms of sentences served in the community, including offenders who have been sentenced by a court to correctional supervision, prisoners placed out of prison under correctional supervision, and persons who have been placed under the supervision of a correctional official. This is broad enough to also include the release of an awaiting-trial prisoner albeit under the supervision of a correctional official before trial as an alternative to pre-trial custody[3]. The meaning of the term "community corrections" therefore is broader than that of the term "alternative sentencing", hence these terms cannot be used interchangeably.

The term used in the UN Standard Minimum Rules for Non-custodial Measures[4] is "non-custodial measures", which refers to measures used at the pre-trial, trial, sentencing and reintegration stages.

This report is confined to the issue of alternative sentencing, meaning sentences of which the whole or greater part is served in the community.

5. Legal framework for alternative sentencing

5.1 International rules

[3] In terms of section 62(f) of the Criminal Procedure Act no 51 of 1977, and section 71 of the same Act in relation to children.
[4] Also known as the Tokyo Rules, the UN General Assembly adopted these rules by resolution 45/110, December 1990.

The UN Standard Minimum Rules for Non-Custodial Measures provide the international legal framework. This instrument provides a set of basic principles that promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment. The Rules are intended to promote greater community involvement in the management of criminal justice, and to promote a sense of responsibility towards society amongst offenders. The rules stress the importance of having social inquiry reports (such as a probation officer's pre-sentence report) to inform sentencing. The rules provide a list of non-custodial dispositions that can be used[5]. The instrument also provides guidance in implementing non-custodial measures, particularly supervision, duration and conditions.

5.2 South African statutory law

Numerous South African writers have remarked that the domestic law framework for alternative sentencing is more than adequate[6]. The Criminal Procedure Act no. 51 of 1977 and the Correctional Services Act 8 of 1959 currently provide the legal context for alternative sentencing[7], in particular Chapter VIII dealing with Correctional Supervision. Sections 84 to 84E deal with matters such as the treatment of probationers, non-compliance with conditions, the appointment of sufficient numbers of suitable persons to act as temporary or voluntary correctional officials, and the mechanics of the application of correctional supervision. These provisions are due to be repealed and replaced with the chapter on Community Corrections in the Correctional Services Act 111 of 1998[8].

Recent amendments to the Probation Services Act 116 of 1991 provide new opportunities for probation officers and assistant probation officers to become involved in alternative sentencing. The Child Justice Bill also provides for extended opportunities for family- and community-based sentencing.

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[5] The measures included in the Rules are: (a) verbal sanctions, such as admonition, reprimand and warning; (b) conditional discharge, (c) status penalties, (d) economic sanctions, (e) confiscation or expropriation, (f) restitution or compensation to victim, (g) suspended or deferred sentence, (h) probation and judicial supervision, (i) community service order, (j) referral to attendance centre, (k) house arrest, (l) any other mode of non-institutional treatment and (m) some combination of the listed measures.

[6] J Sloth Nielsen "Overview of Policy Developments in South African Correctional Services 1994 – 2002". CSPRI Research Paper Series, No. 1 July 2003. L Muntingh "Alternative sentencing in South Africa – an update. NICRO, April 2002.

[7] The operation of legislation is supported by regulations drafted by the Commissioner of Correctional Services, Chapter VII: Correctional Supervision, which provides detailed guidelines on matters such as pre-sentence reports, procedures after sentencing, setting of conditions in terms of sections 84 of the Correctional Service Act of 1959, control over probationers, the use of volunteers, violation of conditions, complaints and requests, health services, patrimonial loss in terms of section 89B of the Correctional Services Act of 1959 , delegated powers and the holding of forums to promote correctional supervision.

[8] Although the Act was passed some time ago, it was not yet in full operation by February 2004.

According to the Criminal Procedure Act no. 51 of 1977 the following non- custodial sentences are available:

- S 276(1)(h) (read with S 276A) provides for a sentence to correctional supervision not exceeding 3 years. This sentence is served entirely at home, with no period of imprisonment. A report is required from a correctional official or a probation officer prior to sentence being passed, and the sentence is available in respect of any offence.

- S 276(1)(i) (read with S 276A) provides for a sentence of imprisonment not exceeding 5 years, from which such a person may be placed under correctional supervision at the discretion of the Commissioner[9]. A report is required from a correctional official or a probation officer prior to sentence being passed, and the sentence is available in respect of any offence.

- S 276A(3)(a) provides that in the case of a prisoner who has been sentenced to less than 5 years[10] (or his or her release date is less than 5 years in the future) the Commissioner may, if he is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court a quo in order to reconsider said sentence. The court has an option to convert the sentence into correctional supervision on the conditions it may deem fit.

- S 287(4)(a) deals with the situation of where a person has been sentenced to pay a fine with an alternative of imprisonment not exceeding 5 years, and such person is unable to pay the fine. Upon the start of the imprisonment or any time thereafter the Commissioner has the discretion (unless the court directed otherwise at the time of passing sentence) to convert the sentence into correctional supervision, as if the sentence had been imprisonment as referred to in s 276(1)(i), or to make an application to the court a quo following the procedure set out in section 276A(3).

- S 287 (4) (b) deals with a situation where a person has been sentenced to pay a fine with an alternative of imprisonment not exceeding 5 years, and such person is unable to pay the fine. The matter may be referred back to the court a quo to set a new sentence of correctional supervision.

- S 290 provides for a person under the age of 18 years to be placed under the supervision of a probation officer or a correctional official for a period of two years.

[9] "The Commissioner" refers to the Commissioner of Correctional Services, who may use this discretion after a person has served at least one sixth of his or her sentence.

- S 296 allows the court, in addition to or in lieu of any sentence (but not in addition to a sentence of imprisonment), to order that the person be detained in a treatment centre established under the Prevention and Treatment of Drug Dependency Act, 1992[11].

- S 297 makes provision for the conditional or unconditional postponement or suspension of sentence, and caution or reprimand. These apply to all offences other than those for which a minimum sentence is prescribed. The conditions that are included are
  -compensation
  -the rendering of a specific benefit or service in lieu of compensation
  -the performance without remuneration and outside the prison of some service for the benefit of the community [12]
  -submission to correctional supervision
  -submission to instruction or treatment
  -submission to the supervision or control of a probation officer
  -compulsory attendance or residence at some specified centre for a specified purpose
  -good conduct
  -any other matter.
  If the sentence is postponed with conditions, a court must be satisfied that the conditions have been observed, in which case the court shall discharge him or her without the passing of a sentence.
  If the sentenced is postponed unconditionally and the person has not been called to appear before the court again during the postponement period, such person is deemed to have been discharged[13].

- Section 300 provides that where a person is convicted of an offence that has caused damage to or loss of property (including money) belonging to some other person, the court may, upon the application of the victim or of the prosecutor acting on the instructions of the victim, forthwith award the injured person compensation for such damage or loss.

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[10] This is applicable once the prisoner has served one quarter of his or her sentence.
[11] This may be seen as an a-typical alternative sentence for the reason that it is in itself custodial, but it is included here because it is clearly intended as an alternative to imprisonment. In addition, because the section does not set any minimum time limits, it can be used flexibly, for a short custodial period and in combination with follow-up outpatient programmes.
[12] This is referred to generally as “community service”. The Criminal Procedure Act limits this kind of sentence to persons who are 15 years and older, and prescribes a minimum number of 50 hours.
[13] The discharge in relation to both conditional and unconditional sentences still leaves the person with a criminal record.

To fully understand how these provisions work once the offender is serving his or her sentence in the community, they have to be read in conjunction with sections 84 to 84E of the Correctional Services Act no. 8 of 1959. Briefly summarised, these sections deal with the following matters:

- Section 84 provides that every probationer shall be subject to such monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as determined by the Court or the Commissioner, and to any other form of treatment, control or supervision, including supervision by a probation officer after consultation with the social welfare authority concerned.
- Section 84B says that if the Commissioner is satisfied that a probationer has failed to comply with any condition he may issue a warrant for the arrest of such probationer, which serves as authorisation for detention of such probationer in a prison until he is lawfully discharged or released, placed under correctional supervision again, or referred back to court with 72 hours for trial or to put into operation any suspended or postponed sentence.
- 84E lists the kind of programmes that the probationer can be involved with, these are
- (a) observation or supervision
- (b) community service
- (c) compensation to victims
- (d) reintegration back into the community
- (e) rehabilitation
- (f) collection of funds, including the costs arising from the execution of the sentence
- (g) any other matter considered necessary or expedient.

These sections clearly visualise a partnership between the Departments of Correctional Services and Social Development as well as with non-governmental organisations, as mention is made several times to working together with “any social welfare authority or other body”.

These legal provisions for alternative sentencing are quite revolutionary. As described above, the Criminal Procedure Act provides a set of sentencing tools that is both broad and flexible. Firstly, section 276A (3)(a) and section 287(4)(b) allow the judicial officer to change his or her own sentence, which is contrary to the general rule of sentencing. Usually judicial officers cannot substitute or change their own sentences; the Criminal Procedure Act only allows errors to be corrected immediately after they have been made[14]. Section 276A also allows a judicial officer to change the sentence of another judicial officer, because it gives this power to “a court, whether constituted differently or not.”

[14] Section 298 of the Criminal Procedure Act.

Secondly, whilst sections 276A (3)(a) and section 287(4)(b) give discretion to the Commissioner of Correctional Services to put matters back on the court roll, section 287(4)(a) goes even further, giving the Commissioner the discretion, in relation to cases where a person is in prison because of failure to pay a fine, to make a decision to convert the sentence to one of correctional supervision without taking the matter back to court.

The other remarkable point about these provisions is that they are not linked to categories of offences. The way the provisions are phrased indicates that they are available to be used in relation to any offence, and that doing so is at the discretion of the judicial officer and, in some instances, the Commissioner. The Commissioner's discretion is limited by the length of imprisonment, the amount of time already served in prison or the proximity of the release date. Providing such wide-ranging powers of discretion was obviously envisioned by those who drafted the series of amendments that introduced most of the alternative sentencing options, between 1987 and 1993. This discretion has been affected, of course, by the introduction of minimum sentences brought about by the Criminal Law Amendment Act no. 105 of 1997, which amended section 51 of the Criminal Procedure Act. Section 51(1) requires that the High Court sentence a person who has been convicted of an offence referred to in Part 1 of Schedule 2, to imprisonment for life. Section 51(2) prescribes other minimum sentences, which are linked to offences and to the offender being either a first, second or subsequent offender. Subsection 51(3)(a) allows a court to impose a lesser sentence if it is satisfied that substantial and compelling circumstances exist that justify this[15].

The extent to which minimum sentences affect alternative sentencing is not easy to determine – but it is clear that prior to their introduction there was a wider discretion for judicial officers to use alternative sentences. Alternative sentences can no longer be used in relation to the offences listed in the schedules to the Act, unless the court finds that there are substantial and compelling reasons to depart from the prescribed minimum sentence, in which case the full range of sentencing options are then available, including alternative sentences. Even where courts depart from the minimum sentence, they often use a shorter period of imprisonment rather than an alternative sentence, and it is submitted that the introduction of minimum sentences has "cranked up" the length of prison sentences generally.

5.3 New Developments in Statutory Law

The Correctional Services Act no 111 of 1998[16] leaves the provisions of the Criminal Procedure Act mentioned above in place, but Chapter VI, entitled "Community Corrections",

[15] Minimum sentences do not apply to children under the age of 16 years, and the courts have generally found reasons not to apply the minimum sentences for 16 and 17 year olds. However, they have generally substituted fairly lengthy prison terms, given the seriousness of the offences in the reported cases. See further S v Mofokeng and another 1999 (1) SACR 502 (W), S v Nkosi 2002 (1) SACR 135 (W).

