I. LIMITING THE CRIMINAL JUSTICE SYSTEM'S REACH

A. Policy Objectives

To structure the criminal justice system so as to address the underlying causes of offending and to divert from formal court prosecution those cases involving some first time offenders and relatively minor crimes where there is no significant risk of harm to the public and where there is no overriding public interest for a prosecution.

B. Policy Issues

1. Does the Penal Code contain offences relating to conduct that need no longer be classified as a crime or which may now be decriminalised?

2. Should a formalised general diversion scheme be introduced under the criminal justice system for certain offences and offenders?

3. Should formalised diversion schemes be introduced under the criminal justice system for specific categories of offenders such as young persons between the ages of 14 and 18 years who are first offenders, the mentally ill and alcohol and substance abusers?

C. Policy Recommendations

1. A review of the Penal Code should be undertaken in order to flag for legislative review offences that need no longer be classified as criminal acts or which may now be decriminalised.

2. In order that informed decisions regarding the possible introduction of diversion may be made the relevant statistical information relating to the various offender groups that may be targeted by any diversion programmes should be collected and analysed. This will include, in particular, statistics concerning those offenders and offences that may be suitable for diversion, such as young first offenders, the mentally ill and alcohol and substance abusers. Information concerning any existing diversion schemes, formal or informal, operated by the police and the Director of Public Prosecutions should also be collected and analysed.

3. A diversion strategy, such as the one currently operating in New Zealand, aimed at diverting certain types of offenders out of the criminal justice system should be developed in consultation with the police and the Director of Public Prosecutions.

4. Consideration should be given to establishing a pilot deferred prosecution diversion programme aimed at young persons aged between 14 and 18 who are first offenders. Based on the statistical information to be gathered in respect of such offenders, specific sessions covering those areas most relevant to the young

offenders and their offences may be developed for incorporation into the diversion programme.

5. Consideration should be given to establishing a pilot diversion programme for the mentally ill to ensure that offenders with mental health problems who enter the criminal justice system are identified and directed towards appropriate mental health care. The pilot project will include the establishment, by the Ministry of Health, of a diversion team to develop and agree plans for the provision of training to improve the identification of mental illness by police officers, court officials and other criminal justice staff; provide recommendations and information to the police, prosecutors and to the courts in relation to decisions on charging, remand, sentencing and disposal of cases; and to ensure that mental health services are made available to offenders both in prisons and at the community level.

6. Consideration should be given to establishing a diversion strategy for alcohol and substance abusers aimed at curbing alcohol and drug related crime as part of the alcohol abuse strategy of the Ministry of Health. The diversion strategy should include the establishment of rehabilitation centres for alcohol and substance abusers with the aim of diverting such abusers out of the criminal justice system and into rehabilitation centres where they may receive appropriate treatment.

Commentary

1) Decriminalisation

Decriminalisation is the process of changing the law so that conduct that has been defined as a crime is no longer a criminal act. One of the first questions to ask when tackling the issue of sentencing and imprisonment is whether particular forms of conduct must fall within the scope of the criminal justice system. Not all socially undesirable conduct needs to be classified as a crime. At least part of the pressure on judicial and prison resources arises from the traditional legislative practice of trying to deter undesirable conduct by making it a criminal offence. In many States there are numerous criminal offences that are routinely disposed of by either a fine or imprisonment for less than 3 months. Should such offences remain "crimes" or are there other ways of dealing with such conduct? Where decriminalisation is recommended in respect of those offences that do not warrant the use of state resources to prosecute, less formal methods for disposing of these cases may be devised. This will then help relieve pressure on judicial, police, prosecutorial and prison resources.

The Penal Code[1]contains several categories of offences that in other jurisdictions have now been decriminalised. Many of these offences carry a sentence of imprisonment if found guilty. For example offences concerning rogues and vagabonds[2] and criminal defamation[3] are now decriminalised, in whole or in part, in many jurisdictions thus reducing rates of imprisonment. In such cases, decriminalising the behaviour and dealing with it outside the criminal law has not resulted in any negative impact on public safety. Some offences contained in the Penal Code, such as for example, challenging a person to fight a duel,[4] are archaic and may be removed altogether.

A review of the Penal Code should be undertaken in order to flag for legislative review offences which may no longer be necessary or which may now be decriminalised. If the recommendation for the creation of a Sentencing Commission for Botswana is adopted, the Sentencing Commission could perform this review function. Having identified those offences that may be abolished or decriminalised the Sentencing Commission may then work with the agencies having jurisdiction over the subject matter to determine if decriminalisation can be accomplished without undermining the purpose for which the law was originally enacted. Thereafter recommendations, including proposed legislation for abolishing or decriminalizing these provisions, can be made to the legislature. The Sentencing Commission would have the task of ensuring that in the future unnecessary criminal provisions are not added to general legislation. The Commission would also keep the criminal law under review and continue to draw to the attention of the legislature criminal provisions against forms of conduct that could be controlled just as or more effectively in other ways. The legislature may then repeal such criminal provisions and develop enabling legislation for alternative measures.

2) Diversion

Under diversion strategies, authorities focus on dealing with people who could be processed through the criminal justice system in other ways. In practice, criminal justice systems typically process only a small proportion of the criminal law offences committed in any State. If States investigated, prosecuted, tried and convicted all offenders, the various parts of the system, including the prisons, would soon be overwhelmed and unable to cope with the numbers. As a result, police and prosecutors, who introduce offenders into the system, have to exercise a degree of discretion in deciding whom to take action against and whom to ignore.

Diverting offenders from prosecution usually applies in those cases involving first time offenders and relatively minor crimes where there is no significant risk of harm to the public and where there is no overriding public interest for a prosecution. In such cases formal criminal justice proceedings may not be necessary. Instead the accused is referred to social workers or other agencies and dealt with through 'diversion schemes' which aim to address the underlying causes of offending. Criminal charges are typically dropped when a defendant successfully completes a diversion program. The defendant therefore avoids the stigma of a criminal conviction. Diversion is primarily targeted towards young people, female offenders, the mentally ill and those with alcohol and substance abuse issues.

The key question in all criminal justice systems is how to structure this discretion to divert offenders from prosecution. Members of the police service need to have clear instructions on when they can themselves issue warnings and take no further action, when they may be

[1] Penal Code Chapter 08.01
[2] s.182. Penal Code Chapter 08.01
[3] ss192-199 Penal Code Chapter 08.01
[4] Section 89 Penal Code Chapter 08:01

able to divert qualifying offenders to alternative programmes without referring them or the case to the prosecuting authorities, and when they must refer alleged offences to prosecuting authorities. Similarly, prosecutors need clear guidelines.

3) The New Zealand experience of diversion

In New Zealand an adult diversion scheme has been operating for almost two decades.[5] Under the scheme the police may deal with some offences and/or offenders without going through a formal court prosecution. Under the diversion scheme offenders agree to fulfil certain conditions in exchange for the charges being withdrawn. The charges are withdrawn only once the conditions have been fulfilled. The benefit of this scheme is that it provides an incentive for non-recidivist offenders involved with low level offending to be punished and take responsibility for their actions without receiving a conviction. The purposes of the diversion scheme are to:

- address offending behaviour that has resulted in the charges;
- balance the needs of victims, the offender and their communities;
- give offenders an opportunity to avoid conviction; and
- reduce re-offending.

Under the New Zealand scheme there are several key criteria for determining when diversion should be considered. Firstly it is important that there is sufficient evidence and public interest in pursuing the prosecution of case. Once this burden has been established the following factors need to be satisfied:

- generally, it is the offender's first offence (unless the offence is dissimilar to earlier offending or the offender has not offended for more than five years)
- the offence is not serious
- the offender has accepted full responsibility for the offences as described in the summary of facts
- the offender has been explained his legal rights
- the offender agrees to the terms (conditions) of diversion.

Certain types of offending are considered too serious to be eligible for diversion. What is serious is generally determined on the merits of each case. Different types of offences have different aggravating and mitigating factors about them that might make them ineligible for diversion. For example, previous traffic offending might prevent an offender from receiving diversion for a careless driving offence. Alternatively a clean driving record would greatly improve the chance of getting diversion. Other categories of offences are serious enough in nature to be automatically considered inappropriate for diversion, they include:

- burglary or dishonesty offences;
- violent offences including family violence offences;
- sexual offences or offences with sexual overtones;
- serious drug offences;
- traffic offence which carry a mandatory minimum disqualification; and
- offences for breaching a court order.

The diversion scheme is operated by the Police Prosecution Service (PPS) and the PPS will consider whether an offender is eligible for diversion. Each case is reviewed by a PPS prosecutor prior to the case being prosecuted. It is at this time prosecutors consider the

[5] New Zealand Police Adult Diversion Scheme Policy

appropriateness of diversion. Prosecutors take into account the views of the victim, the officer dealing with the case and the offender as well as the nature and circumstances of the offence. The prosecutor will advise the court and offender (or their duty solicitor or lawyer) whether the case may be is suitable for diversion. If the prosecutor considers that the case may be suitable for diversion the case is adjourned for the accused to meet with a police diversion officer to provide information on the circumstances that led to his offending. The offender must confirm that he accepts responsibility for the offending. A written agreement will then be prepared and signed which will be tailored to change the offenders behaviour, prevent re-offending and make reparation to the victim or community. A number of conditions can appear in the agreement including the requirement to:

- make an apology to the victim;
- make reparation to the victim;
- attend counselling, education programmes, addiction treatment or other therapeutic programmes;
- make a donation of a specified sum to an approved group; and
- be part of a restorative justice process (where appropriate).

The diversion conditions agreed must be appropriate to the offence and offender; achievable in the timeframe and proportionate to the maximum penalty for the offence and what a court might impose as a sentence. Whatever the conditions are the offender must agree to them before the diversion agreement can be finalised and put into action. The offender is responsible for ensuring the agreed conditions are met and evidence of this achievement is forwarded to the diversion officer by the agreed date. The officer will then advise the prosecutor that the conditions have been completed. If all these conditions have been satisfied and evidence provided to the diversion officer there is no need for the offender to attend court again. The prosecutor will advise the court that diversion has been successfully completed and that the charges have been withdrawn.

4) Diversion schemes for specific categories of offender

In addition to the more general diversion schemes, diversion programmes can also be established aimed at specific categories of offender. These can include young first offenders, the mentally ill and drug and alcohol abusers.

a) Young persons between the age of 14 and 18 who are first offenders

In relation to young people diversion can be a particularly useful intervention with positive outcomes in respect of reoffending. Most youth justice diversion schemes adopt a deferred prosecution model and prosecution is suspended until the young person has successfully completed the diversion programme. An agency such as social services manages the diversion programme. Normally a young person on diversion is involved in individual and /or group-work sessions which cover a range of areas such as offending behaviour, alcohol and drug use, social skills, education, employment and training and problem solving.

b) The mentally ill

A high proportion of offenders have mental health needs. The criminal justice system is not always well placed to handle the complex problems that this can create. An important role at the interface between criminal justice and mental health is therefore assigned to diversion, loosely defined as a means of ensuring that people with mental health problems who enter the criminal justice system are identified and directed towards appropriate mental health care, particularly as an alternative to imprisonment.

With the mentally ill diversion can take two forms. There is diversion *from* the criminal justice system and diversion *within* the criminal justice system. Some diversion schemes focus on taking prisoners with severe mental illness out of the criminal justice system altogether and into hospital. However, only a minority of offenders with mental health problems are sufficiently ill to require hospital treatment. Increasing attention is now given to diversion within the criminal justice system, particularly from options that involve the use of custody to sentences that allow supporting mental health care to be provided to offenders in the community.

There are various ways in which mental health diversion schemes can support criminal justice agencies and improve the general efficiency of the criminal justice system. These include:

(i) increasing the awareness of mental health issues among criminal justice staff;
(ii) reducing the risk of dangerous or disruptive behaviour in custody through the correct or earlier identification of mental health problems among prisoners;
(iii) reducing the use of remand, for example by speeding up the transfer of severely ill prisoners to hospital or helping those with less serious mental health needs to remain in the community on bail;
(iv) reducing delays in the provision of psychiatric assessments;
(v) reducing the need for unnecessary formal psychiatric court reports. This may in turn reduce the need for unnecessary remands in custody, which often arise because the court is waiting for a psychiatric report; and
(vi) facilitating non-custodial sentences for offenders with mental health needs in appropriate cases, thereby reducing the demand for prison places.

People with mental illness can be diverted at *any* stage of their route through the criminal justice system. At the pre-arrest stage vulnerable people may be identified before they experience a mental health crisis that may bring them into contact with the criminal justice system. Support may be provided for families and carers of vulnerable persons in the community through local mental health and other support services. At the point of arrest, options for police officers other than arrest can be made available through partnerships between the police, mental health and other support services The police may refer the person to local mental health and other support services. At the arrest and pre-court stage the identification and assessment of any mental health problems may assist the prosecution in the grating of bail and decisions on charging an accused. If sentenced to imprisonment the identification and assessment of mental health problems in prison can result in appropriate treatment being given through mental health support to the prison authorities or the admission of the prisoner to hospital. On release into the community continuity of care and support for family and carers may continue through engagement by the local mental health and support services.

If the Government wishes to introduce into the criminal justice system a diversion programme for the mentally ill there are initiatives that can be taken. For example the Government should consider the scope for training to improve the identification of mental illness by police officers, court officials and other criminal justice staff. To facilitate the diversion programme a Diversion Team for people with mental health problems who come into contact with the criminal justice system could be established at the mental health hospital. The diversion team could be charged with developing and agreeing plans for the provision of training in mental health issues for criminal justice staff. The diversion team could provide recommendations as well as information to criminal justice agencies, in relation to decisions on charging, remand, sentencing and disposal of cases. The diversion team could also undertake outreach work as a core part of its role to ensure that mental health services are made available both in prisons and at the community level.

c) Alcohol and substance abusers

Any diversion strategy for alcohol and substance abusers aimed at curbing alcohol and drug related crime is dependent upon the establishment of rehabilitation centres by the government. The National Development Plan 9 [6] did envisage the establishment of rehabilitation centres for both drug and alcohol abusers. However due to the shortage of funds this project did not materialise. Currently the Ministry of Health has established a department of drug and alcohol abuse and is formulating an alcohol abuse strategy. Active consideration should therefore be given by government, as part of this alcohol abuse strategy, to the establishment of rehabilitation centres for alcohol and substance abusers. Consideration may be given by government to the utilisation of funds raised from the alcohol levy for this purpose. Once the rehabilitation centres are established rehabilitation programmes may then be formulated. Regulations and guidance may then be drafted to enable the police and prosecutors to divert alcohol and substance abusers out of the criminal justice system and into rehabilitation centres where they will receive the appropriate treatment.

5) Restorative justice and diversion

Restorative justice can play a crucial part in decisions about diversion. Where existing mechanisms allow for dispute settlement by restorative means, they may also encourage the use of alternatives to imprisonment. The use of mediation and alternative dispute resolution in meetings with offenders, victims and community members to deal with maters that would otherwise be subject to criminal sanctions has the potential to divert cases that might otherwise have resulted in imprisonment both before trial and after conviction. Where the diversion is linked to mediation or even full restorative justice processes, a separate administrative structure may be needed to facilitate these processes. This can be provided either by the State or by non-governmental organisations partnering with criminal justice agencies. Any restorative justice schemes may therefore have considerable impact in diverting certain types of offenders and offending away from the criminal sentencing system.

6) Diversion strategies for Botswana

For diversion to operate there must be diversion programmes available. Currently no structured programmes appear to exist in Botswana and resources will have to be allocated by government if such programmes are to be established. Before any decisions can be taken however it will first be necessary to gather and analyse the relevant statistical information available relating to the various offender groups that may be targeted by any diversion programmes. Statistics concerning offenders and offences that may be suitable for diversion, particularly young first offenders, the mentally ill and alcohol and substance abusers, will need to be collected and analysed. The experiences of the police and the Director of Public Prosecutions in relation to any existing diversion strategies in operation will also need to be examined and the relevant statistics analysed. Based on the information collated it should then be possible to establish pilot diversion projects to target at least some of the relevant offender groups.

[6] National Development Plan 9 (NDP9) covered the period 2003-09. The current plan is National Development Plan 10 (NDP10) covering the period 2009-15.

II. PRE-TRIAL, PRE-CONVICTION AND PRE-SENTENCING PROCESSES

A. Policy Objectives

To ensure that persons accused of crimes and who are formally charged and prosecuted shall be treated as innocent until proven guilty. Such persons shall be entitled to trial without undue delay. Pre-trial detention is to be used as the last resort.

B. Policy Issues

1. How can the criminal justice system address more effectively the issues that result in many remand prisoners being held in pre-trial detention for excessively long periods thus contributing to prison overcrowding?

2. How can the system more effectively deal with the large percentage of prisoners detained on remand who are foreign nationals in Botswana illegally and for whom detention in custody is the only option?

3. What steps may be taken to address situations where the police arrest and detain suspects prematurely before sufficient evidence has been gathered to go to trial resulting in an accused being subjected to long periods of repeated remand?

4. What steps may be taken to address situations where the prosecuting authorities are responsible for unnecessary adjournments resulting in remand prisoners having to endure unwarranted periods of detention?

5. What steps may be taken to address the backlog of criminal cases before the courts that may contribute to delays at the trial stage necessitating an accused to undergo repeated periods of remand.

6. How effective are the current alternative systems to pre-trial detention in reducing the numbers of prisoners held on remand?

7. Should there be a uniform presumption in favour of bail and a right to be released on bail when charged with certain minor offences? Should bail conditions be relaxed?

8. Should the bail provisions contained in the Criminal Procedure and Evidence Act be replaced with a dedicated Bail Act?

C. Policy Recommendations

1. A comprehensive review should be undertaken of remand procedures in order to identify the issues that contribute to the detention in custody of remand prisoners.

2. A computerised prisoner database should be introduced by the prison service to track individual prisoners through the criminal justice system. This database will, *inter alia*, facilitate the collection and reporting of statistics on the numbers of prisoners held in custody on remand and the periods of their detention.

3. A review of the operation of Part VIII of the Criminal Procedure and Evidence Act should be undertaken and, in consultation with the Judiciary and the prosecuting authorities, consideration given to the use of 'paper' committals in helping to expedite the preparatory examination stage in criminal cases.

4. Following consultation with the Judiciary and the prosecuting authorities, consideration should be given to the introduction of a system of criminal case management to assist in expediting the hearing and resolution of criminal cases before the courts.

5. Consideration should be given to the feasibility of empowering the prison service to draw attention to remand prisoner who should be considered for accelerated processing by the courts.

6. To assist in the formulation of any new legislative provisions, a review should be undertaken into the operations and effectiveness of the alternative systems to pre-trial detention currently operating and in particular the working of the bail provisions contained in the Criminal Procedure and Evidence Act.

7. In the short to medium term, in the light of the review into the operation and effectiveness of the alternative systems to pre-trial detention, consideration may be given to amending the Criminal Procedure and Evidence Act so as to introduce a uniform presumption in favour of bail, facilitate the granting of more unconditional bail and relaxing and diversifying bail conditions with the objective of reducing remands in custody.

8. In the medium to long term consideration should be given and any necessary legislation drafted to replace the bail provisions contained in the Criminal Procedure and Evidence Act with a dedicated Bail Act.

Commentary

1) General principles governing detention before trial
2) Right to a speedy trial
3) Alternatives to pre-trial detention
4) Bail

1) General principles governing detention before trial

In respect of persons accused of crimes and who are formally charged and prosecuted, the authorities must decide whether or not to detain them prior to and during their trials. The detention of persons who are presumed innocent is a particularly severe infringement of their right to liberty. Taking into account the fundamental legal principle of the presumption of innocence, the law accords un-convicted prisoners special status and provides that they should be subject to no more restriction than is necessary.

The special status of such prisoners is acknowledged in many international and regional human rights standards, which grant un-convicted prisoners rights over and above those held by convicted prisoners.[7] The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) make it clear that un-convicted prisoners shall be treated as innocent and that pre-trial detention is to be used as a last resort.[8] This position is reinforced by the International Covenant on Civil and Political Rights (ICCPR), which states that un-convicted prisoners shall be subject to separate treatment appropriate to their status. Furthermore, it shall not be a general rule that persons awaiting trial shall be detained in custody.[9] In addition the ICCPR stipulates that those tried on a criminal charge are entitled to a trial without undue delay,[10] thus minimising the period of pre-trial detention.

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[7] International and regional standards set out a range of specific rights for un-convicted prisoners. While the phrasing of these rights may vary from standard to standard, with some permitting exceptions in exceptional circumstances where others do not, generally they provide that un-convicted prisoners:

- should be held separately from convicted prisoners
- should sleep in single rooms
- may wear their own clothes; where clothes are provided by the prison, they shall be different from those worn by convicted prisoners
- should not be forced to work but should be offered the opportunity to do so
- may, if they choose, procure food at their own expense from outside the prison, subject to maintaining good order
- may, at their own expense, be visited and treated by their own doctor or dentist
- should be able to inform their family immediately of their detention and should be given all reasonable facilities to communication with and receive visits from family and friends
- may, at their own expense, procure books, newspapers, writing materials and other means of occupation
- should be informed of their right to legal advice and should be able to communicate with and receive visits from their lawyer without restriction and in confidence
- should benefit from a special regime or, at their request, have access to the regime for sentenced prisoners.

[8] United Nations Standard Minimum Rules for Non-custodial Measures
Rule 6.1
"Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard to the investigation of the alleged offence and for the protection of society and the victim."

[9] Article 9.3 of the International Covenant on Civil and Political Rights provides that:
"It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment."

[10] Article 14.3 3. of the International Covenant on Civil and Political Rights provides that:
In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own

The international instruments therefore recognise that un-convicted prisoners are detained as a matter of precaution rather than punishment and make it clear that criminal justice systems should only resort to pre-trial detention when alternative measures are unable to address the concerns that justify the use of such detention. Accordingly, it is now a well established principle that accused persons may only be detained before trial where there is reasonable suspicion that they have committed an offence and where the authorities have substantial reasons to believe that, if released, they would abscond or commit a serious offence or interfere with the course of justice.

States should therefore ensure that, in order to avoid unnecessary infringements of the right to liberty, their criminal justice systems allow for decisions about alternatives to pre-trial detention to be made at as early a stage as possible. When pre-trial detention is ordered the detainee must also be able to appeal the decision to a court or to another independent competent authority. Authorities must also regularly review the initial decision to detain. This is important for two reasons. First, the conditions that initially made detention necessary may change and may make it possible to use an alternative measure that will ensure that the accused person appears in court when required. Also, the longer the unjustified delay in bringing a detainee to trial, the stronger such a detainee's claim for release from detention and even for dismissal of the criminal charges against him.

In essence therefore, the decision to detain an accused person awaiting trial is a matter of balancing conflicting interests. The suspect has a right to liberty, but the combination of circumstances may mean that the administration of justice might require its temporary sacrifice. The longer the suspect is detained, the greater the sacrifice of that fundamental right.

Does Botswana meet the international criteria? In Botswana, as in many countries, unacceptably large numbers of prisoners continue to await trial and sentence inside prison. According to statistics provided by the Prison Service, in July 2012 the central prison in Gaborone held 173 remand prisoners. Of these 80 were foreign nationals, mainly Zimbabweans. As regards the foreign nationals held on remand it is considered necessary for them to be remanded in custody as they are usually residing in Botswana illegally. This group of remand prisoners' places a great strain on prison resources. Special attention needs to be paid to processing such prisoners through the criminal justice system as quickly as possible. All prisoners held on remand have the right to a speedy trial. Where appropriate persons held on remand should also have a right to be released on bail. These are the two issues that need to be addressed when formulating policies aimed at reducing the un-convicted prison population.

2) Right to a speedy trial

Where an accused is detained in custody then the State should ensure that his right to a speedy trial is observed in practice. This can be achieved by the State reviewing trial procedures to make the system function more efficiently and if necessary amending the rules of criminal procedure to eliminate bottlenecks. The judiciary should also ensure the

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choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

right to a speedy trial by applying procedural rules strictly. Postponements of cases for further investigation or long delays in bringing them to trial should be the rare exceptions when the suspect or accused person is detained in custody. The Kampala Declaration recommended that prisoners should be kept in remand detention for the shortest possible period, avoiding for example, continual remands in custody by the court.[11]

It has not been possible at this stage of the Project to undertake a comprehensive review of pre-trial and committal procedures in Botswana. No statistics have been gathered to show the length of time accused persons spend on remand. It will be necessary to gather this information before any informed decisions may be taken on the measures necessary to reduce remand periods. It may also be recommended that a review of Part VIII of the Criminal Procedure and Evidence Act should be undertaken, particularly to consider the impact, if any, the introduction of 'paper' committals[12] might have on helping to expedite the preparatory examination stage in criminal cases. Once the issues that may give rise to any bottlenecks or other related problems in the criminal justice system have been identified, a concerted effort can then be made to set in motion a process of justice reforms to remove pre-trial delays and help manage criminal cases more efficiently. Depending on the findings of any review of pre-trial and committal procedures, there are several reforms that may be considered.

It is the police that have the first contact with suspects in the criminal justice system. They have a particular duty to keep any detention as short as possible. By conducting investigations speedily, they can ensure that the time for which suspects and persons awaiting trial are incarcerated be kept to a minimum. All too often the perception is that the police are too slow in carrying out investigations. One particular criticism that has been levelled against the police in Botswana is their tendency to arrest and detain suspects prematurely before they have sufficient evidence to go to trial. This results in suspected offenders being remanded over and over again for long periods while the police attempt to gather sufficient evidence to go to trial. Eventually the charges against the accused may be dropped altogether. If the suspect is being kept in custody this puts a strain on prison resources. Not only does the accused need to be accommodated by the prison authorities but he will also require transportation to court every time his case is called. If the accused is released on bail, long trial delays may create a public perception that an accused has "gotten away" with the crime and will go unpunished. This undermines public confidence in the judicial system.

