

A sentencing council in South Africa

Stephan Terblanche

Introduction

The South African Law (Reform) Commission investigated the country's sentencing practices towards the end of the previous century. Its findings and recommendations, as well as a draft Sentencing Framework Bill, are contained in its *Report: Sentencing (A New Sentencing Framework)*, published in December 2000 ("the Report"). The Report proposes many radical changes in sentencing laws and practice in South Africa.

Two proposals in the Report lie at the core of all the recommendations. The first is that the basic principles of sentencing should be established in legislation. These basic principles are explained in the Report and are contained in the draft legislation. The other core proposal is that some type of sentencing guidelines commission be established in South Africa. The Report refers to this body as the "Sentencing Council" and this is the term that will be used in this chapter. The main function of the Sentencing Council would be the creation of national sentencing guidelines, but many other tasks are also envisaged.

This chapter focuses on the following six issues:

1. The Law Commission's research method is set out, in order to explain the amount of consultation that accompanied its production.
2. The deficiencies in the South African sentencing system are listed, as found by the Law Commission. This is followed by a brief opinion whether these shortcomings remain, or whether they have been superseded by other problems.
3. The Law Commission's main proposals for changing the current sentencing system are discussed.
4. The role of the Sentencing Council within the changed system is addressed in some detail.
5. An attempt is made to explain why these proposals were thought to provide the best cure for the current deficiencies.
6. Finally, an assessment is made of whether the stated proposals remain the best solution to the problems facing sentencing in South Africa.

The Law Commission's research method

The South African Law Reform Commission is a permanent commission and a creature of statute. The Commission follows a fairly consistent research method,

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problems can severely hamper the workings and continued existence of such a commission; within the South African context this will be a very real problem.

My main concern with the Law Commission's proposals is that, increasingly, they appear simply to be a few bridges too far. A number of the proposals, especially those involving the general principles of sentencing, are tried and tested in many parts of the world. They need little additional research, if any. But other issues need further research and elaboration. For example, the setting of "sentencing guidelines" is a core aspect of the recommendations, but it is not explained in terms of any exactness. Without a specific proposed format it will be almost impossible to provide convincing proof that these guidelines will actually achieve greater consistency than the current system. It is also possible that the current proposals are not sufficiently sensitive to the fact that sentencing is not the exclusive prerogative of the judiciary.² The current proposals might work well if the Council performs perfectly and if all its members completely subscribe to the ideals of the Sentencing Framework Bill. But perfection should not be required for the functioning of any aspect of the criminal justice system.³

Perhaps the Law Reform Commission might be requested to reconsider the complete set of proposals in the Report and, without revisiting the whole issue and repeating the whole exercise, to set priorities to the current proposals. Then, by tackling the issues one or two steps at a time, it might be possible to achieve more meaningful change in time than by taking one massive jump and leaving everybody else behind.

Notes

- 1 For details of the consultative process, see Report, paras 1.42 to 1.46.
- 2 Compare this with *S v Dodo* 2001 (1) SACR 594 (CC) at [25].
- 3 For further notes of caution, see Dixon, 2001, pp 168-78.

References

- Dixon, B (2001). From Cafeteria to à la Carte: the Law Commission's New Sentencing Framework. *South African Journal of Criminal Justice* 14: 168.
- South African Law Commission (2000). Discussion Paper 91: *Sentencing (a New Sentencing Framework)* (all South African Law (Reform) Commission investigations can be accessed at <www.doj.gov.za/salrc/index.htm>).
- South African Law Commission (1997). Issue Paper 11: *Sentencing: Mandatory Minimum Sentences*.
- South African Law Commission (2000). Project 82: *Report: Sentencing (a New Sentencing Framework)*.
- Terblanche, SS (2003). Sentencing Guidelines for South Africa: Lessons from Elsewhere. *South African Law Journal* 120: 858.
- Tonry, M (1991). The Politics and Process of Sentencing Commissions. *Crime and Delinquency* 37: 307.