[16] See note 9 regarding status of the Act.

brings together in one chapter all the provisions relating to community corrections (including pre-trial community measures such as those provided for in sections 62(f) and 70 of the Criminal Procedure Act). The chapter deals with the following matters, amongst others:

- Objectives of community corrections
- Conditions relating to community corrections
- Serving of community corrections
- Supervision and supervision committees
- Supervision committees
- Non-compliance and change of conditions
- Complaints and requests
- House detention, community service, compensation
- Programmes
- Monitoring

The general approach is much the same as that followed under the current law. The chapter seeks to organise the procedures into a coherent structure. It also incorporates numerous aspects that are currently included in the regulatory framework (the Community Corrections Service Orders Chapter VII). This will lead to more certainty, but also to less flexibility.

The Probation Services Act 116 of 1991 was recently amended[17]. The Act defines and empowers probation officers, and a new category of worker, the assistant probation officer has now been included. The Act provides that the Minister of Social Development may introduce programmes aimed at the performance of community service, the observation, treatment and supervision of persons, the compensation of victims of crime and restorative justice as part of appropriate sentencing. The Act introduces the concept of home-based supervision for a child who has been diverted or sentenced (or as an alternative to pre-trial detention).

The Child Justice Bill[18] will introduce a range of diversion options – both individual plans to be supervised within the home and community, as well as structured programmes with a set, organised content. These options are also available as sentencing options. In addition, the Bill introduces restorative justice processes such as family group conferencing and victim offender mediation, which can be used before the trial, during the trial and at the stage of sentencing. The most recent version of the Child Justice Bill does not remove the operation of the provisions in the Criminal Procedure Act relating to alternative sentences, it simply adds more options. The development of programmes for diversion and sentencing in the Child Justice sector is, ultimately, likely to have a positive effect on the possibilities for adults in the criminal justice system as well.

[17] Probation Services Amendment Act 35 of 2002.

5.4 South African Case Law

A significant case regarding community service as a sentence was S v Abrahams[19] in 1990. Conradie J held that community service is not a sanction that can only be applied as a sentence for less serious offences. Whilst this type of sentence is not suitable for all offenders, there are some offenders who have committed serious offences but who would nevertheless be suitable for community service. As far as they are concerned, the Judge was of the view that the courts should use imprisonment as a means of punishment only if the offence is so serious that non-custodial punishment would discredit the criminal justice system with the community.

S v Mogara[20] in that year determined that a sentence of community service need not be restricted to first-time offenders. In the following year, S v Russouw[21] found that although community service is "a valuable weapon in the fight against crime" it was not normally appropriate for offenders suffering from some or other form of personality disturbance or for recidivists. On the facts of the case the court found that community service was not suitable for a second offender who had been convicted of theft and fraud relating to a large amount of public money.

The debate about when a sentence of community service is appropriate continued into the early 1990s. In the case of S v De Bruin[22], the court declined to sentence an offender with three relevant previous convictions to community service. In S v Miners[23], the court declined the use of community service on the grounds that the offender was aggressive and uncooperative. In S v Van Vuuren, however, the court applied correctional supervision for a female first offender that had stolen over R73 000 from her employer, a bank).

In 1994, S v Sikhunyana[24] established that a proper investigation into all relevant issues was essential in determining whether community service was appropriate and that although there were administrative and practical difficulties associated with carrying out community service, courts should not allow themselves to be unduly hamstrung by such difficulties. Also in 1994, the Constitutional Court struck down the sentence of corporal punishment in S v Williams[25], in which Justice Langa reviewed the range of sentencing options available on the statute books. He found that there was a wide legal framework for creative alternative sentences, and

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[18] Bill no. 49 of 2002 was introduced into Parliament in August 2002, but at the time of writing had not yet been finalised.
[19] S v Abrahams 1990 (1) SACR 172 (C).
[20] S v Mogara 1990 (2) SACR 9 (T).
[21] S v Russouw 1991 (1) SACR 561 (C).
[22] S v De Bruin 1991 (2) SACR 158 (W)
[23] S v Miners 1992 (2) SACR 359 (c)
[24] S v Sikunyana 1994 (1) SACR 206 (Tk).
[25] S v Williams 1995 BCLR 861 (CC)

commented that correctional supervision constituted 'a milestone in humanising the criminal justice system'.

S v Leeb[26] was the first case in which the power of a court to alter a sentence to correctional supervision in terms of section 276A(3) was brought before the court. Unfortunately, the case came before the court via the clumsy route of a written motivation submitted by a major in the Department of Correctional Services who, the court decided, was in effect asking for "theoretical" advice about the kind of cases that should be referred to the courts, but who used as his vehicle a matter of murder involving a considerable amount of violence and cruelty, for which the offender had been sentenced to 8 years' imprisonment, and which sentence had been set prior to the new legislation coming into operation in that area[27]. The Court had no hesitation in saying that it was not a case in which it would have considered correctional supervision, even if correctional supervision had been available as a sentence at that time. The Leeb case turned out to have set an unfortunate precedent because it discouraged the Commissioner (and his delegates) from referring cases in terms of section 276A(3) back to court [28].

However, the commissioner's confidence regarding their discretion to convert sentences handed down in terms of section 276 (1) (i) was given a boost by the Appellate Division in S v Stanley[29]. In this case, it was found that courts must take care when handing down a sentence in terms of section 276 (1) (i) not to set any measures that would interfere with the discretion of the Commissioner of Correctional Services – and in particular that the total period of the sentence must not exceed 5 years.

The discretion of the Commissioner of Correctional Services was also under the spotlight in Roman v Williams NO[30], which tested the constitutionality of the Commissioner's power to re-imprison a probationer in terms of section 84B(1) of the Correctional Services Act no. 8 of 1959. The court found that this power was in line with the Constitution, because it was necessary to preserve the "crucial penal character" of correctional supervision, and to maintain public respect for this sentence as an effective punishment and deterrent.

Other cases that are relevant in relation to correctional supervision were also brought before the courts during the 1990s For example, S v Omar[31]went into some detail about the kind of information that should be provided by the correctional official or probation officer to assist the court in determining appropriate conditions. The judgement also remarked on the importance

[26] S v Leeb 1993 (1) SACR 315 (T).
[27] The introduction of Correctional Supervision was phased in by district over a period of time.
[28] The Acting Head of Community Corrections still cites Leeb as being the reason why the majority of conversions to correctional supervision do not go via the court, with the commissioners preferring to use those sections that give them discretion. (Interview with Mr E Kriek, February 2004.)
[29] S v Stanley 1996 (2) SACR 570 (A).
[30] Roman v Williams NO 1997 (2) SACR 754 (C).

of retaining flexibility in the operation of correctional supervision, and that a programme should be able to be relaxed or ameliorated at the discretion of the Commissioner. The Appellate Division matter of S v R [32] decided that correctional supervision was an appropriate sentence for a man convicted of a sexual offence involving a 15-year-old boy, despite the man having a relevant previous conviction. This is because a sentence in terms of section 276 (1) (h) allowed him to obtain the necessary therapeutic support he needed. The court found that the sentence was particularly suitable, because the offender was young (32 years old), had strong family ties and a stable work pattern. His criminality had its origins in personality defects that responded favourably to therapy, whereas imprisonment would have had a negative impact on these defects and would interrupt the therapy. A similar approach was evident in another judgement handed down by the Appellate Division later in the same year. S v Williams[33] established that sentencing involving rehabilitative treatment such as treatment of drug addiction would have much greater success if the offender remained in the community, where he could continue being employed and living with his family. Thus the matter was referred to correctional supervision for conversion after due compliance with the provisions of Section 276 A (1)(a).

The principles relating to the sentencing of a child offender were expounded on in S v Kwalase[34]. The court found that the magistrate had erred in not asking for a pre-sentence report. Referring to the UN Convention on the Rights of the Child, the Beijing Rules for the Administration of Juvenile Justice and the Constitution, the Court found that imprisonment in terms of section 276 (1)(i) would have been appropriate.

In two recent decisions by the Supreme Court of Appeal (SCA), correctional supervision in terms of section 276(1)(i) was found to be appropriate in cases involving fairly serious offences. In S v Mc Millan[35], the court set aside a ten-year term of imprisonment and replaced it with a sentence of imprisonment for five years in terms of section 276(1)(i) of the Criminal Procedure Act. The court based its decision on the principle of consistency. It found that although the offence was considered serious (indecent assault on three young boys), the sentence was too severe in comparison to sentences handed down in equivalent cases that had been confirmed on appeal. Days later, the SCA handed down another positive judgement relating to correctional supervision in terms of section 276(1)(i). In S v Sithole[36], the offender (who had three previous convictions for drunken driving) was convicted of two counts of drunken driving. The trial court had imposed three years' direct imprisonment on both counts. This sentence was overturned by the Provincial Division and substituted with a sentence of four years' imprisonment under section 276(1)(i) of the Criminal Procedure Act. In a further

[31] S v Omar 1993 (2) SACR 5 (C).
[32] S v R 1993 (1) SACR 209 (A)
[33] S v Williams 1993 (2) SACR 674 (A)
[34] S v Kwalase 2000 (2) SACR 135 (C).
[35] S v Mc Millan 2003 (1) SACR 27 (SCA).
[36] S v Sithole 2003 (1) SACR 326 (SCA).

appeal, the SCA upheld the sentence of correctional supervision, saying that although the seriousness of the offence coupled with the previous convictions did indicate that the offender could not avoid imprisonment altogether, the original sentences (at least when cumulatively applied) had been too severe, and that the discretion that the court *a quo* had used in imposing a fresh sentence could not be faulted.

Although section 300 of the Criminal Procedure Act, which allows for compensation to victims, did not elicit much interest from people interviewed at the sites, a fair amount of case law on this section has emerged[37]. Most of these have attempted to identify the types of cases in which compensation should be considered, as well as what factors should be taken into account when such compensatory orders are being considered.

6. Overview of Current Practice

6.1 African context

Alternative sentencing has gained ground in other countries in Africa in the last decade. For example, a Community Service Scheme was started in Zimbabwe in 1992, because of a project carried out by the Zimbabwean government and an international organisation called Penal Reform International (PRI). Statistics show that by December 2000, in Zimbabwe, 41 000 offenders had been sentenced to a community service order instead of to prison[38]. On the strength of this success, PRI obtained further funding from the European Union to help with the implementation of Community Service in Kenya, Malawi, Uganda, Zambia, Burkina Faso, Congo-Brazzaville, the Central African Republic, and Mozambique. The approach that was followed entailed holding a national seminar first, followed by setting up a National Committee on Community Service – comprising government officials, professionals, non-governmental organisations and community-based organisations.

A conference entitled “International Conference on Community Service Orders in Africa” organised by PRI, in collaboration with the Zimbabwe National Committee on Community Service, took place in Kadoma in 1997. The conference produced the Kadoma Declaration and Plan of Action on Community Service, together with a Code of Conduct for National Committees on Community Service.

6.2 South African situation

[37] S v Baadjie en ‘n Ander 1991 (1) SACR 677 (0), S v Stanley 1996 (2) SACR 570 (A), S v Medell 1997 (1) SACR 682 (C), S v Lombaard 1997 (1) SACR 80 (T), S v Brand 1998 (1) SACR 296 (C).
[38] “PRI support to Community Service programmes in Africa” http://www.penalreform.org.

The Criminal Procedure Act of 1977 provided an opportunity for community service orders through the conditions relating to the postponed and suspended sentences that it included[39]. Limited use was made of these provisions because the procedures for the operation of the provisions were not very clear. There was an amendment to the Act in 1986[40], which provided guidelines for the operation of community service. The Cape Town branch of NICRO initiated community service orders in 1980.

In 1997, the Human Sciences Research Council published a study of community service orders, written by Lukas Muntingh[41]. The study presented the findings arising from an evaluation of 1 447 cases supervised by NICRO in Cape Town between 1983 and 1994. Based on the number of referrals, the study concluded that people handing down sentences were sceptical about non-custodial sentences. They did not truly regard this type of sentence as an alternative to incarceration. It must be noted, however, that the kind of cases for which incarceration would commonly be used in all likelihood would not have resulted in a custodial sentence being handed down. Therefore, the author concluded "community service remains a peripheral option that is used for exceptional cases rather than the run-of-the-mill cases that fill the court roll every day"[42].