One way of tackling long periods of detention for accused prisoners is by setting custody time limits. Custody time limits beyond which an accused cannot be kept any longer in custody can be useful in focusing the minds of the prosecuting and investigating authorities on the requirements of 'due process'. Time limits place the burden on the police and prosecuting agencies to speed up the criminal process and limit adjournments. Such time limits may also encourage the police to gather the necessary evidence before the person is remanded in custody rather than afterwards. However custody time limits need to be strictly enforced by the courts and closely monitored by prisons if they are to be effective. Proper resources must also be made available to the investigating bodies if they are not to fall into misuse. For instance, when the court discharges the accused, the police should not as a matter of course promptly re-arrest the accused so that the time period starts again.

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[11] Kampala Declaration on Prison Conditions in Africa 1996. Adopted at the Sixth Session of the United Nations Commission on Crime Prevention and Criminal Justice, 28 April- 9 May 1997. E/CN.15/1997/21

[12] A committal in which the defendant consents to all evidence being tendered to the magistrate in the form of written statements in which case the magistrate is not required to make an assessment of the evidence but automatically commits the defendant to the higher court.

Another solution to excessive delays in the pre-trial process is to discharge those cases that have taken too long to investigate or come to trial. In some jurisdictions, where the police have not proceeded speedily and the accused is prejudiced by the delay, the courts will discharge the accused rather than continue to hold him in custody. When the police are ready with their evidence they can re-arrest the accused and proceed to trial. This approach costs nothing, acts as an incentive to police, checks abuse of process and protects the accused.

The prosecuting authority also has an important role in ensuring speedy trials and thus minimising pre-trial detention. Prosecuting authorities act as the link between the police and the courts, which puts them in a crucial position to speed up the criminal process. Simple courtesies like the prosecuting counsel turning up before the court on time can have considerable impact. All to often an accused may appear before the court only to be committed for a further 14 days because the prosecuting counsel has failed to appear. The cumulative effects of such adjournments on state resources are considerable.

Many delays at the trial stage are caused by the backlog of cases before the courts. Heavy case backlogs tend to distort the administration of criminal justice and develop because the system is not functioning properly. This may be due to under-resourcing. However the delays may also result from a general failure in communication, co-operation and co-ordination between the various agencies concerned in the criminal justice process - judges, prison staff, police officers and social workers. Many countries have developed mechanisms aimed at remedying this situation. Sometimes all that is needed is to invite the stakeholders to meet regularly to discuss the problems observed, identify the bottlenecks and propose immediate solutions. For example, in Uganda there was an extreme backlog of criminal cases before the courts. This led to the appointment of a Case Management Committee with representatives from the police, probation service, prosecution, the prisons and the judiciary. Meetings of the Committee were held on a monthly basis to facilitate communication. By tracking the progress of cases through the system from the very beginning, the Committee was able to identify and address the major "bottlenecks" between the police, courts, and prisons. It is important however that greater efficiency in the hearing of cases must not diminish the quality of justice rendered and the fairness of the proceedings.

The introduction of case management systems and the development of a computerized prisoner database can also aid the tracking of prisoners through the criminal justice system. Losing track of prisoners or lack of information about their penal status is a frequent cause for overstaying on remand. This can be remedied by the development of a computerised database containing the individual records of all prisoners in the criminal justice system. The software used in such a system can help in preventing unlawful pre-trial detention by providing for "alarm bells" each time a procedural deadline is about to be breached in respect of a prisoner.

Another solution may be to bring the judiciary and prisoners closer together. In most jurisdictions, the judiciary has a statutory right to visit places of detention and in some they have a positive duty to do so. Independent inspections ensure that prisoners are properly treated; granted bail when appropriate; appear in court as scheduled; are legally incarcerated; will have their trial heard speedily; and have their complaints heard. In Malawi, for example, magistrates visit prisons to conduct 'Prison Screening Sessions' to screen the pre-trial caseload and weed out those who are there unlawfully or unnecessarily and fix dates for trial. The exercise has been effective in reducing congestion. Court sessions could also be set up inside the prisons themselves so that judges and magistrates could study the cases of prisoners who are remanded in custody. In appropriate cases, a release on bail or automatic release could be granted if the person has been in detention awaiting trial for a period exceeding that permitted by law. Problems related to escorting

prisoners to and from court would also be avoided and consequently many cases could be settled quicker and for less cost.

The prison service could also be empowered to draw attention to prisoner who should be considered for accelerated processing by the courts. Monthly returns could be prepared by the prison service setting out those persons in their custody who have been granted bail by the courts but are unable to meet the conditions set by the courts; or have overstayed; or who are seriously ill; or very old or young or pregnant, in order to enable magistrates and police prosecutors to break down the caseload and process them as a matter of urgency. These lists can be prepared by prison officers and presented directly to the senior magistrate.

Speeding up the delivery of judgments may also reduce the time prisoners may spend remanded in custody. To remedy this problem timeframes can be set within which judges and magistrates must deliver a judgment. A monthly report by the court registry naming the judge/magistrate, cases in which judgment is due and the date of conclusion of evidence would help to monitor and encourage the timely delivery of judicial decisions.

3) Alternatives to pre-trial detention

Avoiding pre-trial detention requires that alternative measures replace it. Such measures ensure that accused persons appear in court and refrain from any activity that would undermine the judicial process. The alternative measure chosen must achieve the desired effect with the minimum interference with the liberty of the suspect or accused person, whose innocence must be presumed at this stage.

Those deciding whether to impose or continue pre-trial detention must have a range of alternatives at their disposal. Possible alternatives include releasing and accused person and ordering such a person to do one or more of the following:

- to appear in court on a specified day or as ordered to by the court in the future;
- to refrain from:
  - interfering with the course of justice,
  - engaging in particular conduct,
  - leaving or going to specified places or districts, or
  - approaching or meeting specified persons;
- to remain at a specific address;
- to report on a daily or periodic basis to a court, the police, or other authority;
- to surrender passports or other identification papers;
- to accept supervision by an agency appointed by the court;
- to submit to electronic monitoring; or
- to pledge financial or other forms of property as security to assure attendance at trial or conduct pending trial.

Whatever alternatives to pre-trial detention are considered it must be remembered that they do restrict the liberty of the accused person to a greater or lesser extent. This burden increases when authorities impose multiple alternatives simultaneously. Those deciding must carefully weigh the advantages and disadvantages of each measure to find the most appropriate and least restrictive form of intervention to serve as an effective alternative to imprisonment.

In cases where a person is known in the community, has a job, a family to support, and is a first offender, authorities should consider unconditional bail. In all cases where the offence is not serious, unconditional release should be an option. Under unconditional release, sometimes known as personal recognizance, the accused promises to appear in court as

ordered (and, in some jurisdictions, to obey all laws). Sometimes a monetary amount may be set by the court that would be paid only if the court determines that the accused has forfeited what is known in some jurisdictions as an "unsecured personal bond" by failing to appear in court or committing a new offence while in the community pending trial. In other case pre-trial release may be predicated upon additional requirements. Courts may require the accused, a relative or friend to provide security in the form of cash or property, a measure designed to ensure that the accused has a financial stake in fulfilling the conditions imposed regarding court appearance and behaving in other specified ways. This form of bail affords an immediate sanction if the accused fails to obey the conditions set for releasing him from pre-trial detention: the bail money or property is forfeited to the State.

In many countries, this security takes the form of monetary bail, or money that the accused pays to a court as a guarantee that he will conform to the conditions set for pre-trial release. Variations on this are possible. For example, the accused may not necessarily have to pay the money over directly to the court (or in some instances to the police), but rather provide a so-called bail bond or surety that guarantees that he, or someone acting on his behalf, will pay the money if called upon to o so.

For these alternatives to pre-trial detention to function properly, the State must first create the appropriate framework. For some alternatives, the State needs only a formal legal authorisation that allows their use; in other cases, it must set up a more elaborate infrastructure. For a limited number of alternatives to pre-trial detention, a legislative framework is all that is needed. With that in place, an authority can release an accuse person pending trial on the basis of a pledge that he will appear before a court. Similarly, no supervisory mechanisms are needed to impose requirements that the accused person not interfere with the course of justice, not engage in particular conduct, not leave or enter specified places or districts, not meet specified persons or remain at a specific address.

In most cases, however, the authority that makes the decision to release a person into the community will want to ensure that there are mechanisms in place to assure compliance with the conditions set. These mechanisms also help reassure and protect victims of crime. Each of the following conditions for release needs some development of infrastructure:

- Reporting to a public authority requires that the authority – the police or the court, for example – is accessible at reasonable times to the accused person and that it has in place an administrative structure that is capable of recording such reporting reliably.
- Surrendering identity documents also requires a careful bureaucracy that can ensure that such documents are safely kept and returned to the accused when the rationale for retaining them is no longer supported by the circumstances.
- Direct supervision requires that there be an entity that can conduct such supervision.
- Electronic monitoring requires a considerable investment in technology and the infrastructure to support it.
- Provision of monetary security requires sophisticated decision making to determine the appropriate level of security as well as a bureaucracy capable of receiving and safeguarding monetary payments.

4) Bail

In Botswana the alternative to pre-trial detention is the release of the accused on bail. Bail is a presumptive right guaranteed in many constitutions with a common law tradition and should only be refused where the offence is serious and there is a reasonable risk that the offender will fail to appear for trial, commit further offences, interfere with the evidence, or be at personal risk or a risk to others were he to be released. However in practice in many

countries and particularly in rural areas, the granting of bail is the exception rather than the norm.

Part IX of the Criminal Procedure and Evidence Act[13] provides for the granting of bail at all stages of a criminal case. Under the Act, after the preparatory examination in the case is concluded every person committed for trial or sentence in respect of any offence except treason or murder may be admitted to bail in the discretion of the magistrate[14]. In criminal cases before a magistrate's court, if the case is adjourned or postponed and the accused remanded, the magistrate may also, in his discretion, admit the accused to bail[15]. Similarly, in criminal proceedings before a customary court, if the proceedings are adjourned, suspended or transferred, the customary court may take from the person charged a recognisance with or without sureties conditioned for his appearance to answer the charge against him.[16]

The provisions contained in the Criminal Procedure and Evidence Act relating to bail provides the basic legislative framework for an alternative to pre-trial detention. As in most jurisdictions, any problems that may arise in the granting of bail flow from the implementation of the law rather than the substantive law itself. To ensure bail is effective the judiciary must foster recognition of the right of accused persons to the presumption of innocence and that pre-trial detention should be the exception rather than the norm. When granting bail, the authorities should also confirm that the accused person is able to meet the requirements that are set. If not, it is likely that the accused person will return to pre-trial detention.

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[13] Criminal Procedure and Evidence Act. Chapter 08:02

[14] Criminal Procedure and Evidence Act. Chapter 08:02, Section 104

[15] Criminal Procedure and Evidence Act. Chapter 08:02, Section 111

[16] Customary Courts Act. Chapter 04:05

17. (1) Where any criminal proceedings before a customary court are –

(a) adjourned for any reason other than the failure of he person charged to appear on the day set for the hearing of the case;

(b) suspended under the provision of subsection (1) of section 37; or

(c) transferred under the provision of subsection (3) of section 37;

the customary court concerned may take from the person charged a recognisance with or without sureties conditioned for his appearance to answer the charge against him, at the time and place of trial and as often as may be necessary thereafter until final judgment in his case has been given, and may, instead of taking a recognisance in accordance with this section, fix the amount of the recognisance with a view to it being taken subsequently by any police officer above the rank of inspector or the police officer in charge of any police station or the person in charge of any place of detention to which the person charged is committed by the customary court.

(2) If on any day appointed for the hearing of the case, the person charged does not appear after he has been three times called by name in or near the court premises, the court may issue a warrant for his apprehension and may also call the person charged and his sureties (if any) upon their recognisance, and, in default of his appearance the same may then and there be declared forfeited; and any such declaration of forfeiture shall have the effect of a judgment on the recognisance for the amounts therein named against the person charged and his sureties respectively.

(3) A customary court may further add to a recognisance taken under subsection (1) any conditions which it may deem necessary as to –

(a) times and places at which and persons to whom the person charged shall present himself;

(b) places where he is forbidden to go;

(c) prohibition against communications by him with any named person or persons;

(d) any other matters relating to his conduct.

(4) Where it appears to the customary court that default has been made in any condition of a recognisance taken by it, the court may issue a warrant for the apprehension of the person charged and an order declaring the recognisance for the amounts therein named against the person charged and his sureties respectively.

In cases where monetary bail is set as a precondition for release care must be taken that this does not unfairly discriminates against the poor. The courts should help to minimise this potential unfairness by setting realistically proportionate bail amounts to the accuse person's means and should avoid setting the amount of bail with the seriousness of the offence in mind. Otherwise the court may decide that an accused person should be released on bail, but in practice that person remains in jail, unable to meet the stipulated bail, even where the amount may seem modest but exceeds the accused person's means. Many people are remanded in custody because they cannot meet the conditions for bail set by the court. This undermines the courts finding that, in principle, the accused person is not someone who needs to be kept in prison pending trial. If an accused is charged with a minor offence and is unable to pay the surety set by the court to be released on bail, then justice requires that the person should be released pending trial. Otherwise, people end up serving a longer time on remand than they would have served, if found guilty of the offence, under a sentence of the court.

In this respect the legislation does expressly provide that no person shall be required to give excessive bail[17]. It is also provided that the accused may be assisted in the provision of bail. The judicial officer may take the recognizance either from the accused alone or from the accused and one or more sureties in the discretion of the judicial officer according to the nature and circumstances of the case[18].

It is also important that where the bail conditions contain the requirement to appear in court the authorities should ensure that required court appearances are not excessive in number and that the schedule hearings are meaningful in that they move a case forward towards completion. All too often an accused will appear in court only to have his case a adjourned for another 14 days without any progress in the case being achieved. In such cases, where the trial delays are the result of constant adjournments by lawyers, one solution to be considered may be the making of cost orders against lawyers responsible for unnecessary adjournments. In some jurisdictions the courts regularly make cost orders against lawyers where the lawyer is unprepared; fails to attend; double-books himself in another court; or otherwise seeks an adjournment on unmeritorious grounds.

Before any informed recommendations may be made concerning possible reforms to the alternative systems to pre-trial detention currently operating in Botswana it will be necessary to undertake a review of the operations and effectiveness of the current systems and in particular the working of the bail provisions contained in the Criminal Procedure and Evidence Act. Detailed statistics will need to be collected and collated concerning the granting of bail and the workings of the current legislative provisions to see what legislative amendments or procedural changes may need to be made to improve the operation of the system

In the short term, consideration may be given to introducing a uniform presumption in favour of bail and a right to be released on bail when charged with certain minor offences. If necessary consideration may be given to relaxing and diversifying bail conditions, including the setting of realistic proportionate bail relative to an accused's means and not the seriousness of the alleged offence.

In the medium to long term consideration may be given to replacing the bail provisions contained in the Criminal Procedure and Evidence Act with a dedicated Bail Act. The provisions of the Act may then deal more comprehensively with issues such as:

[17] Criminal Procedure and Evidence Act. Chapter 08:02, Section 112
[18] Criminal Procedure and Evidence Act. Chapter 08:02, Section 109(1)

- When can bail be granted?
- When can bail be dispensed with?
- By whom can bail be granted (police powers and court powers)?
- What criteria apply to bail decisions?
- When can conditions be imposed?
- What conditions?
- Rules relating to bail conditions.
- Duration of bail decisions.
- Effect of a grant of bail.

III. REVIEW OF EXISTING SENTENCING OPTIONS

A. Policy Objectives

As a general rule imprisonment should be imposed as sparingly as possible. Each case should be examined as closely as possible to determine whether a prison sentence is required and, where imprisonment is considered to be necessary, to impose the minimum period of imprisonment that meets the objectives of sentencing.

B. Policy Issues

1. Should the procedural and due process safeguards applicable under the criminal law in respect of persons accused of capital crimes be reviewed?

2. What is the position regarding the award of corporal punishment in respect of juvenile offenders both before the customary law courts and the common law courts? Should an award of corporal punishment be replace with alternative non-custodial sentences in some cases?

3. To what extent, if any, has the use of mandatory minimum sentencing for some offences resulted in the imposition of excessive and disproportionate sentences of imprisonment and contributed to the increase in the prison population?

4. Should more use be made of legislative safety valves to allow the courts to sentence some offenders below the mandatory minimums? Should the safety valve introduced by section 27(4) of the Penal Code be replaced by a broader standard?

5. Should the mandatory minimum sentences be replaced with sentencing guidelines formulated by an independent Sentencing Commission?

6. What reforms are necessary to improve the delivery of criminal justice before the customary courts and what steps can be taken to achieve better and more consistent sentencing by the customary courts?

C. Policy Recommendations

1. The death penalty will remain as a sentence under the criminal justice system. There should be a review of the legal procedures in capital cases and where necessary consideration should be given to the incorporation of further procedural and due process safeguards in respect of offenders charged with capital crimes.

2. That a review is undertaken to clarify the current position regarding the award of corporal punishment to juveniles both under customary and common law.

3. As part of any sentencing policy alternative non-custodial sentences to replace corporal punishment should be developed and implemented.

4. A review should be undertaken of all offences now subject to mandatory minimum sentencing in order to assess the effectiveness and impact of such sentencing in respect of both the offences and the offenders. The effect of mandatory minimum sentencing on overall prisoner numbers should also be assessed. This review should involve a statistical analysis for the past five years relating, *inter alia*, to the incidence of the offences, the detection and arrest rates, the numbers of persons arrested, their ages and sex, whether the offenders are first offenders or repeat offenders, the conviction rates in respect of such persons and the sentences imposed before both the customary courts and the common law courts.

5. The application of section 27(4) of the Penal Code by the Judiciary should be reviewed and, if considered to be necessary to achieve the objectives of sentencing, legislation should be introduced to provide more comprehensive and specific safety valves to be applied by the courts when sentencing those offences which are subject to mandatory minimum sentences.

6. In the longer term the Government should give active consideration to the establishment of a Sentencing Commission for Botswana. One task of such a Commission would be the formulation of acceptable sentencing guidelines that may enable the individual sentencing of offenders to become the sole responsibility of the judiciary.

7. A training programme should be introduced for those presiding over the customary courts and their clerks. The programme would, *inter alia*, inform presiding officers of their jurisdiction and sentencing powers.

8. In the medium to long term consideration should be given to the establishment of a judicial training college to train and provide continuing support in sentencing trends to both judges of the common law courts and presiding officers of the customary courts.

9. Legislation should be introduced to make it compulsory for presiding officers and police officers to attend appeals from their decisions before the Customary Court of Appeal. Procedures should be put in place for appropriate action to be taken where a presiding officer acts unjustly towards an accused or where there is consistent failure on the part of the presiding officer to follow the Customary Courts (Procedure) Rules.

10. To reduce injustice to an accused resulting from the lack of legal representation, where an offence carries a sentence of imprisonment of more than five years the Customary Courts (Procedure) Rules should be amended to provide that an accused must be informed of his rights to trial before a magistrate and legal representation.

11. Consideration should be given to the abolition of short prison sentences of less than twelve months duration.

12. The customary courts administer justice as courts of law but for administrative purposes fall under the jurisdiction of the Ministry of Local Government. Consideration should be given to placing the customary courts under the jurisdiction of a restructured Ministry of Justice.

Commentary

1) Punishments
2) The death penalty
3) Corporal punishment
4) Imprisonment
5) Mandatory minimum sentencing
6) How may mandatory minimum sentencing be changed?
a) Sentencing guidelines
b) Legislative safety valves
7) Mandatory minimum sentencing and the Stock Theft Act
8) The powers of the customary courts in relation to sentencing

i) Punishments

The Penal Code in section 25 sets out the following punishments that may be inflicted by the courts on those convicted of criminal offences:[19]

(a) death;
(b) imprisonment;
(c) corporal punishment;
(d) fine;
(e) forfeiture;
(f) finding security to keep the peace and be of good behaviour or to come up for judgment;
(g) any other punishment provided by this Code or by any other law.

In respect of the customary courts, section 18 of the Customary Courts Act provides that a customary court may, subject to its warrant, sentence a convicted person to a fine, imprisonment, corporal punishment or any combination of such punishments.[20]

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[19] The Penal Code, Cap. 08:01
25. The following punishments may be inflicted by a court –
(a) death;
(b) imprisonment;
(c) corporal punishment;
(d) fine;
(e) forfeiture;
(f) finding security to keep the peace and be of good behaviour or to come up for judgment;
(g) any other punishment provided by this Code or by any other law.

[20] Customary Courts Act, Cap.04:05
18. (1) Subject to the provisions of subsections (2), (3) and (4) and section 21 and to the provisions of any other law for the time being in force a customary court may sentence a

Several of the punishments provided for in the Penal Code are highly controversial and have been abolished in other jurisdictions as being incompatible with contemporary international and regional human rights obligations. The development of a sentencing policy may therefore be viewed as an opportunity to review the continued application of some of the punishments currently inflicted by the courts. In particular the death penalty, the infliction of corporal punishment and those aspects of imprisonment relating to mandatory minimum sentencing and the powers of the customary courts in relation to custodial sentencing, may all benefit from informed public debate and a review and reappraisal of their continued place in the sentencing structure of the criminal justice system.

2) The death penalty

Capital punishment is reserved only for the most serious offences such as murder[21], treason[22] and murder committed in the process of committing piracy.[23] Section 26(1) of the Penal Code provides that execution is by hanging. While international law permits the implementation of the death penalty by States, certain rules regulating the implementation of capital punishment have now crystallised into customary international law. These rules are reflected in the Penal Code. So for example the death sentence cannot be imposed on persons below eighteen years of age and pregnant women.[24] It also may not be imposed where there are extenuating circumstances such as provocation.

Botswana is the last country in Africa to retain capital punishment under its domestic law. The death penalty is always an emotive issue and several challenges have been made to the constitutionality of the death penalty. The position is however that capital punishment is permitted under international law and the courts have not found the death penalty to breach the constitutional right to life clause. It therefore remains a lawful punishment under the

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convicted person to a fine, imprisonment, corporal punishment or any combination of such punishments but shall not impose any punishment exceeding those set out in its warrant.
(2) No customary court shall sentence any female or any person who is, in the opinion of the court, of the age of 40 years or over, to corporal punishment.
(3) Where any person under the age of 40 years is convicted of any offence, a customary court may, in its discretion, order him to undergo corporal punishment in addition to or in substitution for any other punishment:
Provided that this subsection shall not apply to –
(a) any offence in respect of which a minimum punishment is by law imposed; and
(b) any conspiracy, incitement or attempt to commit any offence referred to in paragraph (a)
(4) No customary court shall subject any person to any punishment which is not in proportion to the nature and circumstances of the offence and the circumstances of the offender.

[21] Penal Code, Laws of Botswana, Cap. 08:01, s 203(1)

[22] Penal Code, Laws of Botswana, Cap. 08:01, s 34(1)

[23] Penal Code, Laws of Botswana, Cap. 08:01, s 63(2)

[24] Penal Code 26. (1) When any person is sentenced to death, the sentence shall direct that he shall be hanged by the neck until he is dead.
(2) Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.
(3) Where a woman convicted of an offence punishable with death is found in accordance with the provisions of section 298 of the Criminal Procedure and Evidence Act to be pregnant, she shall be liable to imprisonment for life and not to sentence of death.

Penal Code.

However the majority of State members of the international community have now abolished the death penalty and many calls have been made by international and regional organisations, States and non-governmental organisations, for Botswana to follow the lead of the abolitionists and remove capital punishment from the Penal Code. While the retention and implementation of the death penalty is a matter that falls within the domestic jurisdiction of Botswana as a sovereign State, it remains an issue that the Government may wish to keep under review. The adoption of a new sentencing policy may provide an opportunity for the question of the retention of the death penalty to be revisited.

3) Corporal punishment

Under the penal system, corporal punishment is lawful both as a sentence for crime[25] and as a disciplinary measure in penal institutions.[26] Corporal punishment is viewed as being a traditional punishment for offenders, providing an effective alternative to imprisonment that helps to reduce prison overcrowding. Corporal punishment is also viewed as being a good deterrent as a public flogging is embarrassing and humiliating to the recipient. As a punishment it is relative quick and easy to administer, particularly in the customary courts and, unlike a custodial sentence, causes little or no disruption to the family and community life of the offender.