At the time of the aforementioned study by Muntingh, NICRO had initiated community service orders, and members of its staff had supervised offenders. Muntingh observed that correctional supervision (which had been phased in over a period following its introduction in 1991) also involved community service, and he recommended that the situation "should be re-assessed with the aim of transferring the supervision function to a government department such as the Department of Correctional Services, which is better geared to the supervision of offenders." In fact, the department of Social Development (at that time named the Department of Welfare and Population Development) took over the responsibility of community service orders from NICRO. This was included in the White Paper for Welfare and Population Development[43], as a responsibility of Probation Services.

Muntingh[44] outlines the procedure for community service orders as follows:
-after conviction the court may request that the offender be assessed for community service and the case be postponed to a later date;
- a probation officer and a NICRO social worker then conduct an assessment interview with the offender, and his or her parents (in the case of a child);

[39] Sections 297(1)(a) and (b)(i)(cc).
[40] Criminal Procedure Amendment Act no 33 of 1986.
[41] L Muntingh "Community Service Orders: An evaluation of cases supervised in Cape Town between 1983 and 1994' HSRC, Cape Town, 1997.
[42] Ibid, at 49.
[43] The White Paper for Welfare and Population Development was published in 1996.
[44] L Muntingh "Alternative sentencing in South Africa – an update" NICRO, April 2002.

-the assessment interview will focus on the stability of the offender's life style, personal circumstances, etc. and his or her willingness to do community service;
-the probation officer will make a recommendation to the court regarding the offender's suitability for community service and the suggested duration and placement;
-if the court agrees with the recommendation it will specify the total number of hours, the number of hours and total duration, minimum number of hours per month and the details of the placement, usually all as conditions to the suspended or postponed sentence;
- a probation officer will then monitor the community server's performance (prior to the mid 1990s a NICRO social worker performed the task of monitoring);
-should the server fail to comply with the conditions of sentence, he or she is entitled to one written warning after which the court is informed of the situation and the postponed or suspended sentence may be put into operation.

Johann Smit describes the term "community corrections" as being a collective term for all forms of sentences served in the community[45]. He includes the following categories in this definition: offenders who have been sentenced by a court to correctional supervision, prisoners placed out of prison under correctional supervision, persons placed under the supervision of a correctional official and persons who have been placed out of prison on parole. Smit places emphasis on the usefulness of community corrections in dealing with the problem of overcrowding. He states that community corrections play an important role in reducing the prison population, and quotes statistics that show that the ratio of those in community corrections to those in prison (based on daily averages) rose slightly from 2000 to 2001[46]. Statistics provided under 6.3 below show that the figures for correctional supervision are coming down. Lukas Muntingh[47] provides a different perspective on this issue. He says: "The expectation that non-custodial sentencing will decrease prison numbers is perhaps unrealistic in the light of overall sentencing trends. There is a definite shift towards longer prison terms and less prisoners are being admitted for terms of less than six months." Graphs provided hereunder at 6.3 bear out the trend towards longer prison terms. Of course, reducing the prison population is just one benefit to the system that might be expected. However, Muntingh also pours a measure of cold water on the other commonly cited benefit – cost-reduction. On this matter he comments as follows: "The minor reductions in the prison population through non-custodial sanctions will, however, have virtually no impact on the maintenance costs of prisons. For example, if each prison had 10 percent fewer prisoners, this would have very little if any effect on the amount of personnel needed, programme costs or on the daily management of the prison." His comments are based on the reality that South

[45] J Smit "Community Corrections as an alternative to imprisonment in South Africa" Paper presented to the Annual Central Eastern Southern Correctional Heads of Africa Conference, Belle Mare, Mauritius, 3-8 August 2003.
[46] Smit provides figures from DCS indicating that there were 169 559 prisoners (including unsentenced prisoners), and 69 814 persons in the community corrections system (including pre-trial release, correctional supervision and parole) and that in the previous year the figures had been 166 334 (in prison) and 62 746 (under community corrections.

African prisons are currently very over-crowded, and therefore staff to prisoner ratios are unreasonably stretched. Therefore, the overcrowding problem tends to undo the cost reduction argument.

There are still good reasons for promoting alternative sentencing, however. Muntingh identifies the issue of appropriateness. In some cases, imprisonment is not appropriate, and alternatives must be found. In addition, reintegration into the community proves to be a major challenge, and if offenders remain in the community, this difficulty is obviated. The actual harm or damage done by imprisonment is thus avoided[48].

In his description of the practice of Community Corrections in South Africa, Smit[49] records that in order to be considered for a sentence or conversion of sentence to correctional supervision the offender must pose a low risk to the community, have a fixed, verifiable address and have means of support or be financially independent. At the pre-sentence stage, a monitoring official will visit the home where the offender intends to reside during the sentence, and this together with other information will be included in the report to court. He goes on to explain that a supervision committee made up of a correctional supervision official, a monitoring official and a vocational official will collaborate to constantly evaluate and monitor a probationer. In addition, this committee can make recommendations for setting or altering conditions, which the Head of Community Corrections can act upon.

When probationers violate a condition, action can be taken in the form of a verbal, written or final warning. The Commissioner also has the power to arrest and detain the probationer in a prison for 72 hours. Smit identifies absconding as a major challenge. Over the past five years, 12 660 probationers absconded, of which 9 080 (72 percent) have been traced. Inadequate supervision is obviously a factor in the number of prisoners who abscond, and Smit provides some insight into the difficulties by providing staffing figures from 2003, which show that the Department of Correctional Services employs a total of 33 285 personnel members, whilst the total number of staff stationed at community correctional offices nationwide is 561[50]. Put differently, only 2 percent of the staff work directly with probationers and parolees at community correction offices. The ratio of probationers and parolees to the number of staff directly involved with them is approximately 67:1, whereas the ratio of staff members working with prisoners (unsentenced and sentenced) is approximately 5:1. Of course, the cost-effectiveness arguments in favour of community-based sentencing rests on the fact that you need fewer staff, but the differences between these ratios indicate a lack of human resources support for community corrections.

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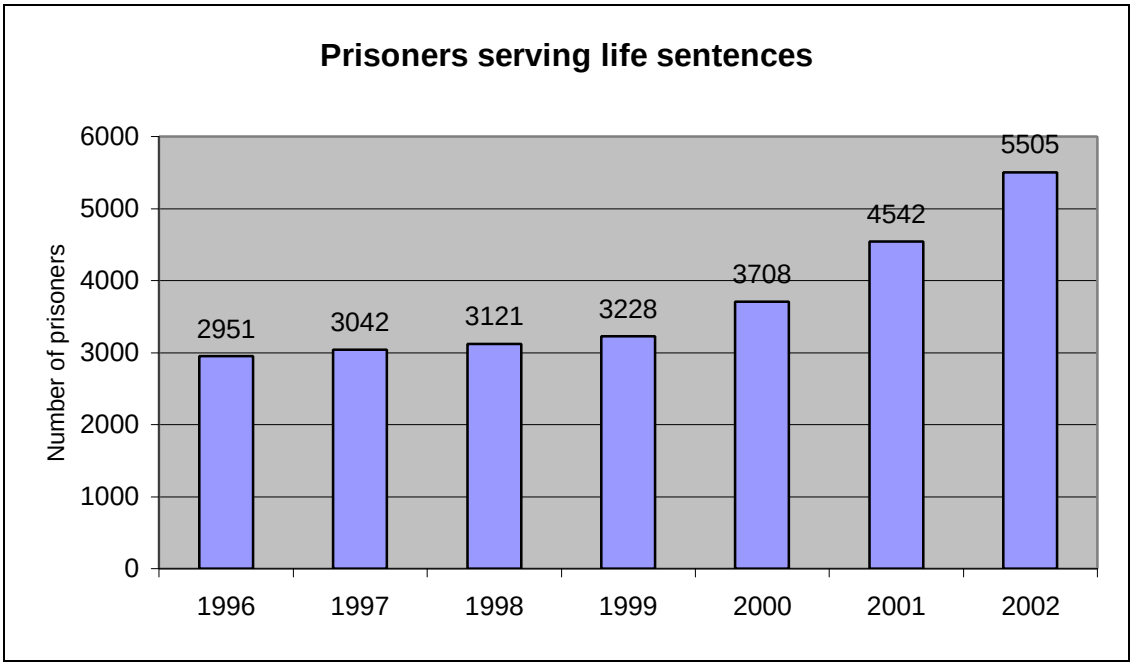
[47] L Muntingh “Alternative sentencing in South Africa – an update” NICRO, April 2002.
[48] Zvekic calls this avoiding “prisonisation” important because it promotes rehabilitation and reintegration and because it is more humane. See further U Zvekic “International Trends in non-custodial sanctions” in *Promoting Probation Internationally*, Publication no. 85, UNICRI, Rome, 1997 at 36.
[49] J Smit 2003 see note 19 above.
[50] Smit cites Groenewald, Directorate of Human Resources, as his source for this information

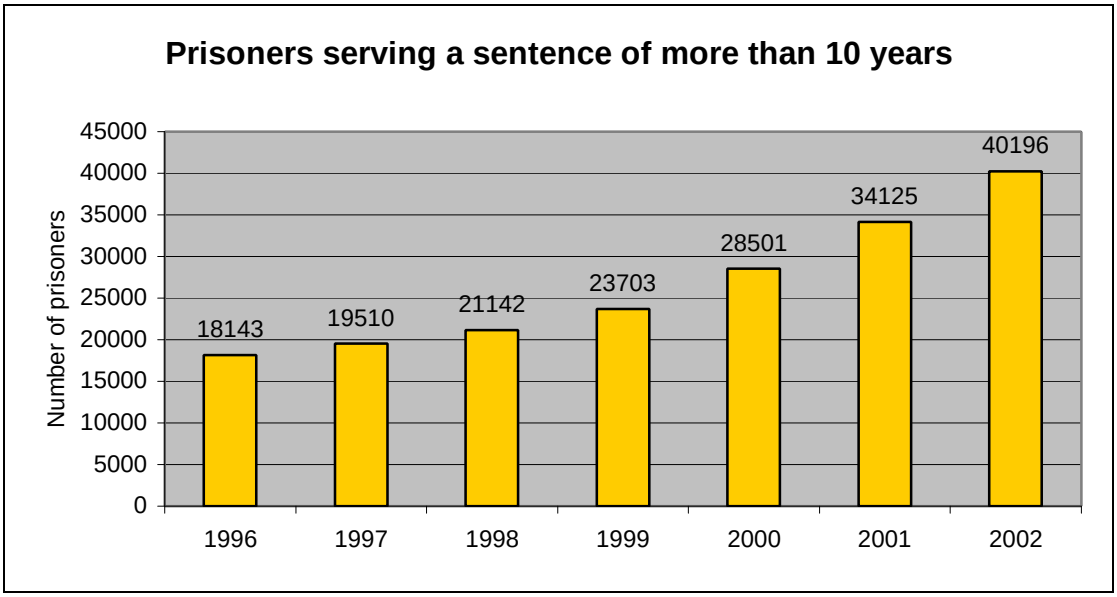
6.3 Statistics

6.3.1 Increase in long prison sentences

According to the Inspecting Judge of Prisons, the numbers of persons sentenced to long periods of imprisonment is rising. This is graphically demonstrated in the Annual Report of the Inspecting Judge of Prisons 2002/2003. The two graphs set out below are reproduced from the Annual Report[51].



[51] Graph 1 appears on page of 29 of the Annual Report, and Graph 2 on page 30.

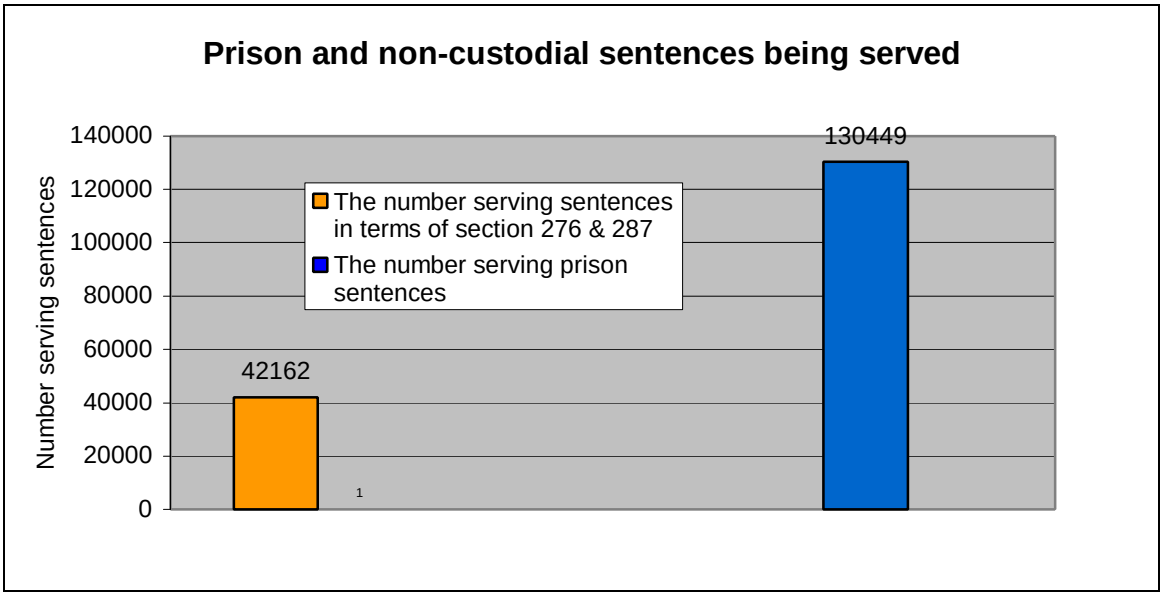


The graphs above demonstrate the effect of the minimum sentencing laws on prison numbers, and as Muntingh has observed[52], this discounts the argument that alternative sentences are likely to contribute significantly to reducing the number of people in prison in the years to come. Muntingh also pointed out that although short-term prisoners (serving sentences of 6 months or less) make up nearly half of the annual admissions to prison, they represent only 5 percent of the daily average number of prisoners serving sentences. Prisoners serving short sentences obviously are prime candidates for alternative sentences, and although targeting them will reduce the number of admissions, it is unlikely to have much of an impact on the daily average number of people in prison.

6.3.2 Comparison of numbers serving sentences

In graph 3, below, the number of probationers serving sentences of correctional supervision in the community is compared with the number of prisoners serving sentences inside prison. The two figures were gathered on different dates, two months apart, but these dates are close enough for the purpose of an estimated comparison.

[52] See note 42, above.



6.3.2 Correctional supervision statistics 2000, 2001, 2002

RSA	Section 276(1) (h) Admitted	Section 276(1) (i) Converted	Section 276 A (3) Converted	Section 287 (4) (a) Converted to 276 (1) I	Section 287 (4) (b) Converted to 276 A (3)
PC EASTERN CAPE	903	264	115	4871	64
PC FREE STATE	828	368	17	1911	6
PC GAUTENG	785	564	28	763	16
PC KWAZULU-NATAL	1055	472	43	2551	15
PC LIMPOPO	504	127	4	3575	1
PC MPUMALANGA	379	93	9	1811	5
PC NORTH WEST	843	153	7	1474	19
PC NORTHERN CAPE	297	200	4	1624	2
PC WESTERN CAPE	1630	1404	14	4557	2
All RSA	7224	3645	241	23137	130

RSA	Section 276(1) (h) Admitted	Section 276(1) (i) Converted	Section 276 A (3) Converted	Section 287 (4) (a) Converted to 276 (1) I	Section 287 (4) (b) Converted to 276 A (3)
PC EASTERN CAPE	1025	272	2	5006	1
PC FREE STATE	758	365	4	1804	5
PC GAUTENG	907	584	39	805	10
PC KWAZULU-NATAL	1078	479	45	2570	8
PC LIMPOPO	448	116	2	2867	9
PC MPUMALANGA	558	123	7	1994	8
PC NORTH WEST	864	187	15	1479	5

PC NORTHERN CAPE	313	195	4	1481	7
PC WESTERN CAPE	1504	1293	13	4186	8
All RSA	7455	3614	131	22192	61

RSA	Section 276(1) (h) Admitted	Section 276(1) (i) Converted	Section 276 A (3) Converted	Section 287 (4) (a) Converted to 276 (1) I	Section 287 (4) (b) Converted to 276 A (3)
PC EASTERN CAPE	1008	344	2	5405	12
PC FREE STATE	879	420	4	1852	6
PC GAUTENG	952	694	51	1247	7
PC KWAZULU-NATAL	1159	472	26	3083	4
PC LIMPOPO	393	226	4	2889	6
PC MPUMALANGA	595	116	7	1665	3
PC NORTH WEST	984	224	20	1316	3
PC NORTHERN CAPE	404	228	5	1157	3
PC WESTERN CAPE	1414	1361	9	3957	4
All RSA	7788	4085	128	22571	48

The figures provided by the Department of Correctional Services set out in the tables below give a useful overview of the different referral mechanisms applicable to Correctional Supervision. It is striking that by far the majority of people serving sentences to correctional supervision are not sentenced to that option by the courts. Section 287(4)(a) is a conversion at the discretion of the Commissioner, which is used in cases where a person has been sentenced to imprisonment not exceeding 5 years with the option of a fine. The conversion may be done at any time after sentencing unless the court directs otherwise. Obviously, people with the option of a fine do not end up in prison unless they are too poor to pay the fine. The fact that the Commissioner (and his delegates) is managing to convert so many of these cases in a year is a tribute to their efforts, but raises serious questions about sentencing officers in the courts who are setting prison terms with the option of a fine without ascertaining whether the sentenced person can pay the fine or not. The time and money being spent on housing prisoners for a period of time, and on the administration brought about by these conversions could be saved if prisoners were sentenced to correctional supervision in the first place. The other trend that these tables reveal is the fact that the numbers in each category dropped steadily over the years 2000 to 2002 – every year fewer people were being sentenced to, or having their sentences converted to, correctional supervision. The only exception was 2002, when more conversions were made in terms of section 287 (4)(a) than in 2001. This aside, the numbers dropped over the three-year period in question. This is a worrying trend.

6.4 Benefits of Alternative Sentencing according to those interviewed

The National Department of Correctional Services states[53] that, in contrast to imprisonment, alternative sentencing has the following advantages:
The probationer:

- Stays within the community and is exposed to the normal influences of the community;
- Is not exposed to the negative influences of hardened criminals;
- Is able to care for and accept responsibility for himself and his own family, and
- Keeps his job and still contributes to the economy.

According to representatives of the National Department of Social Development who were interviewed, alternative sentencing promotes family preservation. It aims to break cycles of crime and violence by not bringing low-risk offenders into contact with high-risk offenders. It also benefits the family financially and promotes moral reintegration.

The site interviews provided a wide range of benefits of alternative sentencing that are listed here:

- Addresses causal factors of criminal involvement
- Family bonds and other interests such as sport can continue to be positive influencing factors
- Victim is given chance for compensation or restoration
- If offender is working, he or she continues to pay tax so we all gain
- Can treat drug and alcohol problems
- Avoids “contamination” by others in prison.
- Reduces stigma
- Can build on offender’s potential
- Creates an opportunity for offender to change his or her behaviour
- Allows offender to demonstrate remorse and make reparation
- Improves relationships in the community
- It is about real justice between victim and offender
- Increasing respect through apologies and explanation of why offence was committed and how people are feeling
- Can integrate tribal/traditional approaches

Certain benefits of the system were identified. The use of alternative sentencing would “contribute to building a healthier country.” Those who believed that alternative sentencing

[53] “Correctional Supervision” see http://www.dcs.OffenderManagement/CorrectionalSupervision.htm

could be linked to plea-bargaining observed that if this could be done it would reduce the number of trials.

6.5 Description of the current practice of alternative sentencing as provided during site interviews.

6.4.1 Benoni

The representative of the Department of Correctional Services (Benoni) reported that the majority of community corrections sentences were brought about by the Commissioner using the discretion afforded him by sections 276 (1)(i) and 287(4)(a). These parolees or probationers made up the majority of clients. If the conditions of the sentence are breached, a written warning is issued. The procedures that are to be followed are clear. If the conditions relating to a sentence handed down in terms of section 276(1)(h) are breached, a written warning is given. The fourth time that the probationer breaches the conditions he or she may be detained for 72 hours, whereafter the supervision committee sits to consider if the person is "fit for the sentence". The probationer is then either released or taken to court for another sentence to be imposed[54], and if it is found that he or she is not fit or able to fulfil the conditions of the sentence, the Commissioner can revoke the sentence.

The Benoni district, which covers a large area, has 12 staff members who carry out monitoring of people serving alternative sentences. They share a caseload of about 900 between them. The district also has administrative staff to support the monitoring, as well as social workers (two posts were recently advertised).

In terms of options for placing people in community service, the Benoni district makes use of about 20 – 30 institutions in the area, such as schools, police stations, and the Daveyton Association for the Disabled. The institution is evaluated before it is selected. The ability of each institution to manage community service participants[55] is monitored continuously. Community support for the schemes appears to be growing.

The Department of Correctional Services (hereafter referred to as DCS) is concerned because the number of these sentences has declined over the past few years. The representative who was interviewed suggested that there were fewer referrals because role-players in the justice system did not trust the community corrections system. This may be

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[54] As provided for in section 84B of the Correctional Services Act no. 8 of 1959.
[55] There is some concern about the suitability of some of the placement options. Police stations, for example, are not considered ideal. This problem is not confined to Benoni. However, it is an issue that needs to be addressed as a matter of national policy.

because community corrections got off to a bad start in1991 because there were no guidelines, which resulted in about 800 absconders, and the statistics relating to these absconders were broadcast throughout the system. However, since 1997 there have been stricter guidelines and less absconders (on average no more than four in a month). The new system, which is computerised and used nationally, facilitates the tracking of offenders, even if they have used false names.

Set monitoring conditions are followed in the Benoni district. Contact is made with the probationer or parolee four times a month, but in some areas, where there are long distances to be covered contact may be less frequent than this. Satellite offices have been established at police stations, community halls, and other similar venues, where meetings are scheduled. This reduces expenses for both probationers and parolees, and is more efficient and effective for staff.

There used to be areas that were considered 'non-monitoring' areas, such as informal settlements, but now these areas have become accessible because community support has been achieved following discussions with community leaders.

The types of programmes offered by community corrections social workers in the Benoni district include:

- Social life skills programme called "Free to go". This includes self-esteem, conflict handling, communication, assertiveness, and human relations.
- Drug and alcohol programme
- Responsibility
- Reintegration – adjustment for longer-term prisoners
- Restorative justice is understood and promoted as a concept, but it is recognised that training is needed before restorative justice programmes can be carried out.

These programmes are all delivered in the form of group therapy. The Community Corrections office in Benoni also provides individual counselling and works with the family where necessary, especially in the area of conflict management.

The staff also monitor community work, offer crime prevention awareness and undertake tours to prisons. Those working in the field observe that community-based sentences definitely work for some, especially for first-time offenders. Such probationers or parolees develop as people, carefully examine their thoughts and feelings, and become equipped with skills to address their problems.