The Penal Code punishes a number of offences with corporal punishment, including rape,[27] attempted rape,[28] indecent assault,[29] defilement of a person under 16 years,[30] defilement of an idiot or imbecile,[31] procuration,[32] living on the earnings of prostitution or persistently soliciting,[33] attempted murder by a convict,[34] disabling in order to commit an offence,[35] intentionally endangering the safety of persons traveling by railway,[36] assault occasioning actual bodily harm,[37] robbery,[38] attempted robbery,[39] housebreaking and burglary,[40] entering a dwelling house with intent to commit certain serious offences,[41] breaking into a building and committing certain serious offences,[42] breaking into a building with intent to commit certain serious offences[43] and travelling by train without a free pass

[25] Penal Code, Cap. 08:01, s. 25(c); Customary Courts Act, Cap. 04:05, s. 18; Children's Act, Cap. 28:04, s. 85
[26] Prisons Act, Cap. 21:03, s. 109
[27] Penal Code, Cap. 08:01, s. 142
[28] Penal Code, Cap. 08:01, s. 143
[29] Penal Code, Cap. 08:01, s. 146
[30] Penal Code, Cap. 08:01, s. 147
[31] Penal Code, Cap. 08:01, s. 148
[32] Penal Code, Cap. 08:01, s. 149
[33] Penal Code, Cap. 08:01, s. 155
[34] Penal Code, Cap. 08:01, s. 218
[35] Penal Code, Cap. 08:01, s. 225
[36] Penal Code, Cap. 08:01, s. 229
[37] Penal Code, Cap. 08:01, s. 247
[38] Penal Code, Cap. 08:01, s. 292
[39] Penal Code, Cap. 08:01, s. 293
[40] Penal Code, Cap. 08:01, s. 300
[41] Penal Code, Cap. 08:01, s. 301
[42] Penal Code, Cap. 08:01, s. 302
[43] Penal Code, Cap. 08:01, s. 303

or a ticket.[44]

The law sets out comprehensive procedures and safeguards regulating corporal punishment.[45]In the common law courts, corporal punishment can be ordered in addition to or in lieu of imprisonment.[46] The Customary Courts Act also authorises customary courts to award corporal punishment, and they may, at their discretion, order this in addition to or in lieu of any other punishment.[47] Females may not be sentenced to corporal punishment.[48] Under the Criminal Procedure and Evidence Act, a court which convicts a person under 18 of an offence may in lieu of the stated punishment order him to be placed in the custody of a suitable person and to receive corporal punishment.[49] Under the Children's Act a children's court[50] may also sentence a child to corporal punishment.[51] The act provides that a sentence of corporal punishment should be not more than six strokes and must be inflicted in accordance with section 305 of the Criminal Procedure and Evidence Act and section 28 of the Penal Code.[52] The Children's Act makes no reference to the customary courts however.

Under the law, men may be sentenced to receive up to 12 strokes and boys may be

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[44] Penal Code, Cap. 08:01, s. 316

[45] Penal Code, Cap. 08:01, s. 28. (1) Subject to the provisions of subsection (4), no person shall be sentenced to undergo corporal punishment for any offence unless such punishment is specifically authorized by this Code or any other law.
(2) A sentence of corporal punishment shall be inflicted once only. The sentence shall specify the number of strokes, which shall not exceed 12, nor, in the case of a person under the age of 18 years, six.
(3) No sentence of corporal punishment shall be passed upon any of the following persons –
(a) females;
(b) males sentenced to death;
(c) males whom the court considers to be more than 40 years of age.
(4) Where any male person under the age of 40 is convicted of any offence punishable with imprisonment, other than an offence listed in the Second Schedule to the Criminal Procedure and Evidence Act, a court may, in its discretion but subject to the provisions of section 27(1), order him to undergo corporal punishment in addition to or in substitution for such imprisonment.
(5) Where it is provided that any person shall be liable to undergo corporal punishment such punishment shall, if awarded, be inflicted in accordance with the provisions of section 305 of the Criminal Procedure and Evidence Act.

[46] Penal Code, s. 28(4)

[47] Customary Courts Act, Cap. 04:05, s.18(3)

[48] Penal Code, s. 28(3), Customary Courts Act, s. 18(2)

[49] Criminal Procedure and Evidence Act, Cap. 08:02, s. 304. (1) Any court in which a person under the age of 18 years has been convicted of any offence may, instead of imposing any punishment upon him for that offence (but subject to the provisions of section 26(2) of the Penal Code) order that he be placed in the custody of any suitable person designated in the order for a specific period:
Provided that such order may be made in addition to the imposition of corporal punishment; and provided further that no order made in terms of this subsection shall direct that the convicted person shall remain in the custody in which he has been placed after he attains the age of 18 years.

[50] Children's Act, 2009, s. 36

[51] Children's Act, 2009, s. 85

[52] Children's Act, 2009, s. 90

sentenced to receive up to six strokes.[53] They must be certified fit to receive the punishment by a medical officer, and the punishment should be inflicted in the presence of a medical officer who must intervene if he considers the person is not fit to continue.[54] Corporal punishment is administered in the case of males under the age of 18 years, with a rattan cane which shall be 0.914 metres long and 9.525 millimetres in diameter and in the case of males of the age of 18 years or over, with a rattan cane which shall be 1,218 metres long and 12,7 millimetres in diameter.[55] The corporal punishment should be administered on the bare buttocks only and on no other part of the body.[56] It must not be carried out in instalments,[57] and must be inflicted privately in a prison[58] or in a customary court;[59] for a person under 18, the court may direct where the punishment should take place and who should administer it, and the parent/guardian has a right to be present.[60] In a customary court, the law states that corporal punishment should be inflicted with a cane or a thupa and on the buttocks only, with protection placed over the kidneys.[61]

As a criminal law sanction, corporal punishment attracts a great deal of controversy, particularly as in the eyes of many people it is both inhumane and degrading. Section 7 of the Constitution protects every person from inhuman or degrading punishment or other treatment. However the section then goes on to state that "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution". This savings clause contained in section 7(2) effectively stops any challenge to corporal punishment as being unconstitutional *per se*. In fact the Court of Appeal in 1984 found that to administer corporal punishment in instalments is inhuman and degrading, but that corporal punishment *per se* is constitutional.[62]

In the past there have been attempts made to amend the law as it relates to corporal punishment, but these attempts have been aimed towards expanding its application as a punishment rather than restrict or abolishing it. Corporal punishment continues to attract widespread popular support and many citizens would apparently like to see the prohibition on subjecting women to corporal punishment removed. They argue that it is discriminatory to give a woman a short prison sentence when a man in the same circumstances would receive corporal punishment and then be free. Many citizens also support the raising of the age limit for receiving corporal punishment for men from 40 to 50 years and increasing the number of strokes that may be administered.

But the fact does remain that corporal punishment is now recognised under international law as being cruel, inhuman or degrading treatment or punishment. The Commission on Human Rights has stated on numerous occasions that corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture. As such

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[53] Penal Code, s. 28(2)

[54] Criminal Procedure and Evidence Act, Cap. 08:02, s. 305

[55] Criminal Procedure (Corporal Punishment) Regulations, S.I. 95, 1969, r.2

[56] Criminal Procedure (Corporal Punishment) Regulations, S.I. 95, 1969, r.3

[57] Criminal Procedure and Evidence Act, Cap. 08:02, s. 305(1)(d)

[58] Criminal Procedure and Evidence Act, Cap. 08:02, s. 305(2)

[59] Corporal Punishment (Designation of Places for Administering) Order, S.I. 146, 1983, paragraph 2

[60] Criminal Procedure and Evidence Act, Cap. 08:02, s. 305(2)

[61] Customary Courts (Corporal Punishment) Rules, S.I. 9, 1972, S.I. 122, 1974, r. 2 and r.3

[62] Clover Petrus and Another vs The State

corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, *inter alia*, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, [63] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Republic of Botswana is a State party to all three instruments.[64] Botswana did enter a Reservations upon signature and confirmed upon ratification to the Covenant stating that "The Government of the Republic of Botswana considers itself bound by Article 7 of the Covenant to the extent that "torture, cruel, inhuman or degrading treatment" means torture inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of the Republic of Botswana. As corporal punishment is not prohibited by section 7 of the Constitution, corporal punishment does therefore put Botswana in breach Article 7 of the Covenant. A similar reservation was entered in respect of Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Several States have objected to these reservation however on the basis that they are incompatible with the objects and purposes of the instruments.

Botswana is also a State party to the United Nations Convention on the Rights of the Child, Article 19 of which requires states to take "all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child..." Other articles in the Convention are also relevant to protection of children from all corporal punishment. Article 3 requires that in all actions concerning children, "the best interests of the child shall be a primary consideration". Article 6 requires States to "ensure to the maximum extent possible the survival and development of the child". Article 28, the child's right to education, requires States to "take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention". Article 37 requires States to ensure that "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment…" Under article 40, all children involved with juvenile justice systems "have the right to be treated in a manner consistent with the promotion of the child's sense of dignity and worth…"

The Committee on the Rights of the Child, which monitors implementation of the Convention on the Rights of the Child, has consistently stated that legal and social acceptance of physical punishment of children, in the home and in institutions, is not compatible with the Convention. Since 1993, in its recommendations following examination of reports from various States Parties to the Convention, the Committee has recommended prohibition of physical punishment in the family and institutions, and education campaigns to encourage positive, non-violent child-rearing and education.

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[63] Article 7 of the International Covenant on Civil and Political Rights states:
"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected with- out his free consent to medical or scientific experimentation."
The United Nations Human Rights Committee has taken a very strict view of corporal punishment. In General Comment 20, the Committee stated that: "the prohibition [in Article 7] must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions."

[64] Botswana ratified the International Covenant on Civil and Political Rights on 8 September 2000; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 8 September 2000

There is little doubt that the continued use of corporal punishment in Botswana will remain a source of serious friction between the State and the international human rights bodies administering the international and regional human rights instruments to which Botswana is a State party. Notwithstanding the domestic legal position in Botswana regarding corporal punishment, under international law such punishment is considered to constitute inhumane and degrading treatment or punishment and will always attract international condemnation. This is amply illustrated by comments and observations made by the United Nations treaty bodies when considering reports submitted by the Government of Botswana on compliance with international human rights obligations.

The Committee on the Rights of the Child, in its concluding observations on Botswana's initial report under the United Nations Convention on the Rights of the Child in 2004, noted "with deep concern that corporal punishment is permissible under the State party laws and is used as a way of disciplining children at home, as a disciplinary measure by schools as stipulated in the Education Act and as a sanction in the juvenile justice system." The Committee strongly recommended that Botswana "take legislative measures to expressly prohibit corporal punishment in the family, schools and other institutions and to conduct awareness-raising campaigns to ensure that positive, participatory, non-violent forms of discipline are administered in a manner consistent with the child's human dignity and in conformity with the Convention, especially article 28, paragraph 2, as an alternative to corporal punishment at all levels of society".[65]

Similarly, the United Nations Human Rights Committee in its concluding observations on the initial report of Botswana under the Covenant on Civil and Political Rights stated that "The Committee is concerned about the existence in law and in practice of penal corporal punishment in the State party, in violation of article 7 of the Covenant. The State party should abolish all forms of penal corporal punishment."[66] Also, the Committee on the Elimination of Discrimination Against Women in the concluding observations on the initial to third report of Botswana under the Convention on the Elimination of all Discrimination against Women stated that "… The Committee is … concerned that corporal punishment is accepted in both school and home settings and constitutes a form of violence against children, including the girl child.[67] "… The Committee recommends that the State party explicitly prohibit corporal punishment in all settings, including through awareness-raising campaigns aimed at families, the school system and other educational settings."
More recently, Botswana was reviewed in the first cycle of the Universal Periodic Review in 2008. The following recommendations were made by the States party representatives in the working group conducting the Review:

"[Botswana] continue to incorporate the provisions of the Convention on the Rights of the Child into domestic legislation, especially article 19(1), in relation to deep concerns about the corporal punishment of children (Chile); consider changing legislation to expressly prohibit all forms of corporal punishment in all settings (at home, in schools and in other institutions) and conduct awareness-raising efforts to change the public's attitude to corporal punishment (Slovenia); to continue efforts to eliminate corporal punishment (Brazil, Sweden), especially in schools (Sweden); to put an end, *de jure* and *de facto*, to the practice of corporal punishments in traditional judicial systems (France)"[68]

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[65] 3 November 2004, CRC/C/15/Add.242, Concluding observations on initial report, paras. 36 and 37

[66] 24 April 2008, CCPR/C/BWA/CO/1, Concluding observations on initial report, para. 19

[67] 26 March 2010, CEDAW/C/BOT/CO/3, Concluding observations on initial to third report, paras. 31 and 32

[68] 13 January 2009, A/HRC/10/69, Report of the Working Group, para. 92(20)

During the review the Government drew attention to draft legislation contained in the Children's Bill which, it said, would incorporate all the provisions of the Convention on the Rights of the Child, but at the same time reaffirmed and defended the legality of corporal punishment in homes, schools and the penal system[69] stating:

"The Government … has no plans to eliminate corporal punishment, contending that it is a legitimate and acceptable form of punishment, as informed by the norms of society. It is administered within the strict parameters of legislation in the frame of the Customary Courts Act, the Penal Code and the Education Act."[70]

Unfortunately, two years after the Government made this statement the Tsetsebjwe incident occurred. In 2011 a child died in Tsetsebjwe after being flogged by village elders. Customary law does not allow corporal punishment on juveniles. Instead their cases are referred to social welfare officers for counselling. In this case the teenager had apparently slapped his schoolmate during a disagreement, when they teased one another about their clothes. The incident was brought to the attention of the local police who referred the matter to the local Kgotla. The headman sentenced the boy to four strokes. These were delivered on the boy's bare back by a passer-by that the headman had invited to administer the punishment. The headman admitted that he was aware that the boy was a juvenile when he delivered the punishment. The boy later complained of a painful waist and back and kidney trouble. His condition worsened until he was taken to a local clinic where it was determined that one of the strokes must have affected his kidneys. The boy eventually died.

Incidents such as this will continue to undermine the human rights record of Botswana. The development of a sentencing policy encompassing alternatives to imprisonment will provide an opportunity to review the continued use of corporal punishment and the possibility of replacing corporal punishment, particularly as regards juvenile offenders, with other sanctions.

4) Imprisonment

As a general rule imprisonment should be imposed as sparingly as possible. Each case should be examined as closely as possible to determine whether a prison sentence is required and, where imprisonment is considered to be necessary, to impose the minimum period of imprisonment that meets the objectives of sentencing. Two issues arise with regard to imprisonment in Botswana. The first is the use of mandatory minimum sentencing for some offences and the second is the powers of the customary courts in relation to sentences of imprisonment.

5) Mandatory minimum sentencing

A mandatory minimum sentence is a pre-determined sentence, created by the legislature that the courts must impose on a person convicted of a crime. A mandatory minimum sentence applies automatically, no matter what the unique circumstances of the offender or the offence may be. These inflexible, "one-size-fits-all" sentencing laws are popular with lawmakers because they appear to provide a quick fix solution for crime.

The Government of Botswana, like many other governments elsewhere, has reacted to the surge in certain types of criminal behaviour by the imposition of mandatory minimum sentencing for certain offences. Mandatory minimum sentences have been passed for

[69] 13 January 2009, A/HRC/10/69, Report of the Working Group, paras. 12 and 41, cf paras. 9, 13 and 46

[70] 17 March 2009, A/HRC/10/69/Add.1, Report of the Working Group: Addendum

treason[71], murder with no extenuating circumstances[72], unlawful possession of arms and ammunition for war[73], possession of and dealing habit-forming drugs[74], motor vehicle theft[75], road traffic offences[76], stock theft[77], causing grievous harm with no extenuating circumstances[78], aggravated robbery[79], attempted aggravated robbery[80], rape[81] and attempted rape[82] and defilement[83].

Supporters of mandatory minimum sentences cite various reasons for their effectiveness.

(a) Mandatory minimum sentences may deter crime by increasing the effectiveness of

[71] The Penal Code (Cap. 08:01) provides that the penalty for treason (s.34) and instigating invasion (s.35) is death. However if there are extenuating circumstances the court may substitute a minimum custodial sentence of 15 years imprisonment instead of imposing the death sentence. The offences of concealment of treason (s.37) treasonable offences (s.37) and promoting war or warlike undertakings (s.38) all carry a mandatory minimum sentence of 15 years imprisonment.

[72] The Penal Code (Cap. 08:01) provides that any person convicted of murder, where there are no extenuating circumstances, shall be sentenced to death (s.203).

[73] The Arms and Ammunition Act (Cap. 24:04) provides that the penalty for possession of arms or ammunition of war without a licence shall be a minimum of five years imprisonment (s.9).

[74] The Drugs and Related Substances Act, Act No. 18 of 1992 (s.16).

[75] The Motor Vehicle Theft Act, Act No. 17 of 1995 (s.3).

[76] The Road Traffic Act (Cap. 69:01)

[77] The Stock Theft Act (Cap. 09:01) provides that any person who steals stock or produce, or receives any stock or produce knowing or having reason to believe it to be a stolen stock or produce, shall be guilty of an offence and shall be sentenced for a first offence to a term of imprisonment for not less than five years or more than 10 years without the option of a fine, and for a second or subsequent offence to a term of imprisonment for not less than seven years or more than 14 years without the option of a fine. Where, for the purpose of stealing any stock or produce, or in the course of stealing any stock or produce, violence or the threat of violence is used, the penalty shall be a term of imprisonment of not less than 10 years or more than 15 years without the option of a fine, an if the violence use or threatened involves the use of a firearm or any other offensive weapon the penalty shall be a term of imprisonment for not less than 12 years or more than 20 years without the option of a fine. (s.3).

[78] The Penal Code (Cap. 08:01) provides that a person convicted of unlawfully causing grievous harm to another by the use of any offensive weapon or any other means whatever shall, where there are no extenuating circumstances, be sentenced to a term of imprisonment of not less than seven years (s.230).

[79] The Penal Code (Cap. 08:01) provides that where a person is convicted of robbery and that person was armed with any dangerous or offensive weapon or instrument, or was in company with one or more other person or persons, or at the time of the robbery or immediately after the time of the robbery used personal violence to any person, he shall be sentenced to a term of imprisonment of not less than 10 years (s.292).

[80] The Penal Code (Cap. 08:01) provides that where a person assaults any person with intent to steal anything and that offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or at or immediately before the time of the assault or immediately after the time of the assault uses personal violence to any person, he shall be sentenced to a term of imprisonment of not less than 10 years (s.293).

[81] The Penal Code (Cap. 08:01) provides that a person convicted of rape shall be sentenced to a minimum term of 10 years imprisonment or if the rape is attended by violence resulting in injury to the victim or if the offender is HIV positive the sentence will be a minimum of 15 years imprisonment (s.142).

[82] The Penal Code (cap. 08:01) provides that any person convicted of attempted rape shall be sentenced to a minimum term of five years imprisonment (s.143).

[83] The Penal Code (Cap. 08:01) provides that a person convicted of defilement of any person under the age of 16 years shall be sentenced to a minimum term of ten years imprisonment or, if the offender is HIV positive, the sentence will be a minimum of 15 years imprisonment (s.147).

severity as a deterrent. If potential criminals know a mild sentence is possible, they are more likely to commit crime. By establishing a set minimum punishment, a potential criminal with any knowledge of the penal code knows that, if caught, he will face a substantial punishment for his crime. This will have a deterrent effect and will thus reduce crime.

(b) Mandatory minimum sentences also keep criminals out of society for a longer period of time than they might otherwise be in jail, thereby reducing their window of opportunity to commit crime.

(c) Mandatory minimum sentences assist the judges as without mandates, judges may have radically different ideas of just sentences. The legal system emphasizes the importance of consistency. Consistent precedent is essential because citizens need to be able to make decisions knowing the legal consequences of their actions. Mandatory sentencing need not be overly harsh, but there should be some sort of rigidity to establish reliability in the legal system.

(d) Mandatory minimum sentences can also have the effect of easing the workload and expediting the trial process of the courts as the removal of judicial discretion may reduce the amount of information that has to be provided to the court to sentence someone.

But mandatory minimum sentencing also attracts severe criticism with many legal writers and judges claiming such sentencing to be unjust and unfair.

(a) Mandatory minimum sentences undermine justice by preventing judges from fitting the punishment to the individual and the seriousness of their offence. The judge cannot lower a mandatory sentence because of the circumstances of the case or a person's role, motivation, or likelihood of repeating the crime.

(b) Mandatory minimum sentences may force judges to deliver long sentences of imprisonment to offenders that are only tangentially connected to the offence. All criminals are not the same; there are significant differences in the level of threat that individuals pose to society, as well as the likelihood of rehabilitation. Most offenders are not high-repeat criminals.

(c) Rigid mandatory sentences are unjust because they inevitably lead to numerous cases of disproportionate punishment. These harsh punishments consequently have disastrous impacts on the individuals, as well as their families and community.

(d) Minimum sentences force minor criminals to spend more time in prison, thereby increasing their exposure to more hardened criminals. This exposure reduces their chance of rehabilitation as other inmates may act as a bad influence.

(e) Mandatory sentencing laws imposing harsh punishments for all offenders can cause the prison population to soar, resulting in an overcrowded prison system, exorbitant costs to taxpayers and excessively long prison sentences for too many people.

(f) Longer prison sentences stop people from working, thereby keeping them in a cycle of unemployment that leads them back into crime. The more time a person spends outside the labour force, the more their marketable skills deteriorate and, when released from prison, their chance of finding work decreases.

(g) Mandatory minimums disrupt the balance of justice. The way a defendant is charged determines if the sentence is mandatory. Mandatory minimums shift control over sentencing to prosecutors who determine the charge.

Whatever the arguments it is clear that the practical effect of mandatory minimum sentencing is longer prison sentences for offenders. Any review of sentencing policy must therefore examine closely the mandatory minimum sentencing policy now operating. This review must include an analysis of how the mandatory minimum sentences are working and what changes, if any, may be necessary to help achieve the objective of tackling specific criminal activity within the context of a fair and just sentencing system.

6) How may mandatory minimum sentencing be changed?

There are two possible reforms that may be considered in any review of mandatory minimum sentencing. These are the introduction of sentencing guidelines and the use of legislative safety valves.

a) Sentencing guidelines

One option is to remove mandatory minimum sentences altogether and allow the judges to choose the appropriate sentence. Judges and not legislators, prosecutors, or defence lawyers, should be given the discretion to determine appropriate sentences based on the facts of each case they consider so as to fit the punishment to the individual. To ensure that a judge's decision will meet standards for appropriate punishment, the prosecutor or the defendant can appeal the judge's sentence. To allow individualized sentencing, sentencing guideline systems can be put in place to guide the courts and help prevent wildly disparate sentences for similar crimes, while allowing for sentence adjustments based on culpability. Although not perfect, sentencing guidelines do a much better job of ensuring that the punishment fits the crime and the defendant.

The formulation of sentencing guidelines would be the responsibility of the Sentencing Commission for Botswana, discussion of which may be found elsewhere in this Report.

b) Legislative safety valves

This option retains the mandatory minimum sentences but recognises that mandatory minimums can create injustice in the criminal justice system. These negative side effects of minimum sentencing can however be avoided by the introduction of legislative "safety valves". Safety valves are laws created by the legislature that let courts give an offender less time in prison than the mandatory minimum requires, but only if the offender or his offence meets certain special criteria. The introduction of safety valves into the criminal justice system can have considerable beneficial effects.

(a) Protecting public safety. Safety valves don't mean that people get off without any prison time, just that they don't get any *more* prison time than they deserve. Safety valves thus help prevent prison overcrowding and save scarce prison space and resources for people who are a real threat to the community.
(b) Gives courts flexibility to inflict the punishment that fits the crime. Safety valves allow the courts in certain circumstances to sentence a person below the mandatory minimum if that sentence is too lengthy, unjust or unreasonable, or doesn't fit the offender or the crime.
(c) The safety valve allows the court to avoid unreasonable outcomes, such as first-time offenders getting the same prison sentence as repeat offenders.
(d) Saves taxpayers money. When courts sentence people below the mandatory minimum, people spend less time in prison than they otherwise would be required to, which costs taxpayers less in prison costs.
(e) The safety valve allows flexibility so that low-risk offenders do not receive excessively harsh punishment.

In many jurisdictions where mandatory minimum sentencing was introduced it became apparent that some first-time, low-level, and nonviolent offenders were receiving mandatory minimums that did not fit them or their crimes. Safety valves were therefore introduced to allow the courts to sentence some of these offenders below the mandatory minimums whenever the court could find "substantial and compelling reasons to do so."

This was the case in Botswana where, by an amendment to the Penal Code in 2004, it is now provided that the court may, where there are exceptional extenuating circumstances which would render the imposition of the statutory minimum period of imprisonment totally inappropriate, impose a lesser and appropriate penalty.[84]

The formulation of a new sentencing policy will provide an opportunity to review the operation of the 2004 amendment to the Penal Code to assess how this safety valve is working or if further amendment to the Penal Code is required. For example, some jurisdictions have introduced more specific guidelines in applying the safety valve so as to assist the courts in giving an offender a sentence below the mandatory minimum. These mandatory sentencing guidelines are formulated to have enough flexibility to recognize varying circumstances, while retaining enough rigidity to deliver consistent punishment. Once the requirements stipulated in the guidelines are met, the court must sentence an offender below the mandatory minimum to create a sentence that fits both the offender and his crime. Examples of requirements that must be met for the safety valve to operate, thus allowing the courts to give sentences below the mandatory minimum include:

(a) No one was harmed during the offence and there was no serious injury to the victim.
(b) The offender has little or no history of criminal convictions.
(c) The offender did not use violence or a weapon.
(d) The offender was not a leader or organizer of the offence but rather an accomplice who played a minor role.
(e) The offender told the prosecutor all that he knows about the offence.
(f) The offender was a minor.
(g) The offender had a significantly impaired mental capacity.
(h) The offender committed the crime under unusual or substantial duress.

Should the safety valve introduced by the 2004 amendment be expanded by replacing the current test with a broader standard? For example, amending the Penal Code to remove the words "exceptional extenuating circumstances" and instead stipulate that the proviso is to apply "whenever justice demands it"? Or should Parliament rewrite the safety valve and include more specific criteria so that, for example, the courts are allowed to give a sentence below the mandatory minimum whenever the mandatory minimum is longer than necessary to provide a just punishment, deter crime, protect the public, or rehabilitate the offender. Should any amendment also specifically stipulate any particular requirements that must be met for the safety valve to operate, such as being a first offender, showing contrition by pleading guilty and willingness to compensate the victim, the age of the offender etc., thus allowing the courts to give sentences below the mandatory minimum?