The Benoni district DCS collaborates with some NGOs. For example, it refers probationers with marital problems to Famsa, and child offenders (mostly for diversion) to NICRO or

Khulisa. It also uses NICRO for training in business skills. These arrangements used to be very informal, but there are now guidelines and contracts with NGOs. The contracts include a requirement that the effectiveness of the programmes be evaluated.

6.4.2 Pietermaritzburg

A Magistrate of the district court in Pietermaritzburg stated that the court is guided by S v R[56], which provides guidelines for when correctional supervision is appropriate. According to the Magistrate, the courts generally have an open mind, and prefer not to send people to prison if possible, but they feel restricted by problems of infrastructure. Correctional supervision is considered a good option and the court in which this particular Magistrate serves has only had two cases brought back to court in the last four years. Therefore, it appears that these sentence options are working quite well, despite a lack of staff to monitor the programmes properly. It is important to stress the importance of accountability and ensure that the community does understand that this is not a soft option.

The procedures used by the DCS include the use of satellite police stations for reporting and telephoning. This helps to reduce the transport costs of both the department and the parolee or probation officer. A "tracing unit" linked to computer systems is used to help re-arrest absconders.

In the past, probation officers and social workers completed pre-sentence assessments and reports at court, but the DCS in Pietermaritzburg has advanced plans for this task to be taken over by DCS officials.

The conditions of sentence determine which programmes are used. The programmes can be geared to include life-skills, substance abuse, marital counselling and domestic violence.

Interviewees reported that there had been difficulty in getting community corrections off the ground in all areas in KwaZulu-Natal (KZN) due to violence in communities. This meant that officials could not enter certain communities because of it being unsafe to do so. Moreover, working in rural areas is difficult because some parts cannot be accessed by road without the use of a four-wheel drive vehicle, especially in the rainy season. Homes are difficult to find because there are not fixed addresses, streets are not named, and often landmarks that are provided along with directions tend to change, such as a sugarcane field that is merely an empty field after the harvest.

The issue of electronic monitoring was discussed with representatives of the DCS (Pietermaritzburg). It was reported that trials were held, but that nothing had ever come of

[56] S v R 1993 (1) SACR 209 (A).

them. It would appear that the project is now on hold, probably because of the initial cost, as well as the fact that the system is linked to telephones. Therefore, it can work only where there are telephones. In any event, the correctional officials were of the view that electronic monitoring could only be used for monitoring, not to replace programmes. If it were available, electronic monitoring would reduce the time it took to track, monitor a person, and would reduce transport costs. However, human contact is an important part of monitoring, and without it there may be less change in the person.

A probation officer in Pietermaritzburg expressed the view that alternative sentencing worked. This was because the rate of recidivism tended to decrease if a person was taken through an intensive process rather than having to face the challenges of life in prison, which often made an offender's behaviour worse. It is fair for the offenders, and also for the victims because they have more say and can benefit from compensation in some cases.

According to the prosecutor in Pietermaritzburg, various sentencing options are available that would fall within the ambit of "alternative sentencing". Community service is used, but the prosecutor stressed that there must be some link between the crime that was committed and the rehabilitation programme. Other options that are used include fines, postponed and suspended sentences (with or without conditions), as well as correctional supervision. Sometimes losses can be made good to the complainant through the offender paying him or her back, giving them something or performing a service for that person.

The diversion of child offenders is a major focus of the various role-players at the Pietermaritzburg court. There was a clear understanding amongst those interviewed of the difference between diversion (pre trial) and alternative sentencing (post plea or trial.) However, the magistrate pointed out that many of the ideas and programmes used in diversion can be adopted in adult court for less serious offences.

6.4.3 Ga-Rankuwa

The Ga-Rankuwa magistrates' court has a fledgling alternative sentencing project in partnership with a non-governmental organisation called the Odi Community Law Centre (OCLC). The Restorative Justice Centre (RJC) is involved and their staff were responsible for training the staff of OCLC. A referral system was developed next. One magistrate is very involved, and makes sure that many cases are referred to them. However, the option is not widely used by the other magistrates at the court. The magistrate interviewed believes that this may be due to the fact that alternative sentencing is seen as more work, and it forces one to think a step further. The current project targets both the pre-trial and pre-sentence stages. An opportunity is given for the matter to stay on the court roll whilst the parties are referred for a Victim-Offender Conference (VOC). If the conference fails, the trial continues. If the VOC is

successful in a pre-trial matter, the Prosecutor considers the withdrawal of the case. If the person has already been convicted, the VOC is used to inform sentence. The OCLC follows up and must report to the court on whether the sentence has been complied with.

Other practical issues were discussed relating to forms that need to be filled in by the Prosecutor. Details relating to how the VOC will be held are very important, and the venue and date need to be set and clearly communicated beforehand. Problems with transport (costs and distance) have made it difficult to bring people together. Although the Magistrate said that he would like to see accommodation being made available at the court for the VOCs, but there is no space available for this purpose at the court in Ga-Rankuwa. It would also be helpful to have a full-time co-ordinator to do the paperwork and help the Prosecutor. The magistrate noted that "it would be wonderful to have a 1-stop shop of services here".

In rural areas such as Phyllis and the Jericho Court, there is an exceptionally high success rate for the completion of VOCs. These are tribal areas and there is enthusiasm for sorting problems in the community without going to court. This is a very natural process, with the people involved using quasi-traditional approaches; they have not been fully trained by the RJC. The magistrate interviewed observed that it is a very African way of resolving disputes. The Chiefs are not involved, but that could be achieved if there were more funding for the NGOs to set up networks with community leaders properly. The Magistrate said that he had noticed that restorative justice processes worked better with people who were from rural areas. A city dweller was less likely to forgive and was under no pressure from the community to resolve problems peacefully. Therefore, although the choice may be available, the majority of people living in urban areas would not opt for an alternative that focused on restoring relationships and putting matters right.

6.4.4 Polokwane

The staff at the Polokwane magistrates' court indicated that some options had been developed in their area for diversion and alternative sentencing. Diversion was being used on children, and it would appear that there had been considerable emphasis on creating diversion opportunities for child offenders in the past few years. Suspended or postponed sentences were sometimes used, with assistance from NICRO.

The magistrate mentioned that periodical imprisonment, as provided for in section 285, had been used in the past for offences such as drunken driving or failure to pay maintenance, but that its use had decreased in recent years. It proved effective for failure to pay maintenance,

and the magistrate was of the view that its use should be continued[57]. However, it increased the burden on the DCS because extra people were required over weekends or in the evenings, when the prisons were often short-staffed. Therefore, although it has some merit, the magistrate is of the view that it does not help reduce the problem of overcrowding.

According to the magistrate, the tactic of postponing the passing of sentence is often used, and for all sorts of cases, but it is particularly useful for child offenders. Sentences of correctional supervision are used for less serious matters or for offenders who are considered less dangerous. Attorneys often request its use. However, the court must first wait for the report from the DCS. Consequently, concern was expressed that this caused matters to stay on the roll longer, which was something that the Department of Justice was trying to avoid.

In response to a specific question, the magistrate indicated that section 300, which allows for compensation to be made where the crime has resulted in damage, is not often used because of a lack of financial means of the offender. However, the thought was expressed that it could be used more, and if a proper investigation were carried out into the circumstances of the accused, this could be utilised as an appropriate sentence, or be linked to another sentence, such as a postponed sentence.

There is a procedure in place that dictates what happens if the conditions relating to the sentences are breached or not completed satisfactorily. The people who have been appointed to supervise the offender in the community give evaluation reports to the prosecutor or probation officer. If there is a problem, the probation officer writes a report and the matter returns to court. Depending on the reason for the failure, another alternative sentence is sometimes recommended.

6.4.5 NICRO (Braamfontein):

Although Johannesburg was not one of the sites targeted for this research, it was suggested that the work of NICRO (Braamfontein) should be considered, as it appeared to be working very well. An interview with Thys De Coning, a representative of NICRO (Braamfontein) revealed that that office makes many recommendations to court regarding alternative sentencing options. The following options are used:

- Correctional supervision: there is an excellent system in the district but there are too many cases and the DCS is understaffed, which affects the service they are able to render.

[57] Since this interview took place, the Supreme Court of Appeal has upheld a sentence of periodic imprisonment for a maintenance defaulter, in Visser v S SCA-361/03 as yet unreported. The judgement was handed down on 1 December 2003.

- Statutory supervision by Probation Officer: this is used more frequently. This option has been under-utilised in the past, but is relatively easy to organise and is effective.
- NICRO programmes are used, especially for young adults.
- Sentence to rehabilitation programmes or treatment centres.
- Suspended sentences with specific conditions such as attendance of programmes or community service. There are endless possibilities for conditions that can be recommended for an individual.

7. Structural framework for alternative sentencing: Problems and opportunities

7.1 Institutional constraints

7.1.1 The Legal Framework

There was broad agreement amongst the interviewees that the current law provided sufficient opportunities for alternative sentencing[58]. The interviewees demonstrated a good knowledge of the different sections in the Act that allowed for alternative sentencing.

The Prosecutor in Pietermaritzburg pointed out that recent amendments to the Criminal Procedure Act that allowed for plea and sentencing agreements could increase the use of alternative sentences, because "plea bargaining" partly involves sentence options. This could be used as an opportunity to move away from the usual standard sentences and do something different.

The magistrate in Ga-Rankuwa made the point that although the law existed, magistrates were not generally encouraged to use it. Although they included the relevant legal provisions in their training, the Justice College did not really promote the use of alternative sentences from a philosophical or contextual perspective.

The representative from NICRO (Braamfontein), Thys de Coning, observed that the new law on minimum sentences was a major obstacle to the use of alternative sentences. However, he went on to say: "We have been quite successful by concentrating, in our recommendations to court, on the issue of substantial and compelling reasons why the court should not impose

[58] Act 62 of 2001 amended the Criminal Procedure Act by inserting a new section, s 105A to provide for the first time a legal framework for plea and sentencing agreements. The amendments allow the prosecutor to make an agreement with any accused who is legally represented. Postponed and suspended sentences can be part of the agreed-upon sentence, and the conditions can thus include community-based alternative measures. This procedure is referred to colloquially as "plea bargaining".

the minimum sentence. In some cases, the law requires that first offenders be given a minimum sentence of 15 years; but we have managed to get the court to bring that down to 5 years. In the beginning it was hopeless as the court was very stereotypical in its approach to sentence, but we are now being successful. A lot of Probation Officers don't realise that this can be done. You have to make a specific recommendation, and state the section of the Act so that it is officially on record and make an official recommendation. If the magistrate does not support this and the case is appealed, the magistrate must have addressed all points raised."

According to Mike Batley of the Restorative Justice Centre, generally speaking, the legislation is adequate, and covers options for using Restorative Justice as part of a sentence, such as compensation, restitution, apology and community service. One grey area concerning the practice of Restorative Justice is what must happen if the process is not completed, for example failure to make the very last payment. The law is not clear about what must happen in such cases. The other issue is whether legal representatives are allowed by law to get involved with restorative justice processes such a victim-offender conferencing. Practice has shown that unless they are specially trained, legal representatives tend to hinder restorative justice processes.

7.1.2 The service delivery infrastructure

A problem identified by staff at the magistrates' court in Pietermaritzburg was that there was a lack of infrastructure and support services, and the mechanisms were not fully operational. This applied to both the DCS and the Department of Social Welfare. This lack of infrastructure leads the court to have reservations about using alternative sentences. For example, the Alcohol Safety School of the Department of Transport for people convicted of driving whilst under the influence of alcohol was not running because of a lack of social workers.

The court considered monitoring to be very important, because "community service is not a holiday". Therefore, the court wanted a guarantee that the person was being monitored and it required a report on this matter. The court lacked Probation Officers to supervise people who were sentenced to supervision or community-based sentences in terms of section 290 and 297 of the Criminal Procedure Act. Concerning children, it was observed that although the new amendments to the Probation Services Act demanded assessment of each child before the first court appearance, this was not being done because of a shortage of probation officers.