7) Mandatory minimum sentencing and the Stock Theft Act

Before any decisions can be taken regarding the mandatory minimum sentences it will first be necessary to examine how the mandatory minimums are working in respect of the various offences for which they have been introduced. In this respect any examination of the effectiveness of mandatory minimum sentencing in Botswana could start with a detailed analysis of the legislation responsible for the largest number custodial sentences handed down by the courts – the Stock Theft Act

[84] Penal Code Section 27. (4) Notwithstanding any provision in any enactment which provides for the imposition of a statutory minimum period of imprisonment upon a person convicted of an offence, a court may, where there are exceptional extenuating circumstances which would render the imposition of the statutory minimum period of imprisonment totally inappropriate, impose a lesser and appropriate penalty.

As at 3 May 2012 there were 506 males and seven females serving sentences of imprisonment for stock theft. The total figure of 513 prisoners serving sentences for stock theft is the largest number of persons imprisoned for any one offence. All were sentenced under the Stock Theft Act[85], section 3 of which provides for the following minimum sentences to be inflicted upon conviction:

> 3. (1) Any person who steals stock or produce, or receives any stock or produce knowing or having reason to believe it to be a stolen stock or produce, shall be guilty of an offence and, notwithstanding the provisions of any other written law, shall be sentenced for a first offence to a term of imprisonment for not less than five years or more than 10 years without the option of a fine, and for a second or subsequent offence to a term of imprisonment for not less than seven years or more than 14 years without the option of a fine.
>
> (2) Where, for the purpose of stealing any stock or produce, or in the course of stealing any stock or produce, violence or the threat of violence is used, the penalty shall be a term of imprisonment of not less than 10 years or more than 15 years without the option of a fine, an if the violence use or threatened involves the use of a firearm or any other offensive weapon the penalty shall be a term of imprisonment for not less than 12 years or more than 20 years without the option of a fine.
>
> (3) A person charged under subsection (1) may be convicted of the offence of stealing any stock or produce or of receiving any stock or produce notwithstanding that the person stated in the charge to be the owner of the stock or produce is wrongly named as the owner of the stock or produce.
>
> (4) Any person who procures, incites, hires, directs, instigates, or colludes with another person to contravene the provisions of subsection (1) shall be guilty of an offence and shall suffer the same penalties as the person who contravenes those provisions.
>
> (5) Any sentence imposed in respect of an offence under this section shall be consecutive to and not concurrent with any other sentence imposed on the same accused person, and no sentence or any part of any sentence imposed in respect of an offence under this section shall be suspended.
>
> (6) Where a person convicted of an offence under this section is a holder of a fresh produce licence under the Trade and Liquor Act, the court convicting the person may order the cancellation of the licence, and accordingly the provisions of section 20 of the Trade and Liquor Act shall have effect.

Where a person is found in possession of any stock or produce Section 4 of the Act places the burden of proof on the accused to show that his possession of the stock or produce was lawful.

> 4. In any proceedings, where it is proved to the satisfaction of the court that a person –
>
> (a) was found in possession of any stock or produce reasonably suspected of being stolen;
> (b) was found in possession of any stock or produce of which the brand or ear marks or numbers, or other identification marks have been altered, disfigured, obliterated or tampered with in any manner;

[85] Stock Theft Act (Cap. 09:01)

(c) was found in possession of any stock or produce and unable to produce a bill of sale or other satisfactory evidence of ownership, identifying the stock or produce and the person from whom it was obtained, and from which such person can be traced;
(d) was found in possession of any forged documents of sale or ownership in relationship to any stock or produce,

it shall be presumed that such person is guilty of an offence under section 3 in relation to the stock or produce concerned, and shall suffer the penalties provided thereunder, unless the contrary is proved.

Stock or produce is given a wide definition under Act. Section 2 defines produce and stock as follows:

"produce" means the whole or any part of any skins, hides, horns or carcass of stock, any wool, mohair, ostrich egg or ostrich feathers.
"stock" means any horse, mare, gelding, ass, mule, bull, cow, ox, ram, ewe, wether, goat, pig or ostrich, or the young thereof.

The mandatory minimum sentence will therefore potentially apply to an offender who steals a skin, ostrich feathers or a goat in the same way as it applies to an offender who steals a horse, bull or cow. There is little wonder that the Stock Theft Act accounts for the largest number of persons serving sentences of imprisonment for any single offence. The mandatory minimum sentence of at least five years imprisonment for a first offence contained in section 3, the reversal of the burden of proof under section 4 and the definition of stock and produce in section 2, all have the potential for unfair and unjust sentencing.

The Stock Theft Act was enacted in an attempt to curb a rise in stock theft. Stock theft is a very emotive subject and many feel the measures enacted to punish offenders, however draconian they may appear, to be fully justified. But is the Act working to cure the mischief that it was intended to correct or is the application of the mandatory minimum sentencing provision contained in the Act merely serving to fill the prisons with people who really should not be there?

A detailed analysis needs to be undertaken of the operation of the Stock Theft Act. This should include statistics showing the incidence of stock theft for each year over the past five years, together with the detection and arrest rates for each year. The figures should indicate the type of stock and produce that forms the subject matter for each offence. The statistical analysis should detail the numbers of persons arrested, their ages and sex, whether the offenders are first offenders or repeat offenders, the conviction rates in respect of such persons and the sentences imposed before both the customary courts and the common law courts as appropriate, including the Stock Theft Courts.[86] Any issues or difficulties the courts may experience in applying the proviso contained in section 27(4) of the Penal Code to stock theft cases should also be noted.

8) The powers of the customary courts in relation to sentencing.

The customary courts are an important element in the criminal justice system and they continue to enjoy legitimacy among the people as being both accessible to the public and a means of ensuring speedy access to justice. The customary courts are responsible for hearing the majority of criminal cases that come before the courts and for sentencing many of the offenders now being held in the prison system. No sentencing policy can therefore be

[86] Specialised Stock Theft Courts have now been established for many parts of Botswana. It has not been possible to review the operation of these courts for the purpose of this Report.

developed without a comprehensive review of the customary courts and their powers in relation to sentencing.

However there are numerous issues arising from the administration of justice through the customary court system and many of the criticisms levelled at the customary courts do have a degree of justification.

A major criticism is that the customary courts do not provide the same constitutional due-process protections as are found before the common law courts and it is common for rules of due process and natural justice to be disregarded by the customary courts where defendants do not have legal representation and where there are no standardized rules of evidence. While section 10(2)(d) of the Constitution provides constitutional right to legal representation in criminal matters[87] the right to legal representation is qualified by section 10(12)(b) of the Constitution, which prohibits legal representation before a subordinate court in proceedings for an offence under customary law. This position is affirmed by section 32(a) of the Customary Courts Act, which provides that no advocate or attorney shall have a right of audience before the customary courts.[88] The apparent justification for this prohibition on legal representation is that the matters adjudicated in these courts are purely customary issues and minor offences. However the fact is that some 85% of criminal matters are heard or tried by customary courts and some customary courts have the power to impose sentences of up to five years imprisonment. Nevertheless the onus remains on the accused person to represent himself when appearing before a customary court.

A further criticism concerns the fact that the customary courts are staffed by persons who have little or no legal training. There has been concern about the quality of justice that they provide and the possible effect they have on the rights of those who appear before them, as guaranteed under Section 10 of the Constitution. In general, customary law is administered by non-trained lay individuals, without a codified guide. It is often alleged that the Kgosi and other presiding officers of the customary courts are poorly trained and ill equipped to administer the law and make legal decisions. According to the President of the Customary Court of Appeal most criminal appeals to his court arise under section 21 of the Customary Courts Act from the failure of the customary courts to observe the procedure at trial set out in the Customary Courts (Procedure) Rules.[89] An accused appearing before a customary court cannot challenge any procedural irregularities when before the court. Indeed an accused may not be able to ask any questions of the court. According to the President of the Customary Court of Appeal, in many instances neither the police nor the customary courts follow the procedures set out in the Customary Courts Act. In this respect, statistics provided by the Customary Court of Appeal show that from January to December 2011 the

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[87] (2) Every person who is charged with a criminal offence -
(d) shall be permitted to defend himself or herself before the court in person
or, at his or her own expense, by a legal representative of his or her own choice.

[88] Notwithstanding anything contained in any other law, no advocate or attorney shall have a right of audience -

(a) in any customary court; or

(b) in any magistrate's court in any criminal proceedings or in any civil proceedings which fall to be determined by customary law, taken under the provisions of sections 37, 39 and 42 except with the special permission of such court.

[89] Customary Courts Act, Cap. 04:05
21. No customary court shall impose upon any person any punishment unless a criminal trial has been held in accordance with the provisions of the Customary Courts (Procedure) Rules.

Customary Court of Appeal heard 92 criminal appeals from the customary courts. All but two of the appeals were allowed.

So the critics argue, the quality of decisions reached in the customary courts varies considerably with scant regard paid to due process, the rules of natural justice and the presumption of innocence. Little if no action is taken if a Kgosi makes a wrong ruling or acts in a manner that is manifestly unjust to an accused. While any party to a dispute in the customary court does have the right to have that dispute transferred to a local magistrate's court, lack of knowledge regarding remedies in the legal system and a lack of money to pay for a lawyer can keep many disputes in the customary system.

The customary courts are such a vital element of the criminal law system and play such an important role in the structure of governance that any proposals for their reform must be informed and can only follow detailed research, analysis of statistical evidence and consultations with the relevant stakeholders. It has not been possible to conduct the level of research and investigation necessary to make informed, detailed proposals concerning any reform of the customary law courts in this Report.

At some time in the future the Government may wish to comprehensively review and reappraise the role, if any, of the customary law courts in the criminal legal system. In the short term however the assumption must be that the customary law continue to have a valuable role to play. The question becomes therefore whether anything can be done in the short to medium term to address the many valid criticisms levelled against the customary courts so as to make them accord more with due process and fulfil human rights expected in a contemporary criminal justice system.

In this respect detailed research must be undertaken including the collation of statistical information relating to the customary courts concerning, *inter alia*, the numbers of cases heard, the types of offences charged and the sentences imposed. The emphasis should be on recognising that the customary courts are a necessary part of the criminal justice system while admitting their shortcomings and putting in place, as far as is possible, measures to address the known problems of the customary courts.

IV. ALTERNATIVE NON-CUSTODIAL SENTENCING OPTIONS

A. Policy Objectives

The recognition that imprisonment is not suitable for all offenders and can have a severely detrimental impact on certain types of offenders. The adoption of non-custodial sentences is intended to avoid offenders becoming institutionalised, promote rehabilitation and integration back into the community, be generally less costly than sanctions involving imprisonment and by decreasing the prison population, will ease prison overcrowding and thus facilitate prison administration and the proper correctional treatment of those who remain in custody.

B. Policy Issues

Fines

1. Should the courts have any legal obligation, at the time of sentencing, to ensure that offenders have the ability to pay any fines imposed upon them?

2. In the even of default in payment of any fine imposed, should the offender be automatically committed to prison?

Restitution to the victim or a compensation order

1. Does the current law adequately reflect the contemporary view that restitution is a "right" of victims in the sentencing process and that restitution for victims of crime should form part of the criminal justice system?

2. What amendments to the law are necessary to make restitution more effective? Should the law impose a positive duty on the courts to consider imposing a compensation order in all cases where there is an identified victim?

3. Should restitution or compensation orders be awarded as stand-alone orders in their own right or given as an additional sentence by the courts?

4. Should a State funded compensation scheme for victims of crime be introduced?

5. To what extent do the customary courts award compensation in kind and order compensation to be paid from any fines imposed on an offender. Are these customary law provisions ones that could be extended to the common law courts?

Suspended or deferred sentences

1. Should suspended sentences be abolished and replaced with non-custodial community based sentences that provide a wider scope for rehabilitation and treatment?

2. Should the limitations on the discretion of the courts to award suspended or deferred sentences in respect of certain serious offences be retained or expanded to cover other offences?

3. Legislation already provides that the suspended or deferred sentence order shall be subject to such conditions as the court may specify, such as the offenders' good conduct and compensation being made by the offender for damage or pecuniary loss. Should the courts be encouraged to add other appropriate conditions to suspended or deferred sentences with the aim of addressing the causes of offending and to further reduce the chance of reoffending?

4. Is there proper monitoring of offenders subject to suspended and deferred sentences. Does the appropriate administrative infrastructure to monitor deferred sentences exist?

Probation and judicial supervision

1. In view of the fact that the probation provisions contained in the Children's Act have not yet been implemented, is it realistic to propose that probation be introduced as an alternative sentence for adult offenders?

2. For a court to order probation there must exist an appropriate service infrastructure staffed by qualified probation officers. Would a proposal to establish a probation service be feasible and what would be the timeframe for the establishment of a probation service?

Community service orders

Should a system of community service be introduced and the Community Service Order to be added to the punishments available before both the common law courts and the customary courts?

Should the Community Service Order replace extra-mural labour awarded under section 97 of the Prisons Act.

Should section 18 of the Customary Courts Act be amended to remove the power of the customary courts to award sentences of imprisonment of less than 12 months and instead award community service sentences?

Initially, for the short term, will it be feasible for the community service scheme to build upon the extra-mural labour scheme currently operating under the Prisons Act and be administered using the Zimbabwe model through national and local committees?

C. Policy Recommendations

Discharge and binding over, Reconciliation, Caution and Reprimand, Arbitration

1. Discharge and binding over, reconciliation, caution and reprimand and arbitration are currently available under existing legislation. A review should be undertaken of their practical operation to assess their usage and effectiveness in order that any necessary reforms to the existing legislation may be formulated and considered

Fines

1. A review of the operation of the fines system should be undertaken. As part of this review detailed statistical information should be gathered to assist in assessing the impact and effectiveness of fines in the criminal sentencing system.

2. The provision relating to corporal punishment contained in section 29(2) of the Penal Code should be reviewed and if necessary legislation drafted to amend the section to ensure its compatibility with section 29(1)(c) of the Penal Code.

3. The Customary Courts (Procedure) Rules, rule 30 should be reviewed for possible inconsistencies with the principle that delegated legislation shall not include sentences of imprisonment, and with the scale of maximum sentences for the non-payment of fines set out in section 29(2) of the Penal Code.

4. The Penal Code, Customary Courts Act and other legislation allowing for the levying of fines should be amended to require that, before levying any fine, the court be required to determine whether a person is able to pay a fine; and that fines not be imposed if the offender is unable to pay the fine at the time of sentence or within a reasonable time thereafter.

5. The Penal Code and the Customary Courts (Procedure) Rules should be amended to eliminate the provision of incarceration for the non-payment of fines. In those cases where the court determines that the offender does not possess the ability to pay a fine, the possibility of the court imposing probation or making a community service order or restitution order in place of the fine should be explored.

6. Consideration should be given to the introduction of a fines recovery programme to monitor the collection of fines.

Restitution to the victim or a compensation order

1. The Penal Code should be amended to expressly recognise that restitution is a "right" of victims in the sentencing process and that restitution for victims of crime should form part of the criminal justice system.

2. A comprehensive review should be undertaken into the operation and effectiveness of the existing compensation provisions contained in section 316 of the Criminal Procedure and Evidence Act and sections 25 and 26 of the Customary Courts Act.

3. In the light of the outcome of the review into the operation of the current law on compensation for victims of crime, consideration should be given to amending the law so as to, *inter alia*, impose a positive duty on the courts to consider imposing a compensation order in all cases where there is an identified victim and for the courts to award restitution or compensation orders as stand-alone orders in their own right.

4. Restitution should be considered as a condition for probation under any probation scheme to be established.

5. In the longer term consideration should be given to the introduction of a State funded compensation scheme for victims of crime and the possibility of funding such a scheme through a victim surcharge.

Suspended or deferred sentences

1. The government should look closely at the operation of the current legislation relating to suspended and deferred sentences in order to evaluate the role and value of such sentencing options in the overall criminal justice system. Are suspended and deferred sentences viewed by the public and the courts as being a recognisable form of punishment? Do they provide the courts with a necessary non-custodial sentencing option that cannot be matched by any other sentencing alternative?

2. In the medium to long-term consideration should be given to abolishing suspended sentences and replacing them with non-custodial community based sentences with appropriate conditions that will provide a non-imprisonment option which can be regarded as both severe and appropriate for the types of offences now receiving suspended sentences. If abolition is recommended then in the short to medium term, while the infrastructure is being established to move towards community based sentencing, suspended sentences will be retained.

3. If suspended and deferred sentences are to be retained then a mechanism should be established to provide specific guidance to the courts in relation to the type of conditions that the court may impose upon the offender during the period of suspension or deferral. This could be a function to be performed by any Sentencing Commission established for Botswana.

Probation and judicial supervision

1. Consideration should be given to introducing probation orders for adult offenders as an alternative non-custodial sentencing disposition.

2. That a probation service be established adequately staffed by trained probation officers. Consultations should be held with the University of Botswana concerning the development of courses for the award of professional qualifications for probation officers.

Community service orders

1. A comprehensive review should be undertaken of the current scheme for extra-mural labour made under section 97 of the Prisons Act. The review will include the gathering of statistics on the use made of section 97 by the customary courts and the

common law courts, the type of work undertaken and the supervision mechanisms in place for those undertaking extra-mural labour.

2. A system of community service should be introduced and the Community Service Order to be added to the punishments available before both the common law courts and the customary courts. Section 25 of the Penal Code and section 18 of the Customary Courts Act to be amended accordingly.

3. The Community Service Order will replace some fines and prison sentences of twelve months duration or less. The Order will replace extra-mural labour awarded under section 97 of the Prisons Act.

4. In the customary courts, section 18 of the Customary Courts Act should be amended to remove the power of the customary courts to award sentences of imprisonment of less than 12 months. In place of short terms of imprisonment the customary courts will now award community service sentences.

5. Initially, for the short term, the community service scheme should build upon the extra-mural labour scheme currently operating under the Prisons Act and will be administered using the Zimbabwe model through national and local committees. Following stakeholder consultations and drawing on the experience of administering the current scheme of extra-mural labour, regulations will be made to structure the scheme.

6. In the medium to long term the aim will be to operate the community service scheme through the probation service and move towards a more comprehensive community payback scheme modelled on the scheme that now operates in the United Kingdom.

Commentary

1) Possible alternatives to sentences of imprisonment
2) Existing non-custodial dispositions for review
- **a) Discharge and binding over**
- **b) Reconciliation**
- **c) Caution and Reprimand**
- **d) Arbitration**

3) Specific non-custodial sentences that may be developed under an alternative sentencing policy
- **a) Economic penalties - Fines**
- **b) Restitution to the victim or a compensation order**
- **c) Suspended or deferred sentences**
- **d) Probation and judicial supervision**
- **e) Community service orders**

1) Possible alternatives to sentences of imprisonment

The Tokyo Rules deal with the objective of sentencing in general terms only. Rule 3.2 provides: "The selection of non-custodial measures shall be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the

personality, the background of the offender, the purpose of sentencing and the rights of the victims". This will mainly be the case for crimes of medium seriousness; very serious offences will always attract a custodial sentence, while lesser offences do not attract imprisonment. For offences in the middle range of seriousness, non-custodial penalties can best be used and they should be imposed in lieu of imprisonment wherever appropriate.

In practice, the difficulty is to ensure that this occurs to the extent possible. One means is to make it a legislative requirement that judges must impose a non-custodial sentence in all cases where they would have imposed short prison sentences. For example in Finland community service has replaced sentences of imprisonment of up to eight months. In Germany, fines are used as an alternative to short term prison sentences. The German penal code strongly discourages the imposition of sentences of imprisonment of fewer than six months and if such a sentence is imposed the judge is required to specify his reasons for so doing.

Given that the reason for considering non-custodial sentences is to create real alternatives to imprisonment, attention must also be paid to the provision that is made for what happens if the offender fails to fulfil the conditions of the non-custodial penalty. If, for example, a fine is imposed that is beyond the means of the offender and the penalty for failure to pay is an automatic term of imprisonment, the fine is not really an alternative sentence. Non-custodial sentences should be tailored to avoid this outcome. Fines, for example, may be made payable in instalments, or community service orders may have some flexibility in how many hours the offender must work each week. Most importantly, imprisonment should not be the automatic default sentence for failure to fulfil the requirements of the non-custodial sentence.[90] Where, for example, an offender fails to meet the conditions of a community service order fully or fails to make all the restitution to a victim that was required, a hearing should be held to determine the causes of the failure. In deciding what further action is to be taken against the offender, partial fulfilment must be seen as a proportionately positive factor. A custodial sentence should not necessarily follow, but careful consideration should be given to replacing the original non-custodial sentence by another such sentence that will meet the objectives sought in fashioning the original sentence.[91]

The first step in reducing the use of imprisonment involves the review of the legal framework for sentencing. Sentencing reform is not merely a matter of changing the practices of the judiciary. Not only should judges be encouraged to consider alternatives to imprisonment, they must have the legal authority to exercise discretion in sentencing and the ability to consider alternative sentences under the law. Specific legislative reforms may also reduce the number of prisoners. For example, a legislative requirement to take into consideration at sentencing the time an offender spent in re-trial detention might promote shorter overall imprisonment.

In considering the implementation of non-custodial sentences, it should be noted that there is an on going risk that the sentences developed as alternatives to imprisonment will not be used for that purpose. Care must be taken to ensure that alternative sentences are not imposed as additional penalties in cases where imprisonment would not have been seriously considered in the fist instance.

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[90] Rule 14.3. The failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure.

[91] Rule 14.4. In the event of a modification or revocation of the non-custodial measure, the competent authority shall attempt to establish a suitable alternative non-custodial measure. A sentence of imprisonment may be imposed only in the absence of other suitable alternatives.

Alternatives to imprisonment must be exactly that. Non-custodial sentences should serve as alternatives to imprisonment rather than as additional penalties imposed on people who would not have been sentenced to imprisonment in the first place. This principle is clearly stated in Rule 2.6 the Tokyo Rules: "Non-custodial measures should be used in accordance with the principle of minimum intervention." Alternatives to imprisonment must also comply with international human rights standards and may not be cruel, inhumane or degrading. The Tokyo Rules 3.9 require that "[t]he dignity of the offender subject to non-custodial measures shall be protected at all times".

Any non-custodial punishments must derive from an established penal framework.[92] The Tokyo Rules, Rule 8.2 list a wide range of dispositions other than imprisonment for the sentencing stage and which, if clearly defined and properly implemented, have an acceptable punitive element:

(a) Verbal sanctions, such as admonition, reprimand and warning;
(b) Conditional discharge;
(c) Status penalties;
(d) Economic sanctions and monetary penalties, such as fines and day-fines;
(e) Confiscation or an expropriation order;
(f) Restitution to the victim or a compensation order;
(g) Suspended or deferred sentence;
(h) Probation and judicial supervision;
(i) A community service order;
(j) Referral to an attendance centre;
(k) House arrest;
(l) Any other mode of non-institutional treatment;
(m) Some combination of the measures listed above.

While the Tokyo Rules list alternative sentencing dispositions, they neither describe the substance of these dispositions nor do they elaborate on the administrative structures needed to implement them as realistic sentencing alternatives to imprisonment.

In the context of a sentencing policy for Botswana not all of the alternative sentencing dispositions set out in Rule 8.2 will be relevant. While imprisonment forms the basic sentencing option for the courts a number of pieces of legislation do currently provide for the imposition of alternative non-custodial sentences in criminal matters. Some of the dispositions therefore already exist under the law and will simply require a review to be undertaken of their operation with a view to implementing any necessary reforms. Some may be considered to be impracticable and not suitable for consideration as alternative sentences at this time. Some however do warrant detailed consideration with a view to their short to medium term implementation.

2) Existing non-custodial dispositions for review

The following dispositions are currently available under existing legislation. It is recommended that a review be undertaken of their practical operation to assess their usage and effectiveness in order that any necessary reforms may be formulated and considered.

a) <u>Discharges and binding over</u>

[92] The Tokyo Rules recognise the danger of arbitrary sentencing and require, in peremptory terms: "The introduction, definition and application of non-custodial measures shall be prescribed by law." Rule 3.1.

Verbal sanctions, such as admonitions, reprimands, warnings or unconditional discharges accompanied by a formal or informal verbal sanction are some of the mildest responses that a court may administer upon a finding of guilt or legal culpability. Provision is made by section 32 of the Penal Code for the discharge of offenders without punishment in certain circumstances.[93] Similarly section 20 of the Customary Courts Act provides for the discharge of an offender without proceeding to conviction.[94] Under section 19 of the Customary Courts Act customary courts may also bind an offender over to keep the peace.[95]

b) Reconciliation

This is one method of restorative justice by which the courts may protect a victim's interests by taking into account their views. Not all cases brought before the court are prosecuted. The court may, upon application brought by the prosecution on behalf of the victim, promote reconciliation. By section 321 of the Criminal Procedure and Evidence Act, in criminal cases, a magistrate's court may promote reconciliation and encourage and facilitate the settlement, in an amicable way, of certain proceedings. This is normally done when the parties are so agreeable and the offence is not of an aggravated nature.[96]

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[93] Penal Code, Cap. 08:01

32. (1) Where, in any trial before a magistrate's court, the court thinks that the charge is proved but is of the opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge.

[94] Customary Courts Act. Cap.04:05, Discharge without proceeding to conviction

20. (1) Where in any criminal proceeding under the provisions of this Act before any customary court, a higher customary court, a customary court of appeal or the High Court, the court thinks that the charge is proved but is of the opinion that having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge.