Several interviewees expressed the feeling that community service placements were rather unimaginative, with most of them being referrals to government departments. It was pointed out that opportunities for developing a type of community service that really benefited the

community in which the offender or the victim lived were being missed. This would also show the victims that the offenders were paying back their debt to the community.

Thys de Coning of NICRO (Braamfontein) pointed out that there is a major problem concerning Rehabilitation Centres (for treatment of substance abuse) because of the complex procedures and red tape involved in having a person admitted. In addition, there is no proper aftercare service especially for drug dependence. Without aftercare the rehabilitation process means nothing. In Johannesburg, NICRO (Braamfontein) is working on these problems and things have improved during the past five months.

Probation services is the function of the Department of Social Development, but now in the case of adult offenders these services are often outsourced to organisations such as NICRO (in Johannesburg) and the Restorative Justice Centre (in Pretoria) for adult probation services[59]. These organisations are now promoting their professional services, and the number of cases being referred is rising.

The staff of the Polokwane magistrates' court placed emphasis on the lack of programmes to which offenders can be referred. There was also a feeling that there were insufficient numbers of staff to carry out effective monitoring of community-based sentences. The probation officer pointed out, however, that diversion programmes could also be used for sentencing purposes, but that this was not done regularly.

Mike Batley of the Restorative Justice Centre pointed out that the DCS could follow the lead taken by the Department of Social Development in outsourcing the running of programmes to appropriate non-governmental organisations. However, he observed that the DCS seemed nervous about funding non-governmental organisations to do such work. He speculated that this might be because they would feel there had been a loss of control on the part of the department. Alternatively, perhaps it was just simply that they did not have in place procedures or mechanisms to outsource programmes.

The lack of capacity to monitor and supervise probationers was also an issue that was raised as an aspect of lack of infrastructure. Amongst the staff at the Pietermaritzburg magistrates' court, there was an impression that the DCS did not have the capacity to monitor people serving correctional supervision sentences. On the issue of whether electronic monitoring could help, the magistrate in Pietermaritzburg said that he would rather retain the human element, and that taking away jobs from people was inconsistent with a crime-prevention approach.

[59] However, probation services for children are managed within the Department of Social Services in Gauteng.

The representatives of Justice College who were interviewed also highlighted this issue of monitoring and supervision. Supervision is very important, and where this fails, the magistrates lose faith in community-based sentence options. The Act assumes that the infrastructure is now in place throughout the country, but judging from what magistrates say this is not the case.

7.2 Attitudinal constraints

The magistrate at Ga-Rankuwa stressed the fact that one of the reasons why most magistrates are not very creative when it comes to sentencing is that they do not want to spend time calling for reports from probation officers or DCS officials. This is because they are under pressure to "perform" in terms of how many cases they finish in a month. A court is supposed to run about 70 cases per month. A prosecutor is supposed to have a high number of cases and achieve a conviction rate of 80 percent. It is in this demand for "productivity" that the key to encouraging alternative sentences lies. If alternative sentences were seen as a way of getting cases off the roll – for example, referring them to a restorative justice process to work out a sentence, - the court would achieve a high conviction rate. Consequently, it would be possible to allocate more time to the serious cases that would stay on the roll. However, it must also be understood that sometimes spending time to get the right result, even in a petty case, is worth the effort. At magistrates' forums, there is such a focus on "quotas" and "performance indicators" that there is little if no exploration of new ideas about sentencing. It is positive that ARMSA[60] decided to hold a training workshop on restorative justice in 2003, but there is still a long way to go.

The Prosecutor in Pietermaritzburg echoed some of the comments above, pointing out that the focus in courts is on finalising cases and reducing backlogs. Quotas have been set, for example, two cases per day in district courts, and one case per day in a regional court. In the High Court, the average length of a case is three days. The prosecutor said that the negative attitude towards alternative sentencing was linked to the fact that it was less work to send someone to prison than to come up with an alternative sentence. Requiring probation officer reports, or giving a victim the opportunity to get involved with the solution deviated from the norm.

Clearly, however, there are problems beyond the pressure to perform, and in some cases attitudinal problems run deeper. One of the magistrates interviewed in Pietermaritzburg wanted to bring back corporal punishment. His comments indicated that he was stuck in the retributive mode. He thought that community-based sentencing was soft on offenders. Meting out physical pain seemed a better solution, in his opinion.

[60] Association of Regional Court Magistrates of South Africa.

Thys de Coning of NICRO (Braamfontein) also maintains that some magistrates who are "from the old school" reject alternative sentencing. He said: "We know which courts are not supportive but we continue to promote alternative sentences if that is what is in the best interest of the individual. We know that eventually in appeals, or review by judges, the magistrates will be required to give feedback where they must explain why they ignored our recommendation."

There are attitudinal problems concerning not only alternative sentencing, but also the roles of probation officers, officials of the DCS and non-governmental organisations. The probation officer in Pietermaritzburg said that there was a "...perception that each time a probation officer enters the court they are only on the side of the accused."

Officials of the DCS in Pietermaritzburg said that it had been a battle to get the Department of Justice on board in some areas because they were not aware of the alternative sentencing options and they had to be educated. They tend to see community corrections as a "rather soft option". An observation was made that magistrates often "hide behind the independence of the judiciary", saying that they do not have to follow recommendations, as sentencing is at their discretion solely.

The staff at the Polokwane magistrates' court raised the issue of the community's attitude. They said that the community would not be happy with community-based sentencing because they wanted to see justice done, therefore it was necessary to work with communities on alternative sentencing and restorative justice and get them to understand it. It was recognised that traditional approaches to justice were more restorative, and this could be used to positive effect in marketing efforts.

Amanda Dissel of the Centre for the Study of Violence and Reconciliation said that when members of the public were aware of options – best shown by examples - they were usually supportive. People think of worst case scenarios and harsh punishment because of a lack of awareness. She said that more criminal justice role players were becoming aware of the advantages of alternative sentencing and restorative justice options but in many instances they were entrenched in the adversarial role and it was difficult for them to change.

Mike Batley of the RJC observed that the mind set of legal people was either retributive or rehabilitative; they took time to come around to the idea of restorative justice which was a third option, where the offender was held accountable in a constructive way. If practitioners could learn that having to confront accountability and to make restitution could be very hard for the offender, they would realise that restorative justice was not a soft option.

The representative of the National Prosecuting Authority who was interviewed said that alternative sentencing requires a different kind of mind set from the current way of the thinking. The concept of "social context" is important and training in this is required to deal with prejudice, diversity and understanding people in their own context. Through social context training it is possible to bring about a new culture, and in this way prosecutors can play a role in assisting presiding officers in reaching a just sentence. The role of the prosecutor at sentencing stage is to provide sound arguments and give the opinion of the state and the victims, which is crucial to reaching a just sentence. The prosecutor can also lend meaningful assistance to probation officers by giving them space to testify in court regarding the content of their reports and sentence options.

The DCS representative in Benoni said that they had worked on getting the support of all the role-players in different departments by holding bi-monthly special monitoring actions to which magistrates, lawyers and social workers were "invited to come and see the type of work we are doing. We visit about 20 clients and everyone interacts. Then we come back to the office and hold a discussion".

7.3 Practical problems

Thys de Coning of NICRO (Braamfontein) reports that there are avoidable delays in court cases where correctional supervision is to be used as a sentence. When the court wants to consider a sentence of correctional supervision, whether a probation officer is involved or not, the court must call upon a correctional supervision official for assessment and to see if they qualify according the Act. In Johannesburg, the courts sometimes request the probation officer's report and neglect to call for a report by a correctional supervision official, which causes delays when the case must be postponed again so that the latter may present their report. This process has been streamlined in the Pretoria magistrates' court, where there is good liaison between Probation Services and the DCS.

The DCS (Benoni) is concerned about the safety of officials carrying out community corrections work. They are vulnerable because using government vehicles makes them very visible. The community must know what role correctional officials play, but this must be weighed up against the privacy of the person sentenced. Practical solutions include switching over to private number plates and not using DCS stickers on car doors. Another solution is for the SAPS to be made aware of the work performed by community corrections officials in their areas so that they can be called on to help if necessary.

Other practical problems with monitoring were discussed. The issue of electronic monitoring came up in the interviews. The interviewees were not of the view that it would be a great

asset to the system. They felt it might work in less serious cases, and in urban areas, but only if it was also backed up with human contact from time to time.

On the issue of the breakdown of cases (breach of sentencing conditions), the probation officer in Pietermaritzburg noted that people under house arrest who did not attend programmes were more likely to breach conditions. Teenagers were more likely to breach conditions than adults were, perhaps because they grew bored, or because "the time seems too long for them". The probation officer in Polokwane also observed that children tended to breach conditions more, as did substance abusers[61].

Mike Batley said that if the sentence is linked to a restorative justice process, breakdown or breach of sentence occurs less frequently. He says that this is because of the way that the parties engage under the direction of a skilled facilitator. He or she must build trust between self and others so that each person feels understood. The facilitator must be involved but impartial. Then, if there is a breakdown in the process, the facilitator is able to contact the parties easily, and find out the reasons for the breach or breakdown and address the situation. This is because it is through the relationships with one another that the parties are committed to the process.

7.4 Offender qualification and disqualification

The interviews revealed a range of different opinions on which types of offender should qualify for alternative sentences. Rather than dividing them up according to sites, the opinions are listed below under two headings, namely "People/cases that qualify" and "People/cases that are disqualified". They are reflected here as a "general approach" but interviewees indicated that it would also depend on surrounding circumstances. The interviewees tended to favour the idea of sentencing discretion, and indicated that they did not believe in a one-size-fits-all approach. Members of the DCS (Benoni) pointed out that according to the law all offenders qualify, but that it is a matter for the discretion of the court. The point was also made that if there were specialised programmes (such as programmes aimed at sexual offences, or substance abuse programmes for people addicted to scheduled drugs) to which people could be referred, even crimes that were usually excluded could also be brought into the alternative sentencing arena.

People/cases that qualify

[61] The views expressed by those interviewed in Pietermaritzburg echo the findings by Muntingh in his study on community service orders (see note 41). Muntingh observed that "those with strong family and community ties and good support systems (such as married and employed persons) were more likely to complete a CSO. The highest completion rate was among older persons and those convicted of victimless crimes."

- those who have responsibilities
- people who have a family
- adults committing drunken driving
- shoplifting
- theft
- housebreaking, depending on circumstances
- Culpable homicide (but there must be support from the community)
- Petty offences where the value of items stolen or damaged is less than R500

People/cases that are disqualified

- murder, rape, armed robbery
- people who have committed several crimes
- crimes that have elicited a big public outcry
- crimes where the victims are children
- crimes where there are aggravating circumstances
- people who live in areas where it is not possible to monitor sentences

These lists do not include all offences, and presumably offences falling into the "grey" area in between might well be considered suitable for alternative sentences depending on the particular circumstances. It is interesting to note that according to the interviews a previous conviction does not appear to "disqualify" a person – although a person who has committed "several crimes" would not be considered suitable[62].

Over and above these general thoughts, the interviews raised other interesting matters. The magistrate in Pietermaritzburg said that he had experienced two cases where the accused had just wasted away during process because of HIV/AIDS. At the beginning of case, the magistrate would have sentenced them to prison but they were not fit for it by the end of the case. Consequently, he opted for correctional supervision instead, but could not impose community service because the offenders would not have been able to perform physical labour.

The link between guilty pleas, "plea bargaining" and alternative sentencing was made by a number of interviewees. It will be possible to bring a broader range of offenders, charged with various offences into the alternative sentencing system through plea and sentencing agreements. This has been happening informally for decades, but now there is a proper structure for it[63], which gives court officials more confidence to apply it. The formal system is very new and has not really taken off yet, but systems and norms will be established as the practice develops.