(2) An order made under this section shall, for the purpose of re-vesting or restoring any stolen property, and enabling the court to make any order restoring the property in respect of which the offence was committed or property seized for production in the trial have the like effect as a conviction.

[95] Customary Courts Act, Cap. 04:05, Binding over

19. (1) A person convicted of an offence before a customary court, a higher customary court, a customary court of appeal or the High Court under the provisions of this Act may, instead of, or in addition to, any punishment to which he is liable be ordered to enter into his own recognizance, with or without sureties, in such amount as the court thinks fit, on condition that he shall keep the peace and be of good behaviour for a term not exceeding three years to be fixed by the court and may be imprisoned until such recognizance, with sureties, if so directed, is entered into, but so that the imprisonment for not entering into the recognizance shall not extend for longer than three months, and shall not, together with the fixed terms of imprisonment, if any, extend for a term longer than the longest term for which he might be sentenced to be imprisoned for the offence.

(2) When a person is convicted for any offence under the provisions of this Act a customary court, a higher customary court, a customary court of appeal or the High Court may, instead or passing sentence, discharge the offender upon his entering into his own recognizance, with or without sureties, in such sum as the court may think fit, to keep the peace and be of good behaviour for a term not exceeding three years to be fixed by the court on condition that he shall appear to receive judgment at some future sitting of the court or when called upon.

[96] Criminal Procedure and Evidence Act, Cap. 08:02, Reconciliation in criminal cases

321. (1) In criminal cases a magistrate's court may, with the consent of the prosecutor, promote reconciliation, and encourage and facilitate the settlement, in an amicable way, of proceedings for assault or for any other offence of a personal or private nature not aggravated in degree, on terms of payment of compensation or other terms approved by such court, an may, thereupon, order the proceedings to be stayed.

Reconciliation as a diversionary measure empowers victims to present their views and concerns where their personal interests are affected. It provides an opportunity for the victim and the offender to develop a mutually acceptable plan that addresses the harm caused by the crime. It also allows the offender to learn about the impact of the crime on the victim and to take direct responsibility for his behaviour. It is the duty of the court to stay the proceedings for a sufficient length of time to enable the terms of settlement to be carried out. If the accused fails to carry out the terms, then the case will proceed.

c) Caution and Reprimand

Section 314 of the Criminal Procedure and Evidence Act provides that in certain circumstances a convicted person may be discharged (which has the effect of an acquittal) and be given a caution or reprimand.[97]

d) Arbitration

Under Customary Law, crime is viewed primarily as a conflict between individuals that results in injuries to victims and their communities and only secondly as a conflict against the State. For some minor offences therefore, the victim and the offender upon agreement can opt for a non-court dispute resolution in the form of arbitration facilitated by a Headman. Headmen of Arbitration are normally lay people appointed by the Chief of a particular tribal area in consultation with the tribe and confirmed by the Minister of Local Government. The role of these Headmen is to protect victims and create peace in communities by reconciling the parties and repairing the injuries caused by the dispute. They also act as mediators to support the healing process of the victim by offering a safe and controlled setting for the victim to meet an speak with the offender on a strictly voluntary basis to negotiate a restitution settlement.

This procedure gives the victim the opportunity to personalise the crime and express the impact it has had on him and his family. This may aid the victims' emotional recovery. Likewise, the offender is made to reflect upon the injustice he has done and to accept responsibility by engaging in constructive actions. In this way, arbitration reflects the principles of restorative justice. This procedure also provides a means of avoiding escalation of legal process and the associated costs and delays. The victim can also obtain financial and emotional restitution quickly in an informal way.

3) Specific non-custodial sentences that may be developed under an alternative sentencing policy

In considering specific non-custodial sentences that may be developed as part of an alternative sentencing policy emphasis should initially be placed on the following dispositions:

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(2) If the proceedings are stayed, they shall be stayed for a sufficient length of time to enable the terms of the settlement to be carried out an if the terms be carried out by that date, it shall be recorded on the record to the case and the accused discharged; if the terms have not been carried out, the case against the accused will then proceed unless the proceedings be further stayed.

[97] Criminal Procedure and Evidence Act, Cap. 08:02, Discharge with caution or reprimand

314. Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion discharge the offender with a caution or reprimand, and such discharge shall have the effect of an acquittal, except for the purpose or proving and recording previous convictions.

a) Economic penalties – Fines
b) Restitution to the victim or a compensation order
c) Suspended or deferred sentences
d) Probation and judicial supervision
e) Community service orders

a) Economic penalties – Fines

Fines are among the most effective alternatives in keeping many offenders out of prison and have long formed part of criminal sentencing schemes. Botswana is no exception. Section 25(d) of the Penal Code lists a fine as one of the punishments a court may inflict on an offender.[98] The customary courts too have power to sentence a convicted person to a fine.[99] A wide range of offences under the Penal Code and other legislation include fines as possible punishments. Fines may also be imposed as a general punishment in respect of offences where no punishment is specially provided for in the Penal Code.[100]

In general, fines are one of the most versatile of punishments and when applied properly have many advantages as a form of sanction. A fine may be applied by the courts as a stand-alone penalty or be imposed in conjunction with another sanction. In theory, fines simultaneously punish offenders while at the same time allowing them to make a form of restitution to the community. They allow for the punishment to be individually tailored to an offender and his crime. Fines are also relatively cheap to administer and can provide an additional source of income for the treasury. They can reduce the number of persons sent to prison, particularly first time offenders who are then spared contact with hardened criminals.

However fines can also give rise to problems and if not properly applied and monitored they can actually lead to an increase, rather than a decrease, in the prison population. It is for this reason that it is necessary, as part of any sentencing policy, to review the operation of the fines system. It has not been possible at this stage to access detailed statistical information relating to the impact of fines in the criminal sentencing system. Therefore only general comments may be made regarding the operation of the fines system at this time. However, as the alternative sentencing project progresses more detailed information and statistics will need to be collected in order that the impact and effectiveness of economic penalties in the criminal justice system may be comprehensively assessed and, where necessary, proposals for reforms put forward.

A general review of the current legislation relating to fines highlights two problematic issues that are common to many jurisdictions. First, do the courts have any legal obligation, at the time of sentencing, to ensure that offenders have the ability to actually pay any fines imposed upon them. Secondly, in the even of default in payment of any fine imposed, should the offender be automatically committed to prison?

Ensuring the ability of an accused to pay the fine imposed

In any criminal sentencing scheme that uses fines, one fundamental issue that must be addressed is the ability of an accused to pay any fine imposed upon him by the court. If the

[98] S. 25(d) Penal Code Cap. 08:02

[99] S18(1) Customary Courts Act Cap.04:05

[100] S. 33 Penal Code Cap. 08:02 General Punishment for offences
When in this Code no punishment is specially provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.

system is to work the judges must give adequate consideration to the question of an accused's ability to pay when imposing a fine.

In some cases the courts do not have any discretion in setting the amount of the fine as the fines to be applied are fixed by law. Some believe that setting fixed fines for specified offences avoids difficult questions about what the amount of the fine should be in a particular case. However, a fixed fine is regressive and hits the poor much more harshly than the rich. For this reason fixed penalties are usually reserved for relatively petty offences for which imprisonment would not normally be considered or where it may be assumed that all offenders have some income from which to pay the fines.

In other cases the requirements of equality demand that an attempt should be made to ensure that the fine is also related to the income of the offender so that the fine should have an equal "penal bite". Often the courts can manage this by inquiring into the income of the offender and then adjusting the fine upwards or downwards as warranted. Another way of achieving this is through "day" fines or "unit" fines. In this form of fining the seriousness of the offence is first expressed in terms of a number of days or "units". The average daily income of the offender or the average daily surplus of the offender is then determined. The actual fine is calculated by multiplying the number of days (units) by the average daily income or average daily surplus of the offender. Such methods can, however, only provide a rough equivalence between offenders of differing financial means. They also presuppose that the court has available before it accurate details of the financial circumstances of the offender.

With regards to the ability of an offender to pay any fine imposed upon him the law is largely indirect. The Penal Code does provide that, in cases where no sum is expressed in the law any fine imposed must not be excessive.[101] There are also provisions in both the Criminal Procedure and Evidence Act[102] and the Customary Courts Act[103] for the court to permit payment of fines by instalments. Also any fine imposed by a customary court exceeding P200 is automatically subject to review by the Customary Court of Appeal.[104] However generally speaking, when sentencing an offender, the courts are not required by law to address their minds to the offender's ability to pay any fine they may impose.

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[101] S29(1)(a) Penal Code

[102] S. 310. Criminal Procedure and Evidence Act.
Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion order that any fine imposed on such person be paid in instalments or otherwise on such dates, and during such period not exceeding 12 months from the date of such order, as the court may fix therein. If on such date or dates the offender has made all payments in accordance with the order of the court, no warrant shall be issued committing the offender to prison to undergo any alternative imprisonment prescribed in the sentence in default of payment of the fine.

[103] Recovery of fines, damages or other money penalties
Section 25. (1) Customary Courts Act.
A customary court shall direct that any fine, damages or other payment which it imposes or awards shall be paid within such time as it thinks just:
Provided that nothing in this subsection shall preclude a customary court from authorizing the payment of any fine, damages or other payment in instalments if the time within which such instalments shall be paid is specified.

[104] S. 45. (1) Customary Courts Act
All sentences in criminal cases tried in the customary courts in which the punishment awarded is imprisonment exceeding six months or a fine exceeding P200 shall be subject in the ordinary course to review by the Customary Court of Appeal; but without prejudice to any right of appeal which may exist under the provisions of this Act.

If the fine imposed by the court is beyond the means of the offender to pay then the consequence of any default may be imprisonment. But imprisonment will contradict the courts original opinion that the offender did not warrant a custodial sentence. If the court has imposed a fine without any other penalty then this would appear to indicate that, in the opinion of he court, the offender does not present a threat to the community and imprisonment is not an appropriate penalty in respect of the offence for which he is being sentenced. Indeed, the offence committed may not even carry a sentence of imprisonment. Nevertheless, in such cases an offender who is sentenced to a fine but then defaults on payment may still find himself imprisoned.

Imprisonment for non-payment of fine

Imprisonment for non-payment of a fine is provided for under the law. Under the provisions of section 29(1)(c) of the Penal Code, a judge, when imposing a fine, can attach a default order. Under such an order, the offender may be imprisoned if the fine is not paid.[105] The period of time the offender is required to serve in prison is based on the amount of the fine and is set out in section 29(2) of the Penal Code. Subsection (2) also provides for corporal punishment to be ordered in respect of the non-payment of any sum imposed as a fine. However section 29(1)(c) confers no power on the court to make any order imposing corporal punishment in default of payment of a fine. The provision relating to corporal punishment contained in section 29(2) therefore needs to be reviewed.

The Customary Courts Act on the other hand does not expressly confer the power to imprison those who default in paying their fines. Under the Customary Courts Act fines are paid to the clerk of the court to be disposed of as directed by the Accountant-General[106] or, where the court so directs, paid to the person injured or aggrieved by the act or omission for

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[105] 29. (1) Where a fine is imposed under any law, then in the absence of express provisions relating to such fine in such law the following provisions shall apply –

(a) where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;

(b) in the case of an offence punishable with t affine or a term of imprisonment, the imposition of a fine or imprisonment shall be a matter for the discretion of the court;

(c) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with a fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion –

(i) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also

(ii) issue a warrant for the levy of the amount in accordance with the provisions of section 303 of the Criminal Procedure and Evidence Act.

(2) In the absence of express provisions in any law relating thereto, the term of imprisonment or corporal punishment ordered by a court in respect of the non-payment of any sum-

(a) imposed as a fine;

(b) ordered to be forfeit to the State;

(c) ordered to be paid under the provisions of any other law,

shall be such as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale –

Amount of fine	*Maximum*
Not exceeding P200	14 days or 6 strokes
P200 –P1000	One month or 9 strokes
P101 – P10,000	Six months or 12 strokes
Exceeding P10,000	Two years imprisonment.

[106] Rule 28. Customary Courts (Procedure) Rules

which the fine was imposed.[107] Section 25(4) of the Customary Courts Act provides that where any fine is imposed by a customary court and the offender defaults in making payment, then the amount of the outstanding fine may be levied by the attachment and sale of any property belonging to the offender and situated within the area of jurisdiction of the court.[108] This would appear to be a far more practical and effective option to that of imprisonment.

However under section 49 of the Customary Courts Act the Minister has made the Customary Courts (Procedure) Rules, rule 30 of which prescribes that those ordered by the court to pay a fine and who fail to pay shall suffer a period of imprisonment.[109] The rule sets out the maximum periods of imprisonment based on the amount of the fine outstanding. The maximum period is six months imprisonment where the amount of the outstanding fine exceeds P40. Rule 30 gives rise to two issues. First the rule goes against the generally recognized principle that delegated legislation shall not include sentences of imprisonment. Secondly the rule is inconsistent with the scale of maximum sentences for the non-payment of fines set out in section 29(2) of the Penal Code. Rule 30 accordingly needs to be reviewed.

It is now generally accepted in most jurisdictions that any imprisonment for non-payment of a fine must not operate automatically. Before being sentenced to imprisonment the offender must have an opportunity to explain before the court any reasons for his non-payment of the fine. If no hearing is held to consider the circumstances of the default this is a clear indication that imprisonment for non-payment of fines is being used simply as a

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[107] 26. Customary Courts Act
A customary court may direct that any fine, or such part thereof ass it shall deem fit, be paid to the person injured or aggrieved by the act or omission in respect of which such fine has been imposed, on condition that such person, if he shall accept the same, shall not have or maintain any suit for the recovery of damages for the loss or injury sustained by him by reason of such act or omission.

[108] Section 25. (4) Customary Courts Act
Where any fine, or any damages or compensatory payment expressed in terms of money, is imposed or awarded by a customary court, and the person concerned defaults in making payment of the amount imposed or awarded or of any instalment thereof, the amount of the same may be levied by the attachment and sale of any property belonging to that person and situate within the area of jurisdiction of the court in accordance with rules made under section 49.

[109] Customary Courts (Procedure) Rules
30. (1) Where a Court makes an order for the payment of a fine or compensation, or both, it shall direct by its sentence that in default of the payment of the fine or both or compensation the offender shall suffer such period of imprisonment as will satisfy the justice of the case:
Provided that in no case shall such imprisonment exceed the maximum fixed by the following scale –

Amount	Maximum Period
Not exceeding P1	14 days
Exceeding P1 but not exceeding P2	1 month
Exceeding P2 but not exceeding P10	3 months
Exceeding P10 but not exceeding P40	4 months
Exceeding P40	6 months

(2) The imprisonment which is imposed in default of payment of a fine or compensation, or both shall terminate whenever the fine is either paid or levied by process of law.
(3) Where a term of imprisonment is imposed by a Court in default of the payment of a fine or of compensation that term shall, on the payment or levy of a part of such sum, be proportionately reduced.
(4) For the purposes of this rule in calculating the maximum period of imprisonment for non-payment of compensation one head of cattle shall be worth P80, and four head of small stock shall be the equivalent of one head of cattle.

means of enforcing the payment of fines - a practice considered in many jurisdictions to be improper.

In those cases where the court has imposed a fine without stipulating an alternative sentence of imprisonment under section 29(1)(c) of the Penal Code, the Criminal Procedure and Evidence Act provides that a defaulter may be arrested and brought before the court for sentencing.[110] Presumably before imposing any sentence of imprisonment under section 29(2) of the Penal Code the court will hear and consider the reasons given by the offender for his default in paying the fine. But what is the position if the default order is made by the court under section 29(1)(c) at the time when sentence is passed on the offender? Are these offenders also given a formal hearing to determine the reasons for their default before the sentence of imprisonment stipulated in section 29(2) is imposed? A far better procedure to be adopted by the courts is that provided by section 303 of the Criminal Procedure and Evidence Act. This allows the court to take steps when passing sentence to issue a warrant addressed to the Sheriff or messenger of the court authorising him, in the event of default, to levy the amount of the fine by attachment and sale of any moveable property belonging to the offender. This is the case even though the sentence may direct that, in default of payment of a fine, the offender shall be imprisoned.[111].

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[110] Criminal Procedure and Evidence Act

302. Whenever a court has imposed upon any offender a sentence of a fine without an alternative sentence of imprisonment, and the fine has not been paid in full or has not been recovered in full by a levy, the court which passed sentence on the offender may issue a warrant directing that he be arrested and brought before the court which may thereupon sentence him to such term of imprisonment as could have been imposed upon him as an alternative punishment in terms of section 29 of the Penal Code or other written law.

[111] Recovery of fine

303. (1) Whenever an offender is sentenced to pay a fine, the court passing the sentence may, in its discretion, issue a warrant addressed to the Sheriff or messenger of the court authorising him to levy the amount by attachment and sale of any moveable property belonging to the offender although the sentence directs that, in default of payment of a fine, the offender shall be imprisoned. The amount which may be levied shall be sufficient to cover, in addition to the fine, the costs and expenses of the warrant and of the attachment, and sale thereunder.

(2) Such warrant when issued by the High Court may be exercised anywhere within Botswana.

(3) Such warrant, if issued by a magistrate's court, shall authorise the attachment and sale of the moveable property within the local limits of the jurisdiction of such magistrate's court, and also without such limits when endorsed by the magistrate having jurisdiction in the place where the property is found.

(4) If the proceeds of sale of the moveable property are insufficient to satisfy the amount of the fine and the costs and expenses aforesaid the High Court may issue a warrant, or in the case of a sentence by any magistrate's court may authorise such magistrate's court to issue a warrant, for the levy against the immovable property of the offender of the amount unpaid.

(5) When an offender has been sentenced to pay a fine only or, in default of payment of the fine, to imprisonment, and the court issues a warrant under this section, it may suspend the execution of the sentence of imprisonment and may release the offender upon his executing a bond with or without sureties as the court thinks fit, on condition for his appearance before such court or some other court on the day appointed for the return to such warrant, such day not being more than 15 days from the time of executing the bond; and in the event of the amount of the fine not having been recovered, the sentence of imprisonment shall be carried into execution at once.

(6) In any case in which an order for the payment of money has ben made on non-recovery whereof imprisonment may be awarded and the money is not paid forthwith, the court may require the person ordered to make such payment to enter into a bond as prescribed in subsection (5), and in default of his doing so may at once pass sentence of imprisonment as if the money had not been recovered.

(7) When an offender has been sentenced to pay a fine only or, in default of payment of the fine, to a period of imprisonment, and before the expiry of that period any part of the fine is paid or levied, the period of imprisonment shall be reduced by a number of days bearing as nearly as possible the same proportion to the number of days to which such person is sentenced as the sum so paid and levied bears to the amount of the fine. An amount which would reduce the imprisonment by a fractional

So while it is generally accepted that there should not be one law for the rich and another for the poor, it appears that this can be the case when it comes to fines. Fine defaulters are sent to prison not because they are a danger to society, but because they cannot, or will not, pay their fines. People who have not committed serious crimes may still go to prison and in effect jails then become "debtors' prisons," for those without the means to pay a fine. In many jurisdictions putting people in jail because they cannot afford to pay a fine is considered an archaic practice. If the practice exists in Botswana then it is an issue that should be addressed.

Possible reforms to the system of fines

The aim of sentencing is to find a sanction that is appropriate to the offence, to the individual offender and to the needs of the community. Fines are a valuable sanction. However a review of the operation of the fine system should be undertaken at regular intervals to ensure that fines are being used properly and to their fullest potential. The introduction of community service orders and restitution orders, if adopted, will ideally provide the courts with alternative sentences that may result in a decrease in the number of fines imposed on offenders. The advantage that community service and restitution have over fines is that the former can play an important role in restoring a sense of harmony to a community after a crime has been committed. The over-reliance on fines on the other hand may simply result in the incarceration of people who the courts felt should never have been put in prison in the first place. Changes should therefore be considered to the way fines are imposed, monitored and enforced with the aims of achieving a reduction of fine defaults and eliminating the practice of incarcerating people for defaulting on fines.

The first step in reforming the use of fines under the criminal sentencing system is to require the courts to satisfy themselves that an offender is able to pay before any fine is imposed. Fines should not be imposed if the person is unable to pay the fine. The Penal Code, Customary Courts Act and other legislation allowing for the levying of fines should be amended to require that, before levying any fine, the court be required to determine whether a person is able to pay a fine; and that fines not be imposed if the offender is unable to pay the fine at the time of sentence or within a reasonable time thereafter. The Penal Code and the Customary Courts (Procedure) Rules should be amended to eliminate the provision of incarceration for the non-payment of fines. In those cases where the court determines that the offender does not possess the ability to pay a fine, the court should impose probation or should make a community service order or restitution order in place of the fine. Where however a fine is considered to be an appropriate penalty, if there is a default in the payment of the fine, the default could be noted on the accused's record so that the default can be taken into account if the person comes before the court on a subsequent occasion.

The introduction of a fine recovery programme

One way to reduce the number of fine defaults is to introduce proper monitoring of the collection of fines. Fines generate a very substantial amount of revenue for the State. The administration of a system of fines requires a relatively complex bureaucracy to provide for the receipts of the fines as well as the transfer of payments to the State. Inadequate monitoring provides fertile ground for corruption. Investment by the State in the establishment and operation of a fines recovery programme to monitor the collection of fines may not only help reduce fine defaults but also increase fine revenue.

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part of a day shall not be received. No payment of any sum under this section need be accepted otherwise than during the ordinary office hours.

Once a fine is levied the fine recovery program would become responsible for its collection. All fines would automatically be registered with the enforcement program, whose officers would contact offenders when a default occurs. As a first step, financial advice and counselling might be offered. As a second step, the fine enforcement officers could accept a wage assignment or have the offender's salary garnisheed, or property attached. Where the fine is related to the operation of a motor vehicle, authority should be conferred on the enforcement program to record the fine against the vehicle.[112] No further vehicle or driver's licence should be issued until the fine is paid.

If these efforts fail, the offender can be required to attend a hearing held by a master, judge or hearing officer. At this hearing, the offender would have to explain why the fine is in default. After a thorough examination of assets and debts, the hearing officer would have the power to order the substitution of a period of community service for the original sentence, to extend the time to pay the fine, or to enter the default on the person's record. If the person is able to pay the fine, but wilfully refuses, only then would imprisonment be appropriate, and even then this should only occur when ordered by a master or judge. The Fine Recovery Program would follow these principles:

> (a) All fines should be automatically registered with and enforced by the Fine Recovery Program.
> (b) If the payment of a fine is not made, the program would be empowered to collect the money by garnishment or attachment, or to take other actions such as preventing licensing of vehicles by the Department of Road Transport and Safety.
> (c) If these measures fail, the offender would be brought to a show cause hearing presided over by a hearing officer.
> (d) If the hearing officer concludes that the offender does not have the ability to pay, the officer may order a period of community service or extend the time for payment of the fine.
> (e)If the hearing officer concludes that the offender has the ability to pay but is simply refusing to do so, the officer could refer the case to a master or a judge. A judge or master would have the authority, after all other efforts at collection have failed, to imprison those who have the ability to pay but refuse to do so.

b) Restitution to the victim or a compensation order

Restitution to the victim or a compensation order both overlap to some extent with a fine in that, from the perspective of the offender, they are economic penalties. If a crime victim suffers a financial loss as a result of the crime committed against him, then he has the right to seek financial redress in the form of restitution from the offender. Restitution occurs when an offender remunerates his victim for the financial losses that he has incurred in consequences of the crime. Restitution can be ordered by the criminal court once an offender has been found guilty.

The award of compensation to victims of crime is part of a wider social and legislative trend towards greater recognition of the importance of the interests of the victims of crime in the criminal process. The general philosophy underlying victims' compensation is expressed in the preamble to the *Declaration of Basic Principles of Justice for Victims of*

[112] Vehicle Flagging Regulations. S.I. No. 122 of 2010. Vehicle flagging is the placement of a mark (flag) in the Vehicle Registration System for the purpose of alerting the Department of Road Transport and Safety licensing office that the owner or driver, as the case may be, of the vehicle in question has outstanding fines owed to the government.

Crime and Abuse of Power,[113] adopted by the United Nations General Assembly in 1985, as a recognition that victims of crime and frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders.

The Declaration highlights the importance of restitution and compensation in the criminal justice system by providing that, where appropriate, offenders should make restitution to victims, their families or dependents. Such restitution, the Declaration explains, "should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of victimisation, the provision of services and the restoration of rights". The Declaration calls upon States to consider restitution as an available sentence option in criminal cases.[114]

Provisions for victims is therefore now recognised as an important objective in criminal justice. Victims suffer damage from crime in terms of loss of property, bodily harm and mental suffering. It is therefore important for victims to be compensated to restore the dignity and stability of their lives. Restitution and compensation forms a very significant mechanism for victims of crime, and when ordered, restitution not only increases victims' overall satisfaction with the criminal justice system, but it also recognizes their personal interests by retaining for them some of what has been taken by the offender. Studies have also shown that restitution can affect the psychological recovery of the victim from the aftermath of crime. It is vital therefore to the rights of victims that courts should seriously consider restitution orders against guilty offenders. Furthermore, it is paramount that the criminal justice system enforces offender compliance with restitution orders, to guarantee that crime victims receive fair reparation for their losses.

Restitution can be used to accomplish other goals apart from simply providing financial assistance to the victim. These include the rehabilitation and reform of the offender through holding him accountable and making him face responsibility for the consequences of his actions.

"Restitution involves acceptance of the offence as a responsible person with the capacity to undertake constructive and socially approved acts. It challenges the offender to see the conflict in values between himself, the victim and society. In particular, restitution invites the offender to see his conduct in terms of the damage it has done to the victim's rights and expectations. It contemplates that the offender has the capacity to accept his full or partial responsibility for the alleged offence and that he will in many cases be willing to discharge that responsibility by making amends."[115]

<u>Basic principles of restitution</u>

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[113] The United Nations Declaration of Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34 29 November 1985.

[114] The United Nations Declaration of Principles of Justice for Victims of Crime and Abuse of Power, 1985.

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

[115] Law Reform Commission of Canada. Working Paper No.5, Restitution and Compensation. 1974.

The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* highlights two basic principles of restitution. Firstly that offenders should pay for the costs of their crimes and secondly that where such costs are not recoverable from offenders or elsewhere, States should endeavour to provide financial compensation to such victims and their families. This principle of restitution underlies the power to sentence an offender by ordering restitution or reparation, as well as damages for tort, while the development of State compensation schemes is driven by the principle of compensation. Victims of crime may therefore be financially compensated in three ways: through an award of compensation in the civil courts, typically through a claim that a tort has been committed; through an order that an offender pay restitution to the victim, as part of the offender's sentence; and through a claim to a statutory compensation scheme in which awards are assessed and paid by the government.

Restitution orders made in favour of the victim are particularly appropriate where the loss is relatively small and easily quantifiable or where the injured party is in need of immediate financial help, for example with funeral or other expenses resulting from the offence. In these situations, if the compensation claims can be considered at the time of the criminal trial, this will bring victims relief and means that they do not have to bring a subsequent civil action. Studies have also shown that most victims prefer restitution that comes directly from the offender, as opposed to compensation that is issued by the government. There is also some evidence that suggests if a victim receives restitution, they are less concerned about further punishment for the offender.

Assessment of the victims' loss

From the specific perspective of alternatives to imprisonment, the court must pay careful attention to the assessment of victim loss when imposing restitution. This can be achieved in various ways. In some jurisdictions, the prosecutor negotiates directly with the defence counsel, after substantiating all losses with the victim. In other cases, assessments of the loss may be made solely by the probation officer as part of the pre-trial sentencing investigation. No matter how the process occurs, the victim is generally required to present receipts or other evidence to substantiate the actual losses suffered. Where the injury or loss is not easily quantifiable or is disputed by the defendant (for example, the extent of injuries suffered), the court may well require additional evidence (such as an independent medical report). In these circumstances, the court may adjourn the hearing until the injured party can provide further evidence or the court may decide not to make an order, leaving the issue of compensation to the civil proceedings.

From an administrative point of view, the implementation of restitution to the victim may require a degree of supervision by the State. In practice, it may be difficult for the court that orders such restitution to supervise its payment, and it may need the involvement of the probation service or a similar bureaucracy involved in the administration of sentences to put it into practice. Alternatively, a court may be able to rely on the community to ensure that the restitution is actually made as ordered.

Restitution under the existing laws

Restitution for victims of crime is to be found in existing law. The Criminal Procedure and Evidence Act[116] provides that in the Botswana courts, after the accused has been convicted, the victim, through the prosecution may make a formal application for compensation. The prosecutor must remind the victim of his right to apply for compensation. When the victim comes into the witness box, the prosecutor has a duty to lead him in a brief examination of

[116] Criminal Procedure and Evidence Act, Cap. 08:02

the injury, damage or loss suffered. The court will then assess the application and either award the compensation forthwith as part of the sentence or refer the victim to a civil court. Any award made by the court shall have the effect of a civil judgment. No other civil proceedings may then be brought by the victim against the offender in respect of the injury for which the compensation has been awarded and accepted.[117]

The customary courts would appear to have more flexibility in the award of compensation to a victim. Under the Customary Courts Act the court may, in its discretion, express and order payment of any damages or other compensatory payments it awards in money or in kind and the court may authorize the payment of compensation in instalments within such time as the court thinks just.[118] A customary court may also direct that any fine, or such part thereof as it shall deem fit, be paid to the victim injured or aggrieved by the act or omission in respect of which such fine has been imposed.[119]

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[117] Section 316 (1) of the Criminal Procedure and Evidence Act provides that:
316. (1) When any person has been convicted of an offence which has caused personal injury to some other person, or damage or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon the application of the injured party, forthwith award him compensation for such injury, damage or loss.
(2) For the purpose of determining the amount of compensation or the liability of the accused therefor, the court may refer to the proceedings and evidence at the trial or hear further evidence upon affidavit or verbal or the amount of compensation which may be awarded by the court in accordance with an agreement reached between the person convicted and the person to be compensated.
(3) The court may order a person convicted upon a private prosecution to pay the costs and expenses of such prosecution in addition to the sum (if any) awarded under subsection (1):
Provided that if such private prosecution was instituted after a certificate by the Director of Public Prosecutions that he declined to prosecute, the court may order the costs thereof to be paid by the State.
(4) When a magistrate's court has made any award of compensation, costs or expenses under this section, the award shall have the effect of a civil judgment of that court, and when the High Court has made any such award, the Registrar of that Court shall forward a certified copy of the award to the clerk of the magistrate's court of the district wherein the convicted person underwent the preparatory examination held in connection with the offence in question, and thereupon such award shall have the same effect as a civil judgment of that magistrate's court.
(5) Any costs awarded as aforesaid shall be taxed according to the scale, in civil cases, of the court which made the award.
(6) Where any moneys of the accused have been taken from him upon his apprehension, the court may order payment in satisfaction or on account of the award, as the case may be, to be made forthwith from those moneys.
(7) Any person against whom an award has been made under this section shall not be liable at the suit of the person in whose favour an award has been so made, and who has accepted the award, to any other civil proceedings in respect of the injury for which compensation has been awarded.

[118] Customary Courts Act, Cap. 04:05, section 25. (1) A customary court shall direct that any fine, damages or other payment which it imposes or awards shall be paid within such time as it thinks just:
Provided that nothing in this subsection shall preclude a customary court from authorizing the payment of any fine, damages or other payment in instalments if the time within which such instalments shall be paid is specified.
(2) Subject to the provisions of subsection (3), a customary court shall express and collect all fines it imposes in money, but, in its discretion, may express and order payment of any damages or other compensatory payments it awards in money or in kind.

[119] Customary Courts Act, Cap. 04:05, section 26. A customary court may direct that any fine, or such part thereof as it shall deem fit, be paid to the person injured or aggrieved by the act or omission in respect of which such fine has been imposed, on condition that such person, if he accepts the same, shall not have or maintain any suit for the recovery of damages for the loss or injury sustained by him by reason of such act or omission.

Adequacy of the current law

But does the current law adequately reflect the contemporary view that restitution is a "right" of victims in the sentencing process and that restitution for victims of crime must form part of the criminal justice system. To what extent are the provisions contained in section 316 of the Criminal Procedure and Evidence Act fulfilling the principles set out in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*? In this respect, as part of any review of the criminal sentencing system, it may be appropriate to undertake a study into the operation of section 316 and the extent to which this provision is being used by the courts. Is the section meeting the needs of the victims of crime? Are offenders complying with any compensation orders made? What amendments to the law are necessary to make restitution more effective? For example should the law impose a positive duty on the courts to consider imposing a compensation order in all cases where there is an identified victim; should restitution be imposed by the courts as a condition of probation; should restitution or compensation orders be awarded as stand-alone orders in their own right or given as an additional sentence by the courts; should a State funded compensation scheme for victims of crime be introduced? Also as regards the customary courts, how are the compensation provisions being applied by these courts. To what extent do the customary courts award compensation in kind and order compensation to be paid from any fines imposed on an offender. Are these customary law provisions ones that could be extended to the common law courts? These are all issues to be addressed once the review of the operation of the current provision has been completed.

Restitution under United Kingdom law

In reviewing the operation of the current legislative provision and considering possible amendment to the law it may be useful to briefly consider some of the principles which underlie the operation of the compensation scheme currently operating in the United Kingdom. Under the Powers of Criminal Courts (Sentencing) Act 2000 [120] both the magistrates and the Crown Court have a discretionary power when sentencing, to make an order for the offender to pay compensation to the victim for any personal injury, loss or damage resulting from the offence of which the defendant has been convicted. In deciding whether to make a compensation order against a convicted person and in determining the amount to be paid if such an order is made, the court must have regard to the means of the convicted person so far as known. The obvious reason being that there is no point in making an order if the defendant is unable to pay. Nor would it be fair to make an order (with a period of imprisonment in default of payment of the order) that the defendant is unable to comply with.

Where the court considers that it would be appropriate both to impose a fine and to make a compensation order but the offender has insufficient means to pay both, the court must give preference to compensation (though it may impose a fine as well). The court is required to give reasons if they do not issue a compensation order in a case where it has the power to do so. The victim does not have to apply to the court before such an order can be made. In determining compensation the court will consider any evidence and representations made on behalf of the offender or by the prosecution. The latter could include details of the victims damage, loss or injury. As a general principles the court is required to make a 'just' order on the information it has, the compensation is not considered an additional punishment, and the loss must be fairly said to have resulted from the offence. Compensation Orders are not a means of 'buying' a shorter sentence and are simply a convenient summary means of 'putting things right'. Compensation paid to the victim is

[120] Powers of Criminal Courts (Sentencing) Act 2000, UK Parliament, 2000, c.6.

deducted from any damages received in civil proceedings. For this reason, the existence of a pending civil claim should not in itself prevent an award of compensation.

State compensation schemes for victims of crime

Many States have now established victim compensation schemes. However, such schemes, particularly if paid for by the State in the first instance, require a major investment in administrative infrastructure. The form that this takes will vary according to the social welfare or criminal justice systems in place when such a scheme is introduced. In some countries it may be possible, for example, to make compensation payments through an existing system. Other countries have found it more effective to set up a separate victim compensation fund with its own administration. Such a fund can then consolidate payments from fines, compensation paid by offenders, and other sources, using them to guarantee compensation to victims. One drawback is that offenders are very often so poor that the amount they are able to contribute is negligible. The difficulty in finding the additional resources to provide adequate compensation and to pay for the administration of the fund may make it an unrealistic proposition in many jurisdictions.

Victim surcharge

One way of funding a victim compensation scheme is through a victim surcharge. In the United Kingdom for example the victim surcharge is an additional charge made upon the conviction of an accused at court. It is imposed in addition to a fine if the offence is punishable by a fine. The money collected through the victim surcharge is paid into a fund aimed at helping improve services for victims of crime. First introduced in 2007[121] as part of the Domestic Violence, Crime and Victims Act 2004 it was paid only by people punished with a fine, at a flat rate of £15. The Government has however published proposals to extend the victim surcharge to all convicted offenders, including those who are sent to prison, and increasing the sums paid. Offenders who are fined will pay 10% of that fine as a victim surcharge, up to £120. Offenders given a conditional discharge will pay £15 and those given a community sentence will pay £60. Anyone given a custodial sentence will contribute £80, £100 or £120 depending on the length of sentence.[122] These changes are intended to provide victims of crime with better, more personalised support and force offenders to take more responsibility for their crimes, instead of the taxpayer bearing the brunt of funding victims' services.

In the short term a government compensation scheme for the victims of crime may not be viable in Botswana due to funding and administration issues. However it is a proposal that may be considered in the future, particularly if a victim surcharge scheme can be developed in order to help fund the scheme.

c) Suspended or deferred sentences

Suspended sentences

A suspended sentence is where a sentence of imprisonment is pronounced by the court but is not put into immediate effect. A suspended sentence allows the court to decide that the offence is serious enough for an immediate custodial sentence, but in the particular circumstances of the case, some or all of the imprisonment should be suspended for a

[121] Criminal Justice Act 2003 (Surcharge No. 2) Order 2007
[122] The Criminal Justice Act 2003 (Surcharge) Order 2012

period on a condition or conditions set by the court. The threat of imprisonment is made (and heard by the public) and will it is hoped have a deterrent effect on the offender. Ideally however the custodial sentence will not need to be implemented because the conditions set by the court will have been complied with by the person under sentence. If however the offender breaches the conditions set by the court, then he is liable to go to prison to serve the suspended sentence.

Both the common law courts[123] and the customary courts[124] have the power, in certain

[123] Criminal Procedure and Evidence Act Cap. 08:02
Section 308. … (2) Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion pass sentence, but order that the operation of the whole or any part of the sentence be suspended for a period not exceeding three years, which period of suspension, in the absence of any order to the contrary, shall be computed in accordance with the provisions respectively of subsections (3) and (4). Such order shall be subject to such conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may specify therein.
(3) The period during which any order for the suspension of a part of a sentence, made under subsection (2) and affecting a sentence of imprisonment shall run, shall commence on the date upon which the person convicted was lawfully discharged from prison in respect of the unsuspended portion of such sentence, or if not then discharged because such person has to undergo any other sentence of imprisonment, such period shall commence upon the date upon which such person was lawfully discharged from prison in respect of such other sentence. If any portion of such other sentence is itself suspended, the periods of suspension of all such sentences shall, in the absence of any order to the contrary, run consecutively in the same order as the sentences.
(4) The period during which any order for the suspension of the whole of a sentence of imprisonment shall run, shall commence –
(a) where the convicted person is not serving another sentence, from the date from which the sentence wholly suspended was expressed as taking effect, or took effect; and
(b) where the convicted person is serving another sentence, from the date of expiration of that sentence including any period thereof which may be subjected to an order of suspension.
(5) If during the period of suspension of the whole of a sentence the convicted person is sentenced to imprisonment the portion then remaining of the sentence wholly suspended shall be deemed to be consecutive to the sentence of imprisonment subsequently awarded.
(6) If the offender has, during the period of suspension of any sentence under this section, observed all the conditions specified in the order, the suspended sentence shall not be enforced.

[124] Customary Courts Act Cap. 04:05
Section 24. … (2) Whenever a person is convicted before the customary court of appeal or any customary court of any offence the court may in its discretion pass sentence but order that the operation of the whole or any part of the sentence be suspended for a period not exceeding three years, which period in the absence of any order to the contrary, shall be computed in accordance with the provisions respectively of subsections (3) and (4). Such order shall be subject to such conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may specify therein.
(3) The period during which any order for the suspension of a part of a sentence, made under subsection (2) and affecting a sentence of imprisonment shall run, shall commence on the date upon which the person convicted was lawfully discharged from prison in respect of the unsuspended portion of such sentence, or if not then discharged because such person has to undergo any other sentence of imprisonment, such period shall commence upon the date upon which such person was lawfully discharged from prison in respect of such other sentence. If any portion of such other sentence is itself suspended, the periods of suspension of all such sentences shall, in the absence of any order to the contrary, run consecutively in the same order as the sentence.
(4) The period during which any order for the suspension of the whole of a sentence of imprisonment shall run, shall commence –
(a) where the convicted person is not serving another sentence, from the date from which the sentence wholly suspended was expressed as taking effect, or took effect; and
(b) where the convicted person is serving another sentence, from the date of expiration of that sentence including any period thereof which may be subjected to an order of suspension.

circumstances, to suspend sentences of imprisonment for up to three years. It is provided that whenever a person is convicted before the High Court or any magistrate's court, or the Customary Court of Appeal or any customary court, the court may in its discretion pass sentence, but order that the operation of the whole or any part of the sentence be suspended for a period not exceeding three years. Such order shall be subject to such conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may specify. Some offences are however excluded from the courts discretion to suspend sentences. These offences are murder, rape, robbery and any offence in respect of which a minimum punishment is imposed by law, or any conspiracy, incitement or attempt to commit any of these offences.[125]

Many jurisdictions recognize that suspended sentences are an appropriate punishment option for many offences and can occupy a space in the sentencing hierarchy as the least onerous of the sentences of imprisonment. Suspended sentences can thus be a useful tool in both ensuring compliance with any conditions imposed on an offender by the court while at the same time sending a signal to the offender and the community that the offence has been treated seriously. Wood CJ explained, the courts' purpose in imposing a suspended sentence as follows:

" … to convey the seriousness of the offence and the consequences of re-offending to the offender, while also providing him or her with an opportunity to avoid the consequences by displaying good behaviour and by not repeating the relevant breach of the law or any similar breach of the law."[126]

Should suspended sentences be abolished?

However there are those who question the whole concept of suspended sentences. Indeed some States have now either severely limited the discretion of judges to award suspended sentences or have abolished suspended sentences altogether. Governments want to show the public that they are tough on crime and that when they say jail they mean jail. This was aptly illustrated by the following statement made by the Attorney General of Victoria, Australia during the second reading of a Bill to abolish suspended sentences in the State:

"Suspended sentences are a fiction that pretends offenders are serving a term of imprisonment, when in fact they are living freely in the community. A suspended sentence does not subject an offender to any restrictions, community service obligations or reporting requirements. As a consequence, many offenders actually incur no real punishment whatsoever for the offence they have committed and make no reparation to the community. Often those released on suspended sentences go on to commit further crimes."[127]

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(5) If during the period of suspension of the whole of a sentence the convicted person is sentenced to imprisonment the portion then remaining of the sentence wholly suspended shall be deemed to be consecutive to the sentence of imprisonment subsequently awarded.
(6) If the offender has, during the period of suspension of any sentence under this section, observed all the conditions specified in the order, the suspended sentence shall not be enforced.

[125] SECOND SCHEDULE. OFFENCES ON CONVICTION WHEREOF THE OFFENDER CANNOT BE DEALT WITH UNDER SECTION 308.
Murder.
Rape.
Robbery.
Any offence in respect of which a minimum punishment is by law imposed.
Any conspiracy, incitement or attempt to commit any of the above mentioned offences.

[126] R v Laws, (2000) 116 A Crim. R 70.

[127] Sentencing Further Amendment Bill 2010, Second Reading speech, Robert Clark, Attorney-General, 21 December 2010.

As the critics point out, isn't there something paradoxical about saying a custodial sentence is required and then not sending the offender to prison? How can the court make a decision that only a custodial sentence will do and then decide that that sentence should be suspended? This involves what has been described as a penological paradox. All of the relevant sentencing factors require a custodial sentence but when those very same factors are revisited, a decision is made that imprisonment is not required and the sentence suspended. But if the offender then goes on to breach the conditions of the suspended sentence, the sentence is activated and he can be sent to serve the original sentence in prison. Logically, this simply does not make any sense.

Supporters of suspended sentences argue however that the abolition of such sentences may make it more difficult for judges to impose appropriate sentences that minimise the chances of reoffending. Non-custodial sentencing options, such as suspended sentences, provide the offender with wider scope for rehabilitation and treatment. They point out that there is no evidence that prison acts as a greater deterrent than suspended sentences. In fact, as a means of reducing further offending, suspended sentences may be as effective, if not more effective, than immediate imprisonment. Research has shown that imprisonment makes re-offending more likely rather than deterring reoffending and so removing suspended sentences may actually increase rather than reduce crime. There may also be a drastic, costly and unmanageable increase in the prison population as the removal of suspended sentences may lead to more people receiving immediate custodial sentences. In New Zealand for example, following the abolition of suspended sentences,[128] the number of people being sentenced to immediate terms of imprisonment rose.

But States that have abolished suspended sentences discount these arguments. Abolitionist States have usually started by reducing the categories of offences for which the courts can suspend the operation of an immediate custodial sentence. As is the case currently, legislation may provide that serious offences such as murder, robbery, rape etc. can never be the subject of a suspended sentence. As regards the remaining offences in respect of which the courts may suspend a sentence of imprisonment, States abolishing suspended sentences have instead introduced community sentences. Their argument is that if you are going to award a prison sentence and then have the offender remain in the community why not just accept that giving the offender a custodial sentence is wrong and impose a proper non-custodial community sentence in the first place.

Deferred sentences

While a suspended sentence is an actual sentence of imprisonment imposed on an accused person following conviction, a deferred sentence enables the court to review the conduct of the accused before passing sentence, having first prescribed certain requirements. If the defendant successfully completes the stipulated period without breaching the prescribed requirements the court will review the accused's case and may dismiss the charges against him. If, however, the accused does not follow all of the prescribed terms and conditions, the court may enter the conviction and sentence the accused accordingly. Under the existing legislation, both the customary courts[129] and the common law courts[130] can defer sentencing

[128] Sentencing Act 2002 (NZ).

[129] Customary Courts Act Cap 04:05

Section 24. (1) Whenever a person is convicted before the Customary Court of Appeal or any customary court of any offence the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may order to be inserted in recognizance to appear at the expiration of the period, and if

a convicted person for up to three years.

The value of a deferred sentence lies in the fact that it provides an opportunity for an offender to have some influence as to the sentence passed in that it tests the commitment of the offender not to re-offend. It gives the offender an opportunity to do something where progress can be shown and it provides the offender with an opportunity to behave or refrain from behaving in a particular way that will be relevant to sentence. Deferred sentences are likely however to be used in very limited circumstances. The decision to defer sentence will be predominantly for a small group of cases at the custody threshold where the court feels that there would be particular value in giving the offender the opportunity to comply with the conditions prescribed because, if the offender complies with the requirements, a different sentence will be justified at the end of the deferment period.

Possible reforms

Before any proposals for the possible reform of suspended or deferred sentence orders can be developed, it will first be necessary to examine the operation of the current legislation. Information needs to be gathered on the number of suspended and deferred sentence orders made each year by the customary courts, magistrate's courts and the High Court. Which crimes most frequent attract suspended and deferred sentences? What conditions do the courts specify when making suspended or deferred sentence orders? What is the percentage of suspended sentences are partially suspended? What is the percentage of wholly suspended sentences that are imposed in conjunction with another sentencing option, such as a fine? What percentages of suspended or deferred sentences have their conditions breached and what is the consequence of such breach? Based on the results of this analysis it will then be possible to consider the future for suspended and deferred sentences as part of the criminal sentencing system.

There are already limitations on the discretion of the courts to award suspended or deferred sentences in respect of certain serious offences. Should these limitations be retained or expanded to cover other offences? As regards non-second schedule offences, it may be that sentencing reform should focus on increasing and strengthening non-custodial sentencing options that provide a wider scope for rehabilitation and treatment. Possible options are that in the long-term, the goal should be to introduce alternatives to suspended and deferred sentences comprising community based sentencing, while in the short to medium term, suspended and deferred sentences should be retained as an option for judges to use in appropriate cases.

The current legislation already provides that the suspended or deferred sentence order shall be subject to such conditions as the court may specify, such as the offenders' good conduct and compensation being made by the offender for damage or pecuniary loss. However, should the courts be encouraged to add other appropriate conditions to suspended or deferred sentences with the aim of addressing the causes of offending and to further reduce

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at the end of such period the offender has observed all the conditions of the recognizance, the court may discharge the offender without passing any sentence.

[130] Criminal Procedure and Evidence Act Cap. 08:02

Section 308. (1) Whenever a person is convicted before the High Court or any magistrate's court of any offence other than an offence specified in the Second Schedule, the court may in its discretion postpone for a period not exceeding there years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may order to be inserted in recognizances to appear at the expiration of that period, and if at the end of such period the offender has observed all the conditions of the recognizances, the court may discharge the offender without passing any sentence.

the chance of reoffending? In the United Kingdom for example, at the same time as passing a suspended sentence the court may impose on the offender one or more requirements for the offender to undertake in he community for the duration of the suspension period.[131] Should a similar provision be introduced?

In order for such conditions to be effective, it would be critical that there should be proper monitoring of offenders subject to suspended and deferred sentences. For instance, if the offender breaches the conditions of suspension or deferral an administrative structure must ensure that the suspended or deferred sentence is imposed. The infringement of the conditions of deferral must be brought to the attention of the court so that it can decide whether to bring the suspended sentence into effect or impose a sentence where it has earlier deferred from doing so. This monitoring would need to be performed by the relevant government agency and would require investment in the training of qualified staff and the establishment of an administrative infrastructure. As this would most probably be the same infrastructure developed to service the introduction of community sentences, such action would support any decision to move away from suspended sentences and expand the use of community sentences.

d) Probation and judicial supervision

The Tokyo rules do not define Probation and judicial supervision,[132]presumably because there are different understandings of what probation actually is. In many jurisdictions the function of probation historically was one of welfare. Placing an offender "on probation" meant only that a social welfare service would pay particular attention to the offender's welfare and other needs. While this is still the case in many countries, in others, the probation service has evolved into an agency that is primarily responsible for ensuring that offenders carry out and observe orders of the court so that they may remain in the community instead of being imprisoned.

This evolution of the probation service can be seen, for example, in England and Wales. Probation was introduced in England in 1908 under the Probation of Offenders Act. Probation officers were appointed to "advise, assist and befriend" people who were brought before the courts for the first or second time, in the hope that they might be deterred from committing further offences. Probation was perceived as offering them a chance to prove themselves. As the service developed probation officers found themselves dealing not just with first or second offenders but with people who may have offended several times and been sentenced in a number of ways, including imprisonment. The assistance offered by the probation service accordingly developed to include counselling related to personal problems, training in social skills, and practical assistance in finding work or accommodation. The Probation Service became responsible for a range of other programmes, including Community Service Orders; running hostels; and running day centres where people could receive intensive education and training.

So today probation has become the means whereby offenders can be supervised in the community and offered various types of assistance, including counselling and practical

[131] These requirements are an unpaid work requirement; activity requirement, programme requirement; prohibited activity requirement; curfew requirement; exclusion requirement; residence requirement; mental health requirement; drug rehabilitation requirement; alcohol treatment requirement; supervision requirement; and an attendance centre requirement (where the offender is aged 25 or under).

[132] The Tokyo Rules refer to judicial supervision in the same context as probation. While the courts cannot carry out supervision directly, they may be able to involve community organisations in this function.

help. The objective of a system of probation is to effect a change in a person's circumstances that will make it less likely that they will commit a further offence.