[62] This accords with Muntingh's finding in the study published in 1997 (see note 41) that a surprisingly high percentage (50.7%) of those sentenced to CSOs had a previous conviction.

The prosecutor at Ga-Rankuwa provided figures from a study undertaken in the Pretoria North Court during the 1990s, which indicated that in assault cases 80 percent of the victims knew the offender well. These kinds of cases would be well served by the use of alternative sentencing options, particularly restorative justice options, or correctional supervision with treatment or counselling aspects.

Mike Batley (RJC) pointed out that restorative conferencing had been used in many domestic violence cases in Pretoria where it had been able to break the history, cycle and breakdown in relationships.

7.5 Knowledge gaps

According to representatives of Justice College who were interviewed, the shift to using alternative sentencing requires a "mind set change". The challenge lies in the fact that when training magistrates one deals with individuals who are trained as lawyers, not social scientists. The best method for bringing about this sort of change in mind set is social context training of the type used by Law, Race and Gender[64]. In addition, however, magistrates will need to be confident about the legal principles, what the law allows, and what the perimeters are. It is unfortunate that not all law graduates do "penology" or "principles of sentencing" as part of the law degree. However, it is not far-fetched to promote its inclusion in basic training in future.

According to the representative of the NPA who was interviewed, court personnel do not know the details and fear that alternative sentencing programmes may not work. People with expert knowledge about the programmes must be available to attend court to testify. Such expert witnesses must be able to measure the impact of the programmes and they must be objective. In fact, it is better to use outsiders to undertake evaluations as the court personnel are more likely to afford more weight to such evaluations. The department currently provides prosecutors with no training in alternative sentencing, but the NPA would be open to such training being offered.

Personnel members of the Pietermaritzburg court observed that the level of experience of magistrates and prosecutors was falling and therefore that they were not experienced. Very few of them would have been working in the courts when these sentencing options first came into operation and there was presumably a lot of publicity about them. The DCS must start promoting these options afresh; it is a mistake to presume that magistrates and prosecutors know about them.

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[63] See note 58.

The probation officer in Ga-Rankuwa said that training magistrates about areas of work outside the strict letter of the law really bears fruit. She gave the example of one magistrate she works with who went through Developmental Assessment Training (relating to children) and is now implementing it with success.

On the issue of gaps in the knowledge of probation officers, it was pointed out that a probation officer must be a qualified social worker. The problem is that probation work is not emphasised in the course of acquiring a social work degree, therefore additional training is needed for such a graduate to be an effective probation officer. Four universities now offer honours degrees in probation work and as from 2004, an undergraduate degree will be offered, as it is clear that more knowledge is required. Funding has been allocated to support a Professional Board for Probation Officers, which is being established. It should be operational by June 2004 as part of the Council for Social Work Professions.

The probation officer in Pietermaritzburg complained that probation officers in her area had never been educated about new laws: "we must teach ourselves on it and what the court expects from us". The issue of pre-sentence reports was raised: very often, the reports fail to meet court requirements. Probation officers feel that what they place before the courts is often not really taken seriously and at times it feels that their work is "just being used to satisfy procedure". Magistrates need to understand what goes into the interviewing and assessing that lie behind a report.

It is evident that that the DCS, and in particular community corrections officials, are knowledgeable about community corrections in relation to sections 276 and 287 of the Criminal Procedure Act, but there is a gap when it comes to sentences in terms of sections 290 and 297 of the Criminal Procedure Act. Moreover, no one seems to be driving this. The first community service orders were initiated and monitored by NICRO from 1980 to the mid-1990s. The Department of Social Development then took over as the lead department in this regard, but in recent years probation officers have concentrated a great deal on child offenders and diversion. This is very important work and much has been achieved in this area in the past decade. However, there are signs that the time invested in those successes may have been at the expense of alternative sentencing.

There was much said about the knowledge gaps in communities and how these impeded the use of community-based sentencing options. The representatives of the National Department of Social Development who were interviewed gave the example of Excelsior in Pinetown, where the department upgraded a place of safety to be used as a secure care facility for

[64] Law, Race and Gender is a training organisation, based at the University of Cape Town, which specialises in social context training for justice officials.

children awaiting trial. The community was very resistant and the municipality actually launched a legal action to prevent the Department from carrying out its plans, due to the fact that they had not been consulted. This case shows how community support can make or break a strategy. In the case of Excelsior, although the children were not able to move about freely in the community, but were locked up, the community still did not want them there. In the end, however, as some community members got more involved, there came gradual acceptance. One of the neighbourhood schools used the secure care facility's swimming pool for their learners, and allowed some of the children in the secure care facility to have access to their computer training facilities. This demonstrates that communities need to be well prepared for a new approach with offenders, but most importantly, they need to become actively involved in working with the offenders or service providers. In addition, if the community can see a benefit for themselves in any form, they will be that much more accepting.

Police, as do probation officers, work in a very close relationship with the community. The representatives from the SAPS who were interviewed said that the lack of understanding at community level about the fact that a person could be sentenced and continue to live within the community was very difficult for police to deal with. Communities may see this as a failure on the part of the police, because a matter was reported by the community to the police and, in their view, "nothing has been done" to the perpetrator. This in turn means that police officers have to understand alternative sentences well and be convinced of their usefulness, so that they can help communities to see them in a different way. If members of the police are confident about and comfortable with alternative sentencing, they will be able to convey this to the communities they work with. Police are very important role players when it comes to ensuring the involvement of victims in alternative sentencing, particularly in processes of restorative justice such as victim offender mediation or family group conferencing. Because they are the first line of support to victims of crime, it is vital that they understand concepts of restorative justice.

The interviewees also commented that there were gaps in the knowledge of traditional leaders. It was said that they must be involved, particularly in rural areas. They have a lot of knowledge about conflict resolution and communities trust their judgement in many things. However, they would need to be taught about the modern approach to criminal justice and have to identify how their traditional approaches might link up or fit in with the larger criminal justice framework. It was observed that traditional leaders in general were willing to get involved, but it was necessary to set up meetings in line with the correct protocol, and spend time talking to them about it. They said, for example, that in Pongola there were eight amakhosi who were invited to DCS meetings and events. They were already involved with the DCS in a community partnership strategy, but they could play an even larger role.

The majority of interviewees seemed to recognise the concept of Restorative Justice, although their knowledge of it was superficial in most cases. Descriptions of restorative justice given included the following statements:

- "it deals with feelings and emotions, responsibility and accountability"
- "It focuses on reconciliation, and causes us to see a change in offenders"
- "it involves remorse and forgiveness and includes elements of restitution, reform"
- "it can be used for compensation of victims"
- "community service is restorative because people see the offender working in the community to pay back for his crimes"

There was a great deal of interest in restorative justice, and interviewees expressed a desire to learn more about it so that they could incorporate it into their work. A probation officer interviewed in Ga-Rankuwa said that they were already holding family group conferences, victim-offender mediation for diversion, and that this could be used for sentencing as well. It was conceded that ongoing training was important, even for those already undertaking restorative justice work. It was something new, and everyone in South Africa was still learning about it.

A final area in which there appears to be a knowledge gap relates to the question of how the impact of alternative sentencing is measured. There is a lack of information, in particular longitudinal studies, which may provide indications about the impact of alternative sentences on recidivism. There has been minimal independent evaluation of alternative sentencing structures and programmes [65].

7.6 Networking and relationship gaps

There is a lack of communication between DCS community correction officials and probation officers employed by the DSD. Both are called upon to carry out evaluations and assessment of offenders. The processes need to be streamlined so that there is no duplication of work.

This is linked to a broader complaint of a lack of inter-sector collaboration around sentencing. This would appear to be in breach of clause VII (3)(21) of the Community Corrections Service Orders, which require that the Community Corrections officer set up forums for the promotion of correctional supervision. These must meet at least once a quarter. It would appear that this is not done in all areas, although the same role players meet in many other forums such as the Integrated Justice System meetings or Child Justice Forums. However, sentencing is rarely discussed at those meetings, which tend to focus on pre-trial and trial matters, and on

[65] Muntingh (2000) points out that studies into recidivism undertaken to prove whether alternative sentences work better to prevent re-offending are fraught with difficulty because of differences in offences and offenders and also because it is virtually impossible to obtain baseline data for purposes of comparison.

over-crowding in prisons because of prisoners awaiting trial. Although alternative sentencing can also contribute to reducing prison numbers, for some reason it does not generally get on to the crowded agendas of these meetings.

The DCS officials interviewed indicated that the forums vary at local level. In Mpumalanga, there has been consistent involvement from social development and the forums have credibility and understand the positions of other criminal justice role players. However, there are many areas where the forums are just not operating at all.

Many of the issues regarding problems with community networking have been discussed above, but the fact that this work is time-consuming causes it to be put onto the back burner. Nevertheless, there were positive examples of community involvement. For example, in Pietermaritzburg community volunteers are very involved in finding placement opportunities for community service, and in Tugela Ferry the community has even assisted by transporting victims of crime to court by taxi free of charge.

On the issue of the government and non-governmental sectors working together, it was agreed that there was very good co-operation. The view was expressed by a magistrate in Pietermaritzburg that the state had become too reliant on NGOs. He gave the example that there used to be four State-employed probation officers at the magistrates' court, but because NICRO has started doing an increasing amount of the work, the staff has been reduced. Now there is only one state-employed probation officer at the court. It was agreed that there should not be reliance on donor funding because eventually this would disappear. The state departments had to take financial responsibility. This did not mean that they should not outsource some of their responsibilities, however.

On the issue of inter-sectoral work and operating as a team at court, some issues were identified. The representatives of Justice College raised the issue of the independence of the judiciary which, in their view, meant that magistrates could not be seen to be part of a team relating to sentencing because they had to remain independent. The other role players could form the team, which could give sufficient information on which to base a proper sentence, to inform the court of possibilities, and to give enough information for court to substantiate sentence. However, the approach of the DCS is that although magistrates cannot be part of a team deciding on a particular sentence, they should nevertheless be included in a team that aims to develop an overall approach to sentencing, to understanding what resources there are and how they can be used optimally. Therefore, the official requirement is that a meeting with criminal justice officials, including magistrates, is supposed to take place quarterly. Those areas that manage to do this, and those areas where magistrates are persuaded to attend and physically see what is done (the placements, the monitoring and the structured programmes) manage to get a higher number of referrals.

There seemed to be some deep problems with the way in which some probation officers felt they were seen and how the other role players, especially magistrates, treated their work. One poignant input by a probation officer captures the spirit of this difficulty in professional relationships:

"Some magistrates ask for our reports and our opinion for recommendations for sentence but they make us feel sad because they say whatever they want and look down on us: we are not trained to give sentences, only to give information and a clear insight into the offender. We would like to be respected…We don't want to go and talk to them because they make us embarrassed. Magistrates don't always give reasons or explain why they give a sentence so we don't develop relationships".

8. Key Findings and recommendations

8.1 Findings and recommendations related to under-utilisation of alternative sentences

Finding: There is a sound statutory framework for alternative sentences, and numerous positive precedents in case law.

Finding: The statistics provided by the DCS indicate that the number of sentences of correctional supervision being handed down dropped in the years from 2000 to 2001 and again from 2001 to 2002.

Finding: The majority of cases (by a wide margin) arise from conversions by Commissioners in terms of section 287 (4) (a) from sentences of imprisonment of less than 5 years with the option of a fine.

Finding: There is insufficient information available regarding the use of community service orders, but their utilisation appears to be on the decline. The "value" of community service appears to be diminishing, and the placements (mostly in government departments) are unimaginative.