When a court makes a probation order various conditions can be attached to the order that are tailored to meet the circumstances of the individual offender. The standard conditions of a Probation Order are usually that the probationer:

- must be of good behaviour (should not commit any offences during the period of the order);
- must conform to the directions of their probation officer;
- must attend all appointments with their probation officer;
- must inform their probation officer at once if they change their place of residence or their place of employment.

The court can also impose any additional conditions that seem necessary. Examples of these could include:

- carrying out unpaid hours of work as an additional punishment;
- attending for specialist counselling (for example, for alcohol or drug problems);
- paying compensation to the victim of his offence;
- complying with medical or psychiatric treatment; and
- being restricted to home for part of each day.

The conditions can also address the needs of offenders in particular groups. For example men convicted of offences of domestic violence may be required to attend groups with a specialist programme devoted to the particular problems of domestic violence offenders. Women can also be treated using group-work projects designed exclusively for female offenders.

For a court to order probation there must exist an appropriate service infrastructure staffed by qualified probation officers. Probation officers usually hold the same qualifications as social workers in local authorities or voluntary agencies but they receive particular training in working with prisoners and in court work, including the writing of Social Enquiry Reports.[133] These reports are the key to responsible sentencing and provide the court with the information it needs about an offender's background and personal circumstances and may also help the court to understand the offenders motivation for committing the offence. Prior to a probation order being made, the court will adjourn the case for the preparation of a social enquiry report by a probation officer. The report will discus the offender's involvement in the offence and will make a recommendation as to sentencing alternatives which may help the offender change the behaviour that triggers offending. The report will also include information about how the offender is likely to cope in the community as well as with any conditions or restrictions the court might consider imposing that will permit the person to remain in the community. The reports are particularly useful in the case of first offenders and young people.

So today in many jurisdictions the probation service has become the entity of government that provides information to the criminal justice system, particularly on sentencing, and/or monitors whether offenders meet the requirements of community sentences imposed upon them, while assisting them with any problems they might face. The probation service will have responsibility for the implementation of the probation order of the court by providing the service support and supervision of any conditions of probation that the court may impose, including the implementation of other community dispositions such as restitution to a victim, conditionally suspended and deferred sentences, and community service orders.

[133] Tokyo Rules refer. Rule 7.1.

Should Botswana move towards community sentences as alternatives to imprisonment then the creation of a professionally staffed and fully resourced probation service will be vital. Indeed the creation of such a service should already be underway in order to service existing sentencing provisions. The Children's Act, for example, presupposes the existence of a probation service and the Act contains several references to probation officers. Section 91 of the Act[134] places a duty upon the Minister to appoint such number of persons he considers necessary, to be probation officers and sets out the functions they are to perform. Section 92 of the Act[135] provides for the appointment of a probation committee to, *inter alia*, review the work of probation officers. However no probation officers have in fact been appointed. Instead the function of the probation service is being performed by social workers employed by the social services department of the Ministry of Local Government.

As a sentencing option, probation has had little impact on criminal sentencing.[136] Probation, as a sentencing option, is only to be found in the Children's Act, section 85(a) of which provides that a child found guilty of an offence by a children's court may be placed on probation for a period of not less than six months or more than three years.[137] A child made subject to a probation order may therefore retain his liberty and reside in the community,

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[134] 91 Probation officers

(1) The Minister shall appoint such number of persons as he or she considers necessary, to be probation officers.

(2) A person shall not be appointed as a probation officer unless he or she is of good character and qualified in matters relating to child welfare.

(3) The functions of probation officers shall be to –

(a) make an assessment of the risk posed by a child offender to the community;

(b) prepare a pre-sentence report for the court setting out relevant personal information about the child offender, an analysis of the offences committed, and a proposal about the manner in which the child should be sentenced;

(c) devise and carry out any measures for the observation and correction of tendencies to delinquency in children, and for the discovery and removal of any conditions causing or contributing to the delinquency of children;

(d) supervise or control any child or other person convicted of an offence and placed under the supervision of the probation officer (including children sentenced to community service), in order to change the offenders attitude and behaviour;

(e) work with any child convicted under this or any other Act both during and after sentence;

(f) make arrangements for the release, from prison, of any child sentenced to imprisonment and to assist in the resettlement of that child in the community; and

(g) to perform such other appropriate duties as may be conferred on them under this Act or regulations made thereunder.

[135] Section 92 Appointment of probation committee

The Minister may appoint a probation committee consisting of such number of persons as he or she may consider desirable, chosen by reason of their experience and character, who shall review the work of probation officers and perform such other functions, in connection with probation, as may be prescribed.

[136] In 1957 the British Resident Commissioner did consider the feasibility of introducing probation for adults in what is now Botswana. It was considered then to be impracticable, partly because of the size of the country and the long distances involved, and partly because of the absence of trained probation officers. Further, in view of the limited number of offences committed, it was not then considered a financially viable course (Resident Commissioner: 1957).

[137] Section 85. Manner of dealing with child charged with offence

Where a child charged with an offence is tried by a children's court and the court is satisfied of his or her guilt, the court shall, after taking into consideration the general conduct, home environment, school records and medical history (if any) of such child dispose of the case by –

(a) placing the child on probation for a period of not less than six months or more than three years;

(b) …

but will be required to report to a social worker on a regular basis. If the child fails to comply with the probation order or commits another offence while on probation, he will be liable to be sentenced for the original offence[138] and any probation order made may be varied or cancelled by the court upon the application of the offender or his probation officer.[139]

The law however provides no equivalent probation provisions for adults. The question therefore arises as to whether the use of probation orders can be viewed as a suitable alternative sentence for adult offenders in the Botswana context. Should probation orders be introduced to widen the sentencing options available for adults?

The damaging impact of prison and the possibility that it could be counter-productive by confirming a person in a deviant lifestyle is now generally recognized, particularly in relation to offenders under 30 who are going to prison for the first time. There are provisions in the law that will allow the courts to impose non-custodial sentences in such cases. These include fines and, where a prison sentence of less than twelve months is prescribed, extra-mural labour whereby the offender continues to live in the community but is required to work unpaid for a public authority for a specified time.[140] But these alternatives do have limitations. Many offenders do not have the financial resources to pay a fine and may in consequence be imprisoned in default. There are also practical limitations on the numbers or prisoners who can undertake extra-mural labour. So the introduction of another alternative non-custodial sentence in the form of the probation order may be a feasible option. The probation order, with its focus on rehabilitation and assistance as well as some supervision of an offender's activities, may be the ideal community sentence to replace prison sentences of short duration.

However a difficulty lies in determining the type of offence for which probation might be suitable. Probation may be considered suitable for minor offences that are often dealt with by way of a suspended prison sentence. Probation may also be suitable for some offences that at present are usually dealt with by fines, where the court considers the defendant may have difficulty paying and would eventually be imprisoned for default. But some offences, including housebreaking and theft, stock theft, burglary and rape, may be considered too serious for a court to consider a sentence without some immediate custodial element, even in the case of first offenders, whatever their personal circumstances. To what extent the introduction of probation would reduce prison population is therefore very difficult to predict.

So in general probation may be considered suitable for first time offenders and petty

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[138] Section 86 Court to explain order for probation to offender

(1) Before making an order for probation under section 85, the court shall explain to the offender in ordinary language, and in the language that the offender understands, the effect of the order and that if he or she fails to comply therewith or commits another offence while on probation, he or she will be liable to be sentenced for the original offence as well as any other penalty which the court may consider fit to impose.

(2) Where an order for probation is made by a children's court under section 85, the court shall immediately give a copy of the order to the probation officer assigned to the court and shall also give a copy to –

(a) the offender;

(b) the probation officer responsible for the supervision of the offender; and

(c) the person in charge of any institution in which the offender may be required by the order to reside.

[139] 87. Discharge, etc., of order for probation

A children's court which has made an order for probation may, upon application made to it by the offender or by the probation officer, vary or cancel the order.

[140] Section 97 of the Prisons Act

offenders such as people convicted of common theft and common assault but in the majority of cases these offences do not attract an immediate custodial sentence anyway. It may well be that some of these people would benefit from social work involvement, but in looking at the potential of supervision as an alternative to custody, and a means therefore to relieve prison overcrowding, using probation in the case of these offenders may not have much impact. People convicted of the more serious property offences and offences of violence are more likely to experience an immediate custodial sentence and probation would not be applicable. The availability of community-based options would in practice therefore, do little to divert these particular offenders from the prison system.

But research suggest that rehabilitation within the context of incarceration is highly unlikely, hence the impetus in recent decades to keep people in the community for as long as possible. As a community based sentence probation is versatile, has more potential than prison in assisting people to cope with their problems, has a failure rate in terms of re-offending no greater than prison and, along with other community-based sanctions, is undoubtedly cheaper.

Therefore, notwithstanding these reservations there would seem to be some justification for the introduction of probation orders in Botswana although its implementation would have to take account of the particular needs and problems of the country and its culture. One such problem is the human resources implications. In a nation where there are relatively few social workers, and the vast majority of those are untrained and inadequately equipped, it would be impossible for a professional service of this nature to be introduced in the short term.

e) Community service orders

A community service order has the primary purpose of providing a constructive alternative for those offenders who would otherwise have received a short custodial sentence and offers offenders the opportunity to make reparation for their wrong doing by undertaking unpaid work for the benefit of the community. The effect of the order is intended as a penal sanction that makes serious demands on the offender. The order will require the offender to do unpaid work for a specified number of hours or to perform a specified task. The hours are worked either as part of a team or on an individual basis. As its name suggests, the work should provide a service to the community. Community service must present a challenge to the offender and the 'punishment' element is contained in the time the offender must devote to the order, the discipline of regular attendance, prompt time keeping and satisfactory work performance. Such sentences served in the community offer the courts a credible alternative to custody, taking account of the offence committed and the risk posed by the offender, while at the same time making the offender pay back to the community in a positive way for the damage caused by offending. Community service also encourages public participation in the implementation of non-custodial measures by allowing members of the community to provide work opportunities for offenders. [141]

However before it can impose a community service order, the court must be satisfied that suitable work is available under appropriate supervision. Community service requires close supervision to verify that the offender does the work required and that the offender is neither exploited nor forced to work beyond what is required or under unacceptable conditions. In many jurisdictions, the probation services or officials performing an equivalent function bear primary responsibility for ensuring that these requirements are met. Where the offender is unemployed he will be expected to work during normal working

[141] Tokyo Rule 17

hours for a full working week. If employed the community work will be arranged during evenings or at weekends.

In the Republic of Ireland[142] for example the legislation for Community Service Orders allows the Judge to sentence an offender to between 40 and 240 hours work. The offender must be 16 years or over to be considered. Community Service is a direct alternative to a prison sentence and will only be considered by the Judge if a custodial sentence has first been considered. The steps involved are as follows:

- The judge will ask the Probation and Welfare Service to complete an assessment as to whether the offender is suitable or not to do community service and whether there is work available for the offender to do;
- A probation officer will meet with the offender in preparing the report;
- The offender must agree to do the work and the Judge will specify the sentence the offender will serve if he fails to complete the order;
- The number of hours per week work by the offender is agreed with the probation officer;
- It is the offender's responsibility to finish the work on time;
- It is the responsibility of the probation officer to bring the case back to court for any failure to complete the order.

In England and Wales, community service by offenders was introduced as a penal sanction in 1973. When introduced the rationale of the community service order was vague.[143] Courts were empowered to order offenders to perform between 40 and 240 hours of unpaid work, to be completed within a year. The choice of work was to be left to the probation service, which was to oversee its performance. Failure to attend or to perform work as directed could lead to revocation of the order. Importantly, while the order was legislated as implicitly an alternative to a custodial sentence, it could be imposed on anyone guilty of an imprisonable offence, and was never in reality restricted to those on whom a prison sentence would otherwise have been imposed. Care must therefore be taken to ensure that community service orders are used only where the individual would otherwise receive a custodial sentence, and not to draw more people into the criminal justice system.

Community service in Botswana – The Children's Act

Community service is not available as a sentencing option in Botswana. The Children's Act in section 85 does provide that where a child charged with an offence is tried by a children's court the court can sentence the child to community service for such period as the court considers appropriate.[144] However no mechanisms have been put in place by

[142] Criminal Justice (Community Service) Act 1983. Criminal Justice (Community Service)(Amendment)(No. 2) Act 2011

[143] The Wootton Committee, which proposed its introduction in 1970, believed that it: "should appeal to adherents of different varieties of penal philosophy. To some, it would simply be a more constructive and cheaper alternative to short sentences of imprisonment; by others it would be seen as introducing into the penal system a new dimension with an emphasis on reparation to the community; others again would regal it as a means of giving effect to the old adage that the punishment should fit the crime" (Home Office, 1970: para 33).

[144] Section 85 Children's Act, 2009 Cap. 28:04 Manner of dealing with child charged with offence
Where a child charged with an offence is tried by a children's court and the court is satisfied of his or her guilt, the court shall, after taking into consideration the general conduct, home environment, school records and medical history (if any) of such child dispose of the case by –
…(c) sentencing the child to community service for such period as the court considers appropriate;
…

which such community service can be administered. Also the provision contained in section 85 is far too vague and imprecise. Nowhere in the Act is community service defined or elaborated upon. A sentence of community service "for such period as the court considers appropriate" is indeterminate and cannot stand alone as a sentence. Furthermore the section fails to acknowledge that community service is unsuitable as a sentence for children under the age of 16. While section 117 of the Act[145] provides that the Minister may make regulations providing for any matter that is to be provided for under the Act, no such regulations in respect of community service have been made. Community service is therefore not currently an option available to a magistrate when sentencing in the children's court.

Extra-mural labour

One provision of the law that is available and is often confused with community service is extra-mural labour provided for in Part XII (ss 97-104) of the Prisons Act. Section 97 of the Prisons Act provides that the courts may, with the consent of the offender, order the offender to be employed under the immediate control and supervision of a public authority on pubic work or service carried on outside prison.[146] The Commissioner of Prisons and Rehabilitation and official visitors may also order extra-mural labour for offenders who are approaching the end of their prison sentence.[147]

There are however fundamental differences between community service and extra-mural labour. Community service is given as an alternative to imprisonment while extra-mural labour is performed by those offenders who have already been sentenced to and are serving a term of imprisonment. Extra-mural labour, particularly when carried out under section 98, may therefore be more accurately classified as a rehabilitation provision rather than alternative sentencing. Also, while in most jurisdictions it is the probation services or officials performing an equivalent function who bear primary responsibility for supervising community service, it is the officers in charge of the relevant prisons who have the ultimate control of offenders performing extra-mural labour.[148] Also the immediate control and

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[145] Section 117 Children's Act, 2009 Cap.28:04 Regulations
The Minister may make regulations providing for any matter which is to be provided for under this Act, and generally for the better carrying out of the purpose and provisions of this Act.

[146] Section 97. Prisons Act Cap. 21.03
Notwithstanding the provisions of this Act or any other law, an offender who has been sentenced to a term of imprisonment not exceeding twelve months (whether that term consists of a single punishment or punishments running concurrently or consecutively) or who has been committed by any court for non-payment of a fine not exceeding P800, may, by order of the court and with the consent of the offender, be employed under the immediate control and supervision of a public authority on pubic work or service carried on outside prison.

[147] 98. (1) Notwithstanding the provisions of this Act or any other law, where the Commissioner or an official visitor is satisfied that an offender whose remaining term of imprisonment does not exceed twelve months (whether that term consists of a single punishment or punishments running concurrently or consecutively) may be usefully employed on public work or service carried on outside prison, he may, with the consent of the offender, order the release of that offender from prison and the offender's employment under the immediate control and supervision of a public authority on such public work or service as the officer in charge of the prison shall approve.
(2) The provisions of subsection (1) shall not apply to an offender serving sentence for the offence of rape.

[148] Officers in charge to have ultimate control of offenders doing extra-mural labour.
99. (1) Where the employment of an offender under the immediate control and supervision of a public authority is ordered –
(a) by a court under section 97, the officer in charge of the prison situated within the district within which the court is situated shall have ultimate control of the offender or, where

supervision of an offender performing extra-mural labour lies not with the probation service but with the public authority employing the offender.[149] The public authority is also responsible for keeping the records of offenders undertaking extra-mural labour.[150] Also, where an offender doing extra-mural labour is found by a medical practitioner to be unfit to perform the work set as extra-mural labour it shall be the court or the Commissioner that shall have jurisdiction in the matter[151] and likewise in the case of any complaint of recalcitrance on the part of the offender in the performance of his extra-mural duties.[152]

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two or more prisons are so situated, the officer in charge designated by the Commissioner shall have such control; or

(b) by the Commissioner or an official visitor under section 98, the officer in charge of the prison from which the offender is released shall have ultimate control of the offender.

(2) The officer in charge having ultimate control of an offender by virtue of subsection (1) shall designate the public authority which is to have the immediate control and supervision of the offender.

[149] Conditions of extra-mural labour.

100. (1) The public authority under the immediate control and supervision of which an offender is employed under this Part shall –

(a) determine the number of hours the offender shall work each day: Provided that no offender shall be required to work more than eight hours a day; and

(b) require the offender to report daily at such time an place as the authority or its duly authorised servant or agent shall specify.

(2) Section 91 shall apply, *mutatis mutandis*, in the case of an offender in respect or whom steps have been taken under this Part.

(3) No offender shall be employed under this Part on land other than land owned and occupied by a public authority.

(4) Every offender employed under this Part shall receive from the officer in charge having ultimate control of him food on the same dietary scale as the food which he would have received in prison:

Provided that where, in the opinion of the officer in charge, it is not reasonably practicable for such an offender to draw rations from the prison, the officer in charge shall cause the offender to be supplied with food on a dietary scale approximating as nearly as is reasonably practicable to the dietary scale on which he would have received food in prison.

(5) Where the place of employment of an offender employed under this Part is situated at an unreasonable distance from his normal place of abode, accommodation shall be provided for him.

[150] Public authorities to maintain record of offenders doing extra-mural labour.

104. Every public authority shall maintain, in such form and containing such particulars as the Commissioner may require, a record of all offenders employed under its immediate control and supervision under this Part and shall make that register available for inspection at any reasonable time by the Commissioner or the officer in charge of the prison.

[151] Procedure where offender doing extra-mural labour is found to be unfit.

101. Where any offender is found by a medical practitioner to be medically unfit to perform the work or service on which he is or is to be employed under this Part, the medical practitioner shall forthwith make a written report to that effect to the relevant court, if the offender is or is to be employed by order of a court under section 97, or to the Commissioner, if the offender is or is to be employed by order of the Commissioner or an official visitor under section 98, and the court or the Commissioner, as the case may be, may in writing authorise any peace officer to seize the offender and to surrender him into the custody of the officer in charge of any prison or to remove the offender direct to a hospital to serve the whole or the unexpired portion of his term of imprisonment as if he were a prisoner in respect of whom no steps had been taken under this part.

[152] Procedure where offender doing extra-mural labour under order of court is recalcitrant.

102. (1) A public authority under whose immediate control and supervision an offender is or is to be employed by order of a court under section 98 may make a complaint in writing to the court that the offender, without reasonable excuse –

(a) has failed to present himself at the time and place specified under section 100(1)(b)

(b) has absente himself from his work without permission; or

(c) does not work or conduct himself properly

(2) Where a complaint is made under subsection (1), the court may in writing authorise any peace officer to seize the offender and to produce him before the court when the court shall enquire into the complaint and, if satisfied of the truth thereof, order the offender to be removed to prison to

[Note that the reference in section 102(1) to section 98 is incorrect and should read section 97.]

Nevertheless the extra-mural labour provisions contained in the Prisons Act and the extent to which they have been implemented are of considerable relevance when considering the feasibility of introducing community service as a non-custodial sentencing option. The principle contained in section 97 is very close to that of community service. No fundamental shift in policy would therefore be required to introduce community service into the penal sentencing system. What would be required is the transfer of the principle out of the Prisons Act and into the sentencing provisions of the Penal Code. There would also have to be established the administrative infrastructure to administer and supervise any community service scheme. However the administration of the scheme is not an insurmountable problem as the experience of Zimbabwe illustrates. Zimbabwe has one of the most successful community service schemes and it has been used as a model for many countries in Africa and beyond.

The Zimbabwe model

In the early 1990's Zimbabwean authorities working to reduce both prison overcrowding as well as to contain the increasing costs associated with maintaining the growing population of prisoners carried out a survey to obtain a profile of the prison population. The survey showed that some 60 per cent of prisoners were serving sentences of six months or less while 80 per cent were serving sentences of 12 months or less. Many were serving sentences despite having been given the option to pay fines. It became clear to the authorities that most of these prisoners were not violent or serious offenders, that most should not have been sent to prison, and that Zimbabwe was in need of alternative sentencing options, particularly for first and youthful offenders.

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serve the whole or the unexpired portion of his term of imprisonment as if he were a prisoner in respect of whom no steps has been taken under this Part:
Provided that the court, instead of ordering the offender to be remove to prison, may, if it considers that special circumstances exist which justify that course, order that the offender be employed under the immediate control and supervision of some other public authority on public work or service carried on outside a prison, in which case the order shall, for the purpose of this Part, be deemed to have been made under section 97.
(3) Where a court orders an offender to be removed to prison under subsection (2), it may order forfeiture of remission not exceeding 30 days.
Procedure where offender doing extra-mural labour under order of Commissioner or official visitor is recalcitrant.
103. (1) Where the Commissioner is satisfied that an offender employed or to be employed by order of the Commissioner or an official visitor under section 98, without reasonable excuse –

(a) has failed to present himself at the time and place specified under section 100(1)(b);
(b) has absente himself from his work without permission; or
(c) does not work or conduct himself properly

the Commissioner shall order the recall of the offender to prison and for this purpose may in writing authorise any peace officer to seize the prisoner and to surrender him into the custody of the officer in charge of any prison to serve the whole or the unexpired portion of his term of imprisonment as if he were a prisoner in respect of whom no steps had been taken under this Part:
Provided that the Commissioner, instead of ordering the recall of the offender to prison, may, if he considers that special circumstances exist which justify that course, order that the offender be employed under the immediate control and supervision of some other public authority on such public work or service carried on outside a prison as the officer in charge having ultimate control of the prisoner shall approve, in which case the order shall, for the purpose of this Part, be deemed to have been made under section 98.
(2) Where the Commissioner orders the recall of an offender to prison under subsection (2) he may order forfeiture of remission not exceeding 30 days.

In the light of these findings the Zimbabwe government established a National Committee under the Ministry of Justice to look into ways of improving the situation that would reduce the use of custody without letting people off lightly. Previously, a fine was the only alternative to imprisonment but the members of the Committee began looking at other alternatives such as 'Community Service'. Following this review the Ministry of Justice drafted legislation that was passed in 1992 amending the criminal procedure code to allow, among other alternatives, the courts to order community service as a sentencing option.

An initial problem faced by Zimbabwe was that of implementing the community service scheme in the absence of a probation service. So following the amendment to the Criminal procedure code a hierarchy of a national, provincial and district committees were established to implement the community service scheme in the community. These committees were chaired by a magistrate and membership was drawn from respected members of the community, non-governmental organisations and representatives from key sectors in the criminal justice system (police, courts, prisons, local government, social services). Membership of these committees was voluntary and none of the persons involved in the scheme received any payment for the work they undertook.

This involvement of the local community at the district committee level was critical to the success of the programme as it was at this level where representatives of local institutions provided community service opportunities for offenders. In the absence of probation officers, these placement institutions, such as clinics, schools or hospitals, requested the court to send offenders on community service orders to perform work at the institution. Offenders are sentenced to perform a number of community service hours by magistrates based upon a protocol that ranges from 35 to a maximum of 420 hours, providing a rough equivalent of what might have been a prison sentence of one to 12 months. Community service officers monitor the implementation of the order and communicate breaches to the court. In the first year, between January 1993 and December 1994, over 3,000 people were placed on Community Service. They worked in hospitals, schools, children's homes, old people's homes and undertook environmental work and other tasks. Approximately 91 per cent of the 18,000 probationers sentenced to community service in the first four years of the programme successfully completed their service, with results showing a much lower rate of recidivism. Overall the scheme costs one-fifth to one-sixth of the estimated cost of imprisoning an offender for one month.

For the Community Service scheme to succeed it had to have the acceptance of both the courts and public. In 1994, the National Committee conducted a series of regional training events around Zimbabwe to raise public awareness and to train magistrates and others working in the justice system as to the purpose and operation of the Community Service scheme. Guidelines were produced for sentencers and forms were designed for the use of courts and institutions to monitor the offenders' performance under the terms of the order. Staff were appointed to undertake the administrative tasks necessary to ensure the courts had 'placements institutions' to which to send offenders and that an adequate system of supervision and control was in place to ensure the smooth and effective running of the scheme. The scepticism that initially greeted the scheme, was soon dispelled as members of the public realised the benefits of the work done for the community and public good. Due to its success and in part also because the community service scheme reflects more traditional approaches to justice of community service and reparation, several other countries in Africa and beyond have adopted the Zimbabwe model of community service.

It may therefore be perfectly feasible for Botswana, even in the short term, to implement a community service scheme such as the one operated in Zimbabwe using existing resources. Community Service Orders could replace some fines, corporal punishment and prison sentences of short duration. Community service being more akin to restorative justice and

reparation is ideally suited to the traditions of the customary courts. Indeed there may be a strong argument for removing the power of imprisonment from the customary courts altogether and replacing it with community service.