Finding: Magistrates are not utilising alternative sentencing options on a very wide scale, still tending to set short terms of imprisonment (which make up half of the intake of sentenced prisoners during the course of a year), sometimes with an option of a fine which subsequently remains unpaid. This reluctance to use alternatives appears to be due to a number of factors:

- Firstly, there are negative attitudes about alternative sentences, which are driven by a law enforcement oriented, tough-on-crime perspective. Several of the interviewees indicated that magistrates believe alternative sentences are a “soft option”.
- Secondly, a lack of knowledge about and lack of confidence in the operation of the sentences in practice seems to be a major reason for judicial officers not using alternative sentences. This is borne out by the fact that where they are involved in forums for the promotion of community corrections, and have been taken out to physically witness the work that is being done, they are more likely to apply alternative sentences. It must be borne in mind that many of the court personnel have been appointed or promoted in recent years and were not in their current positions when new sentencing options became available.
- Thirdly, a powerful disincentive for the use of alternative sentences arises from the pressure on magistrates to work according to certain “quotas” and “performance indicators”. This causes them to be reluctant to depart from the normal route, call for pre-sentence reports and keep matters on the roll for longer. Their pragmatic response to this situation is to sentence people to fines or short periods of imprisonment. A different set of indicators would need to be agreed upon with regard to the promotion of alternative sentencing.

Recommendations:

The Department of Correctional Services (Community Corrections should revitalise alternative sentencing through:

- The production of a booklet on community corrections, setting out the law, case examples, programmes, positive stories, relevant statistics and contact details of relevant persons.
- A Memorandum of Understanding, which should be entered into between the Department of Justice and Constitutional Development (specifically, Justice College), Department of Social Development (Probation Services) and Department of Correctional Services that magistrates will receive social context training in alternative sentencing.
- Representatives from the Departments of Correctional Services, Social Development (Probation Services) and Justice and Constitutional Development, together with content experts should collaborate on providing a suitable training programme.
- Revitalise, and where necessary establish the Forums for Promotion of Correctional Supervision as required in terms of Chapter VII (3) (22) of Correctional Supervision Rules. Also add prosecutors and attorneys from the legal aid board justice centres to the list of persons who should attend those forums.

8.2 Findings and recommendations relating to the lack of incentives in the criminal justice system for alternative sentencing

Finding: There are few incentives in the criminal justice system for the use of alternative sentences. Organising such a sentence takes time and creativity, whereas prosecutors and magistrates are being put under pressure to finalise cases as quickly as possible. This differs from pre-trial diversion, where the prosecutors see a systemic benefit to divert cases, because every case that is diverted means one more case off the roll.

Recommendation: Create an incentive for alternative sentencing in some cases by linking alternative sentencing to the newly established legal procedure for plea and sentencing agreements. This will obviate the need for a trial, which would be a good trade-off for the time spent on calling for and hearing a pre-sentence report.

Recommendation: The Legal Aid Board is running a project to promote the use of plea and sentencing agreements, as these agreements are only available to legally represented individuals. The Department of Correctional Services and the Department of Social Development (Probation Services) should meet with the Legal Aid Board to agree on ways to ensure that a full understanding of alternative sentencing is factored into the training and activities linked to the promotion of plea and sentencing agreements.

Recommendation: Plea and sentencing agreements always involve a legal representative. It is important therefore to inform members of the private legal profession about this initiative through a publication that they read, such as *De Rebus*.

Recommendation: The Department of Justice should reconsider performance indicators and quotas in view of the important need to promote alternative sentences. A more flexible approach would allow for the greater use of such sentences.

8.3 Findings and recommendations relating to the practical problems besetting alternative sentences

Finding: Numerous practical problems were identified

- Delays in pre-sentence reports
- A high number of people abscond
- Insufficient supervision of probationers
- Lack of programmes to which probationers may be referred

Finding: The number of staff members carrying out community corrections (562) is minimal compared to the number of staff members working in prisons (33 285).

Recommendations

- The Justice, Crime Prevention and Security Cluster should undertake a study to examine the implications of current sentencing trends and investigate different scenarios such as the increased use of alternative sentencing, and the introduction of the sentencing framework contained in the Sentencing Report of the South African Law Reform Commission.

- The Community Corrections Directorate needs to undertake a highly professional national planning exercise to determine properly the cost of and therefore the budget required for the service that they should be delivering. This should include all relevant costs: personnel, volunteers, programmes (including the costs of outsourcing) transport, etc. This plan and budget should then be entered into the Department of Correctional Services MTEF process so that the system can be supported with adequate resources. This plan and budget report should include a cost-benefit analysis (even though it is conceded that with current levels of overcrowding actual savings may be difficult to obtain).

8.4 Findings and recommendations relating to Probation Services

Finding: Probation Services is no longer taking a strong lead in promoting sentences in terms of section 290 and 297 of the Criminal Procedure Act. Consequently, that this type of sentencing option appears to be used less often. This is probably due to the fact that Probation Officers have become very involved in the development of diversion for child offenders over the past few years. This has caused them to shift their attention away from adult probation work as well as from sentencing work generally.

Finding: The positive aspect of the aforementioned finding is that the work that has gone into the development of diversion programmes is not lost to the field of alternative sentences. For example, a programme could be accessed either as a diversion option or as an alternative sentencing option. Therapeutic programmes, skills development programmes, mentoring programmes and community service all lend themselves ideally to sentencing, and could be accessed as the programme component of correctional supervision, or as a condition relating to a postponed or suspended prison sentence.

Finding: There is some confusion over roles and even duplication of work when a probation officer prepares a pre-sentence report and the court decides to consider correctional supervision, which requires the involvement of a correctional official.

Finding: Probation officers feel hamstrung by their lack of status in the criminal justice system. Making probation services more professional needs to be worked at continually. Probation officers expressed the need for more training in a number of areas to help them work better in the area of alternative sentencing.

Recommendation: The Department of Social Development (Probation Services) needs to enter into a memorandum of understanding with the Department of Correctional Services (Community Corrections), which should set out the exact roles and areas of work, plans for collaboration and streamlining. The memorandum should identify training needs and set out a plan for the training of probation officers and correctional officials. Because all the role players need to understand the perspective and professional responsibilities of the other role players involved, inter-sector training is recommended.

Recommendation: The up-dated training of Probation Officers in alternative sentencing and the writing and delivery of pre-sentence reports is urgent. The Department of Social Development must undertake or initiate this as a matter of urgency. It is imperative that pre-sentence reports placed before the courts be delivered promptly and be of such a standard that the courts treat probation officers in a professional manner.

Recommendation: The Department of Correctional Services (Community Corrections) should have discussions with the Department of Social Development (Probation Services) on the issue of funding arrangements for programme delivery. The Department of Social Development has considerable experience in the use of a number of different models for delivering programmes through public private partnerships, service level agreements, subsidies, and other methods. This learning should feed into the planning and budgeting process recommended in 8.3 above.

8.5 Findings and recommendations relating to the involvement of community members and traditional leaders

Finding: A number of those interviewed recognise that the opportunities provided by alternative sentencing resonate with traditional African approaches to conflict resolution, particularly in relation to restitution, compensation, and restoring harmony. Already there are some examples of traditional leaders becoming involved, but this is not widespread.

Finding: Community members do not understand alternative sentencing, but where they do become involved they are supportive. The police play an important role in community acceptance of alternative sentencing because they are the interface between the community and the criminal justice system. Currently, police do not have enough information about alternative sentencing and therefore probably do not project confidence in such options.

Finding: There is a broad, if superficial, understanding about restorative justice amongst those interviewed. There is enthusiasm for the idea of more incorporation of restorative justice concepts and practice into alternative sentencing work, and a call for training in this regard.

Recommendation: Restorative Justice components should be introduced into the content of alternative sentences. This can be achieved through more training in restorative justice and the development of new processes and programmes for alternative sentencing.

Recommendation: The national Department of Correctional Services (Community Corrections) and the national Department of Social Development (Probation Services) should initiate a meeting to discuss the involvement of traditional leaders with the National Council of Traditional Leaders. At local level, Traditional Leaders need to be drawn into the Forums to Promote Correctional Supervision.

Recommendation: Involvement of the South African Police Service in the Forums to Promote Correctional Supervision. The confidence of the police in alternative sentencing needs to be boosted through their involvement and through training.

8.6 Findings and recommendations relating to measuring the impact of alternative sentencing

Finding: There is a lack of information available about the impact of alternative sentences. There have been some evaluations, but they have tended to concentrate more on the successful “completion” of alternative sentences, which is different from measuring the longer-term impact such as changes in the offender, victim satisfaction and recidivism rates. These studies are difficult to undertake, they require the long-term commitment of resources, and finding comparable baseline data is difficult. For such studies to be credible there needs to be a degree of independence in the evaluation process.

Finding: There was a view amongst many of the interviewees that if such information were available it would contribute enormously to boosting the confidence of courts, police, and communities in alternative sentencing.

Recommendation: Notwithstanding the challenges, there is a need to develop a model to test the impact of research. Such work has been done in other countries in Africa, and it is recommended that technical assistance be requested from Penal Reform International (given their impressive work in alternative sentencing in Africa) and from UNICRI (Rome), which has a solid track-record in alternative sentencing work.

9. Recommendations for pilot projects

To promote the use of alternative sentencing, the Civil Society Prison Reform Initiative has proposed that pilot projects be undertaken in three centres. Of the sites visited for the purposes of this study, Polokwane, Pietermaritzburg, and Ga-Rankuwa, all present themselves as possible sites for pilot projects. They all have personnel who show sufficient enthusiasm about alternative sentencing to sustain a project, and yet all require development, which indicates that pilot projects at these sites would improve services whilst testing new methods and ideas. Alternative sentencing seems to be running smoothly in Benoni, which could be used as a learning site. The work being done by NICRO Braamfontein in adult sentencing, and the work being done by the Restorative Justice Centre in adult probation and restorative justice work with child offenders should all be included in the learning.

It is recommended that the following modus operandi be followed in setting up such pilot projects:

1. The first step is to revitalise or establish the Forum to Promote Correctional Supervision at the selected sites, in line with Chapter VII (3)(22) of the Rules for Correctional Supervision. The forum should be asked to appoint from its ranks an executive project committee, with the power to co-opt any additional members it deems necessary. Probation officers, prosecutors, and legal aid justice centre lawyers who are not currently listed in Chapter VII (3)(22) must be included, as they are essential role players.

2. The scope of this committee ranges wider than correctional supervision, as all forms of alternative sentencing will be included in the scope of the pilot project.

3. A project manager should be appointed to co-ordinate and drive the project. The role of such a project manager would include:

- Undertaking a rapid assessment of current practices and gaps in alternative sentences and of resources available in the area
- Developing a detailed, time-framed plan for the alternative sentencing project
- Developing systems for collecting, documenting and analysing the information arising from the pilot project

- Liaising with all role players from government and non-government departments, and getting their approval for the plans
- Ensuring that the plan, once agreed to by the stakeholders, is properly implemented
- Ensuring that the role players are trained and ready for the implementation of the project
- Overseeing the day-to-day running of the pilot project
- Recording and reporting on the successes and challenges of the project
- Trouble-shooting problems within the project
- Ensuring that targets and deadlines are met
- Preparing for succession planning in the final phase of the project to ensure sustainability.

4. Essential elements to be included in the pilot project are:
   - Working inter-sectorally to promote the use of alternative sentencing
   - Marketing alternative sentences effectively
   - Increasing the referrals to all categories of alternative sentencing
   - Involving community members and traditional leaders in the project
   - Including plea bargaining as an important feature of the project
   - Including restorative justice processes and outcomes in alternative options
   - Incorporating new legal developments such as the recent amendments to the Probation Services Act and the Child Justice Bill
   - Strengthening and developing the programmes for alternative sentencing, and widening the menu of such options
   - Clarifying roles and removing duplication, particularly between Probations Services (DSD) and Community Corrections (DCS)
   - Shortening delays in the development and presentation of pre-sentencing reports
   - Developing plans for long-term sustainability by working with departments to plan and budget so that they can incorporate the work of the pilots in their general service delivery, in partnership with non-governmental organisations
   - Monitoring sentencing trends and the possible impact thereof on the prison population.

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