A community service scheme for Botswana

If community service is to be introduced it is important that both the courts and the public have confidence in any community service scheme established. Ignorance and suspicion must be dispelled, particularly concerning the work that is to be undertaken by offenders participating in the scheme. The courts might be reluctant to make orders, on the basis that, were they to become aware of the purpose or circumstances of the work performed, they may not approve of them. National standards for community service work must therefore be agreed and imposed upon those administering the scheme. These standards must emphasise the need for work to be hard and demanding, while at the same place emphasis on rehabilitation and on work that is fulfilling and which secures public support for the supervision of offenders in the community. Initially it should be possible to build upon the existing scheme of extra-mural labour currently operating. Although it has not been possible to collate detailed statistics, there is evidence that the customary courts in particular make use of section 97 of the Prisons Act when sentencing offenders. If this use of section 97 by the customary courts can be supported by statistical evidence it may assist in justifying any proposals to replace imprisonment by community service orders in the customary courts.

In the longer term it should also be possible to develop the system of community service to make it more responsive to the individual needs of the offender. In the United Kingdom for example, the Criminal Justice Act 2003 introduced a new style of community sentence, known as a community order. The community order allowed magistrates and judges to tailor community sentences to the severity of the offence and, at the same time, address offending behaviour. This was done by creating an order with one or more of twelve possible requirements, such as unpaid work or drug rehabilitation, to be completed over a defined period. More recently the community order has been replaced with a new community sentence that emphasises the punishment aspect of the sentence while at the same time recognizing and addressing the rehabilitative needs of the offender.

The Community Payback Order

Recently introduced in England, the Community Payback Order replaces the previous sentencing options of community service orders, probation orders and supervised attendance orders. Each Community Payback Order can consist of a range of requirements. Judges and magistrates will consider what crime has been committed, motive and likelihood of re-offending. They will then decide on the specific community sentence to be given that meets the requirements of the individual offender. The requirements are:

- Unpaid work or other activity requirement
- Offender supervision requirement
- Compensation requirement
- Programme requirement
- Mental health treatment requirement
- Drug treatment requirement
- Alcohol treatment requirement
- Residence requirement
- Conduct requirement

The local authority must carry out an annual community consultation on the types of activities to be carried out locally by those subject to an unpaid work or other activity requirement. Local residents can make suggestions online of projects they would like to see completed These can range from cleaning up litter in a park, to removing graffiti from a school wall, or clearing fly-tipped rubbish from the street.

Offenders will usually work in their local area, and be managed by a Community Payback supervisor. Offenders must wear a high visibility orange vest while undertaking work. Offenders will be expected to complete anything from 40 to 300 hours of Community Payback, depending on how serious their crime was. Unemployed offenders have to work 3 or 4 days each week. If the offender has a job, the Community Payback work will be arranged outside his working hours, like evenings or weekends.

The treatment or programmes available under the Community Payback Order are intended to help the offender with problems that led him to commit crime in the first place. They're also to stop the offender committing more crime. Programmes and treatment could be to help with addictions, such as drugs and alcohol, mental health conditions and getting new skills and qualifications. Depending on the treatment or programme, it could involve:

- counselling sessions - where the offender will get support from a medical professional
- drug testing
- 'accredited programmes', such as anger management courses, to help with behaviour
- mental health treatment with a doctor or psychologist
- improving reading and writing skills
- getting help with a job application
- learning interview skills

If the offender does not complete a treatment or programme, or fails a drugs test, he could be sent back to court and his punishment could increase.

When sentencing an offender to community payback the court may impose specific conditions on the offender. Once the sentence has started conditions may also be imposed by the offender manager who is appointed to supervise the offender and his sentence. These conditions can include:

- being at a particular place at certain times - known as a 'curfew'
- wearing an electronic tag to check that the offender stays there
- appointments with an offender manager
- being stopped from going to certain places or areas, e.g. the victim's home
- being stopped from taking part in certain activities, e.g. going to a pub or a bar
- being told where the offender has to live, e.g. a family member's home

The key features of the Community Payback Order are:

- The Community Payback Order is a sentence and not an alternative to a sentence.
- While the Order will be regarded as an alternative to custody the courts will also be able to impose a Community Payback Order with a restricted range of requirements as an alternative to, or in addition to, a fine.
- Previously, in cases where a short jail term would have been imposed on minor fine defaulters, courts will now impose a low tariff Community Payback Order.
- A Community Payback Order including an unpaid work or other activity requirement may only be imposed on an offender aged 16 or above.

- Unpaid work or other activity requirements can be imposed for between 20 and 300 hours. A requirement of 20-100 hours is referred to as a "level 1 requirement"; and a requirement of 101-300 hours as a "level 2 requirement".
- Where an unpaid work or other activity requirement is to be imposed in a Justice of the Peace court, it will be limited to a "level 1 requirement". Justice of the Peace courts can select from: offender supervision requirement, level 1 unpaid work or other activity requirement, residence requirement, conduct requirement and compensation requirement.
- Orders can be made for a period of between 6 months and 3 years unless they consist solely of an unpaid work or other activity requirement. An unpaid work or other activity requirement must be completed within 3 months (level 1) and 6 months (level 2) - unless the court states otherwise at the point of sentence.
- An offender supervision requirement is mandatory when an order is imposed on an offender aged less than 18 years. It is also mandatory when a court imposes any requirement apart from an unpaid work or other activity requirement.
- A further offence committed during the order is not a breach of the order.
- A court may schedule discretionary periodic review hearings to check on an offender's progress at any point within the duration of the order.
- A court can decide to discharge an order early, in circumstances where an offender has made highly positive progress.
- If an offender breaches a Community Payback Order, the court can vary the order to impose new or different requirements. It can decide to impose a restricted movement requirement (electronic monitoring). Ultimately it can decide to revoke the order and impose a custodial sentence, or any other disposal that it could have used at first instance.

V. EARLY RELEASE

A. **Policy Objectives**

To put in place early release mechanisms to help and assist prisoners in making a smooth transition from prison life to living once again in the community, with the objective of reducing the incidence of criminal behaviour and recidivism, while at the same time ensuring public safety, reducing prison numbers and easing prison overcrowding

B. Policy Issues

1. Should automatic remission of sentence under section 91 of the Prisons Act be replaced by earned remission?

2. Should a system of enhanced remission based on incentives be introduced for long-term prisoners?

3. Should the standard remission of sentence under section 91 of the Prisons Act be raised from one third to one half of sentences?

4. Would it be acceptable to introduce "truth in sentencing" legislation and replace automatic remission with shorter sentences of imprisonment imposed by the courts to reflect the abolition of automatic remission?

5. Why are the provisions contained in Part IX of the Prisons Act relating to parole not working? How may the problems in applying and administering the current system of parole to be addressed?

6. If community service orders are introduced and replace extra-mural labour under section 97 of the Prisons Act, should extra-mural labour under section 98 of the Prisons Act also be abolished? Would it be more effective to replace extra-mural labour under section 98 of the Prisons Act with a more developed system of parole?

7. Should the exercise of the prerogative of mercy by His Excellency the President under section 53 of the Constitution be made subject to judicial review?

8. Should a formalised early release scheme be introduced encompassing the temporary release of prisoners for specific purposes and the release of prisoners on compassionate grounds, particularly in respect of the terminally ill and the elderly?

C. Policy Recommendations

1. Remission of sentence, under which a prisoner is released unconditionally before the end of his sentence, will be retained under the Prisons Act

2. The current system of automatic remission of sentence should be replaced by earned remission based on the Canadian model.

2. A system of incentives should be introduced for long-term prisoners through the operation of an enhanced remission scheme to allow prisoners to benefit from higher remission (up to 50%) where they can demonstrate constructive engagement with prison activities and programmes.

3. The parole of offenders will continue as an integral part of the penal system. A detailed investigation will be undertaken into the operation of the parole system in order to ascertain the shortcomings in the system and to determine the steps to be taken to develop the full potential of parole. In this respect full statistical information will be gathered and collated and research undertaken into the operation, structure and management of the parole system.

4. Based on the findings of the investigation into the operation of the parole system, where necessary regulations will be drafted and administrative structures and procedures put in place to ensure the proper functioning of the parole system.

5. The pre-release extra-mural labour provision contained in section 98 of the Prisons Act will be replaced with a new system of parole.

6. In the light of the developments in judicial review taking place elsewhere in the Commonwealth, a review will be undertaken of the Constitutional provisions relating to the procedural aspects of the Prerogative of Mercy.

7. Consultations will be held with a view to the formalisation under the law of temporary release in respect of prison inmates for a number of specific purposes, including the use of short-term temporary release as a prelude to parole, day-to-day release and early release on compassionate grounds.

8. Following consultations with stakeholders active consideration will be given to enacting all the elements of an early release scheme into a single piece of legislation to be called the *Remission, Temporary Release and Parole Act.*

Commentary

1) Forms of early release
2) Existing early release mechanisms available
- **a) Remission**
- **b) Parole**
- **c) Extra mural labour**
- **d) Prerogative of Mercy**

3)Temporary Release
4) Day-to-Day Release
5) Early release on compassionate grounds – the terminally ill and elderly

1) Forms of early release

Most countries have mechanisms in place that allow prisoners to be released before they have completed their full prison terms. Early release mechanisms can help considerably in the reintegration of prisoners back into society. Prisoners, especially those who have been incarcerated for long periods of time, often find it difficult to readjust to life outside of the prison environment. Therefore, early release can provide a means to help and assist prisoners in making a smooth transition from prison life to living once again in the community. With some degree of supervision this can help reduce the incidence of criminal behaviour and recidivism, while at the same time ensuring public safety.

The granting of early release can also act as an incentive to good behaviour on the part of prisoners. It helps most prisoners to make an effort to be of good behaviour and improve their discipline by observing rules and regulations in anticipation of an early release. While the major objective of early release is the prisoners' re-integration into society, there is also a more practical consequence flowing from in early release in that it can reduce prison numbers and ease prison overcrowding.

Early release can take a number of forms and the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) adopt a wide-ranging approach to this issue. The official Commentary on the Tokyo Rules observes that the Rules relating to the post-sentencing stage deal with "measures to reduce the length of prison sentences or to offer alternatives to enforcing prison sentences. The "post-sentencing dispositions"[153] that States should make available to achieve these objectives are listed as:

- Furlough and halfway houses;
- Work or educational release;
- Various forms of parole;
- Remission; and
- Pardon.

Strictly speaking, the first two of these are not fully alternatives to imprisonment. Prisoners who are granted furloughs, that is, short periods of leave from prison in the course of terms of imprisonment, or who live in halfway houses before being released into the community, remain prisoners in terms of the law and subject to the rules of prison discipline. Similarly, prisoners who are temporarily allowed out of prison to work or for educational purposes do not lose their "prisoner" status. However, while not an alternative to imprisonment these

[153] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Rule 9, Post-sentencing dispositions:
9.1 The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society.
9.2 Post-sentencing dispositions may include:
(a) Furlough and half-way houses;
(b) Work or education release;
(c) Various forms of parole;
(d) Remission;
(e) Pardon.
9.3 The decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the offender.
9.4 Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

dispositions are still of value in allowing prisoners to improve themselves and in easing their transition back to the community.

Whatever the early release system adopted by the State it should be coherent, transparent and fair. Wherever possible the system should be consistent with the emerging norms of human rights law. The parole system, along with the systems of remission and temporary release, should aim to achieve clarity in the law and support a proper equilibrium between the protection of the public and the rights of sentenced persons to a fair and balanced system of early release.

2) Existing early release mechanisms

The early release mechanisms currently available are:
a) Remission
b) Parole
c) Extra mural labour
d) Prerogative of Mercy

a) Remission

Remission, in which a prisoner is released unconditionally before the end of his sentence, is a form of unconditional release. Remission is usually awarded automatically after the offender has served a fixed proportion of a sentence, but it may also be a fixed period that is deducted from a sentence. Sometimes remission is used as an incentive and reward for good conduct and behaviour in prison. It can be limited or forfeited in whole or in part if the prisoner does not behave appropriately or commits a disciplinary offence.

Unlike in some other jurisdictions, such as South Africa, where prisoners must earn their remission, in Botswana it is automatically deducted from the prisoner's sentence when he enters the prison system. There are two types of remission in Botswana[154]:

[154] Prisons Act, Cap. 21:03 Remission
91. (1) Subject to subsection (2), every prisoner under sentence of imprisonment for more than one month shall, on admission to prison, be granted remission of one third of his sentence and may thereafter forfeit that remission or part thereof as provided by this Act.
(2) No remission shall be granted –
(a) to prisoners under sentence of imprisonment for life or confine during the Presidents pleasure; or
(b) which would result in the discharge of any prisoner before he has served a term of imprisonment of one month.
(3) The Commissioner may restore forfeited remission in whole or in part.
(4) Without prejudice to the preceding provisions of this section and notwithstanding the provisions of section 84 a parole board referred to in section 84 may, in considering a prisoner's case under section 86, recommend to the Minister that –
(a) any prisoner serving a determinate term of imprisonment of not less than four years be granted special remission on the ground –
(i) of his meritorious conduct,
(ii) that his mental or physical condition warrants such remission;
(iii) that special circumstances exist which, in the opinion of the parole board, warrant such remission; or
(b) any prisoner serving a term of imprisonment for life or confined during the President's pleasure be released on any ground specified in paragraph (a).
(5) The Minister shall consider every recommendation made to him under subsection (4) and then submit it to the President together with his own recommendation.

(i) Automatic remission. Under section 91 of the Prisons Act every prisoner under sentence of imprisonment for one month or more is granted automatic remission of one third of his sentence on admission to prison. The remission can however be subsequently forfeited in case of a breach of the disciplinary rules. No remission is granted in respect of prisoners under sentence of imprisonment for life or confined during the Presidents' pleasure. Apart from good conduct, there are no other requirements to be fulfilled by a prisoner to qualify for remission and no conditions are imposed on the prisoner at the time of his release.

(ii) Special remission. Under section 91 (4) of the Prisons Act, the parole board may recommend to the Minister to grant special remission to any prisoner serving a determinate term of imprisonment of not less than four years, or who is serving a life term of imprisonment or confined during the President's pleasure, on any of the following grounds:

- Any meritorious conduct by the prisoner.
- The mental or physical condition of the prisoner.
- Any special circumstances applicable in respect of the prisoner.

Remission, like other early release mechanisms can give rise to problems and to public concern. Most offenders are released from prison at some stage. But if offenders are released before the end of their sentence the public has a right to expect protection from potentially dangerous offenders after their release into the community. It is generally accepted therefore that some restrictions should be imposed on offenders released into the community, at least for the remaining term of their sentence.

Remission can also be unfair to offenders in circumstances where it is granted or refused arbitrarily. Authorities must put in place procedures to ensure fairness in such decisions. The simplest approach is to grant remission automatically when a fixed proportion of the sentence has been served. This, however, removes authorities' discretion in evaluating whether an offender is ready for release on the basis of prison behaviour and the risk he may still pose to society at large. In practice, particularly where the prisoner is serving a short sentence, it may be unrealistic to attempt an evaluation, in which case the prisoner should be released when a set minimum period has been served. Where remission is conditional on good behaviour in prison, it is important that the presence or absence of such behaviour be determined fairly as this can raise issues of favouritism and inconsistency in the treatment of individual prisoners. The reports and feedback made by prison officers on the behaviour and performance of prisoners is crucial to the operation of the remission system in such cases and there must be full confidence in the integrity of the information received. Offenders should also know at an early stage what they must do to qualify for early release and how they need to behave to ensure that they do not lose eligibility for such a release.

There are also concerns expressed about the deceptive nature of remission. The practical effect of remission of sentence is that the offender serves a different sentence to that which was publicly imposed by the court. Some claim that this undermines the authority of the court and adversely affects public confidence in the administration of justice. Most people would assume that when a judge sentences an individual to a term of imprisonment that would be the amount of time they would serve. However, with automatic remission, prisoners came to understand that the reduced sentence is in fact their maximum sentence, as any loss of remission would only result from disciplinary action and extra punishment. To counter this, the 'Truth in Sentencing' laws introduced in some jurisdictions[155] seek to

[155] See for example the Crimes (Administration of Sentences) Act 1999 (NSW)

ensure prisoners serve the full amount of time they are sentenced to, rather than a reduced portion, and then be released on parole or remission.

Reform of Remission

A reformed system of remission offers the potential to play a vital role in the reintegration of the prisoner into society. Currently, remission is treated as a right, though one which maybe forfeited in part or fully through misbehaviour while in prison. As an automatic entitlement, standard remission for good behaviour has a limited incentive effect within the prison. However, in the context of serious prison overcrowding which undermines rehabilitative efforts, an increase in standard remission could have an immediate positive effect. For example increasing the standard remission from one third to one half for sentences of five years or less would show an immediate reduction in the prison population.

The introduction of truth in sentencing legislation would also recognise that the possibility of early release must be acknowledged at the sentencing stage. So where, as in Botswana, legislation allows for the automatic remission of one third of every sentence imposed, this automatic remission provision would be abolished so that the sentence imposed would more truly reflect the time to be served. Instead, the legislation would now require the courts to adjust the sentence actually imposed by one third, to reflect the abolition of automatic remission. In real terms, this would replace automatic remission with a reduction of sentence at the time the sentence is imposed. This would then ensure that the sentence actually served by the prisoner is the full sentence awarded by the court.

Earned remission, such as operates in Canada where prisoners may 'earn' early release at a rate of up to 15 days each month of good behaviour may also be considered to replace the current system of automatic remission. Canada is acknowledged as having one of the most effective remissions programs and is a good example of a system that advocates the need for earned remissions while focusing on the need for public safety. Emphasis is placed on community reintegration. To this aim the *Prisons and Reformatories Act* defines good behaviour as 'obeying prison rules and conditions governing temporary absence and by actively participating in programs...designed to promote prisoners' rehabilitation and reintegration.'[156] Earned remission therefore strike a balance between the need to encourage better behaviour for prisoners while at the same time ensuring protection where needed for members in the community. Earned remissions have been found to ensure greater public safety, by reforming and reintegrating prisoners back into society by encouraging the perpetrator to actively participate in the reintegration process. To be effective however there must be clear guidance on the rules governing the earning of remission. Earning such remission must also be attainable: if engagement with rehabilitative programmes is a requirement, then such programmes need to be adequately resourced and accessible.

A system of incentives could also be considered for long-term prisoners through the operation of an enhanced remission scheme. Such a scheme would allow prisoners to benefit from higher remission (up to 50%) where they can demonstrate constructive engagement with prison activities and programmes that show they are less likely to reoffend and will be better able to reintegrate into society. This type of system could allow for targeting schemes of enhanced remission around certain groups of offenders and certain types of prison services such as addiction, counselling and literacy.

b) Parole

Parole is the conditional release of an offender on conditions that are set prior to release and that remain in force, unless altered, until the full term of the sentence has expired. In some

[156] Prisons and Reformatories Act 1985 s 6(1) (Canada)

jurisdictions specific individualised post-release conditions are attached to parole. However in many jurisdictions the only conditions imposed are that an offender does not commit a further offence during the remainder of the sentence and/or that they report routinely to the authorities. These are also the only parole conditions that some countries can realistically enforce. The disadvantage to such basic conditions is that they are not related specifically to the needs of the individual offender and are thus less likely to assist him in transitioning from prison to a law-abiding life in the community. Parole can be mandatory when it takes place automatically after a minimum period or a fixed proportion of the sentence has been served, or it can be discretionary when a decision has to be made to release a prisoner conditionally.

Part IX of the Prisons Act is devoted to matters pertaining to parole. Under section 84 of the Act, the Minister is empowered to establish such number of Parole Boards as he thinks appropriate throughout the country.[157] Inmates must be eligible for release on parole before the Parole Board may consider their cases.

Section 84 of the Prisons Act provides for three types of eligibility for parole. First, a prisoner is eligible for release on parole if he is serving a determinate term of imprisonment of not less than four years and neither the whole nor part of which was imposed for stealing stock or for unlawful dealing in or possession of precious stones, and he has served one half of that term or three years imprisonment, whichever is the longer. The second type of eligibility arises where the prisoner is serving a determinate term of imprisonment of more than five years and the whole or part of which was imposed for stealing stock or for unlawful dealing in or possession of precious stones, and he has served one half of that term or five years' imprisonment, whichever is the longer. Finally, a prisoner who is serving a term of imprisonment for life or is confined at the President's pleasure is eligible for release on parole if he has served seven years imprisonment.[158]

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[157] Prisons Act, Cap. 21:03 Establishment and constitution of parole boards.

84. (1) The Minister may, by order published in the *Gazette*, establish such number of parole boards as he thinks appropriate for the purposes of this Act.

(2) Every parole board shall consist of at least one judge or magistrate, one medical practitioner (who may be a Government medical officer), one welfare officer (who may be a Government welfare officer) and two other persons who are not public officers and may, in addition to these persons, consist of such other persons as the Minister may determine.

(3) Every member of a parole board shall be appointed by the Minister by notice published in the Gazette and shall hold office for such period as the Minister may determine.

(4) Where one judge is a member of a parole board, he shall be chairman of the board and where two or more judges are members of a parole board, the senior in precedence shall be chairman of the board.

(5) Where no judge is a member of a parole board and –

(a) one magistrate is a member of the board, the magistrate shall be chairman of the board; or

(b) two or more magistrates are members of the board, the senior in grade shall be chairman of the board; and where two or more such magistrates share seniority in grade the Minister shall, after consulting the Chief Justice, designate the chairman of the board from among them.

(6) The Minister may give directions to a parole board or to parole boards generally as to the carrying out of its or their functions under this Act and every parole board to whom such directions have been given shall comply with those directions.

[158] Prisons Act, Cap. 21:03 Eligibility of prisoners for release on parole.

85. Subject to the other provisions of this Part, a prisoner shall be eligible for release from prison on parole if he is serving –

(a) a determinate term of imprisonment of not less than four years (whether that term consists of a single punishment or punishments running concurrently or consecutively), neither the whole nor part of which was imposed for stealing stock or for unlawful dealing in or possession of precious stones, and he has served one half of that term or three years' imprisonment, whichever is the longer.

(b) a determinate term of imprisonment of more than five years (whether that term consists of a single punishment or punishments running concurrently or consecutively), the whole or part of

The parole board is required to consider the case of every prisoner as he becomes eligible for parole and each year thereafter. After considering each case the board shall recommend to the Minister that an eligible prisoner should either be released on parole, subject to such conditions as the board may recommend, or not be released as the case may be.[159] The Minister, on the basis of the parole boards recommendation, may in writing order the release on parole of the prisoner concerned, subject to such conditions as may be generally prescribed and as the Minister may in each case specify. If the prisoner concerned is serving a term of imprisonment for stealing stock or for unlawful dealing in or possession of precious stones then his release on parole shall have no effect unless it is confirmed by the President in writing.[160]

If a prisoner contravenes a condition, which was attached to his release on parole, then the Minister may order the recall of the prisoner to prison to complete his term of imprisonment. Normally, when a prisoner is so recalled the period he spent outside prison is not counted as part of his remaining term of imprisonment. The Minister may however in his discretion, in writing, direct that the whole or part of the period on parole be reckoned as part of the prisoner's term of imprisonment.[161]

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which was imposed for stealing stock or for unlawful dealing in or possession of precious stones, and he has served one half of that term or five years' imprisonment, whichever is the longer; or

(c) a term of imprisonment for life or is confined during the President's Pleasure and has served seven years imprisonment.

[159] Prisons Act, Cap. 21:03 Functions of parole boards

86. (1) Shortly before a prisoner becomes eligible for release on parole a parole board shall consider his case and shall do so thereafter at least once every year.

(2) After considering a prisoner's case under this section, a parole board shall either –

(a) recommend to the Minister in writing the release on parole of the prisoner, subject to such conditions as the board may in each case recommend: Provided that no such recommendation shall be made unless the board has taken into consideration reports from the medical officer and the officer in charge of the prison in which the prisoner is detained; or

(b) inform the Minister in writing of its decision not to recommend the release on parole of the prisoner.

(3) A parole board shall transmit to the Commissioner a copy of every document submitted to the Minister under subsection (2).

[160] Prisons Act, Cap. 21:03 Release on parole

87. After considering any recommendation made by a parole board under section 86 that a prisoner be released on parole, the Minister may in writing order the release on parole of the prisoner concerned, subject to such conditions as may be generally prescribed and as the Minister may in each case specify, which conditions the prisoner shall, for the purposes of this Act, be deemed to have been lawfully ordered to observe by a prison officer:

Provided that, where the prisoner concerned is serving a term of imprisonment the whole or part of which was imposed for stealing stock or for unlawful dealing in or possession of precious stones or a term of imprisonment for life or is confined during the President's pleasure, no order under this section shall have effect unless it is confirmed by the President in writing.

[161] Prisons Act, Cap. 21:03 Breaches of parole

88 (1) Were the Minister is satisfied that a prisoner, after his release on parole, has contravened any condition subject to which his release on parole was ordered, he may order the recall of the prisoner to prison and for this purpose the Minister may in writing authorise any peace officer to seize the prisoner and to surrender him into the custody of the officer in charge of any prison to complete his term of imprisonment.

(2) Where a prisoner is re-admitted to prison in consequence of his recall to prison under this section, the period for which he was at liberty after his release on parole shall not be reckoned as part of his term of imprisonment:

Provided that the Minister may in writing direct that the whole or part of that period shall be reckoned as part of the prisoner's term of imprisonment.

Therefore the basic legislative framework is in place to operate a system of parole. However more is needed. Detailed regulations and procedures need to be put in place to cover the administration of the parole system. The system must be procedurally fair, provide a proper infrastructure so that adequate and relevant conditions may be imposed on the parolee and the system must be able to deal quickly and fairly with any breaches of the conditions imposed.

It is recognised that decisions on parole must be handled in a way that is procedurally fair to the offender. This means that the infrastructure must provide the decision-maker with the necessary information about the prisoner, his prospects upon early release, and what conditions may be appropriate for early release on parole. The offender must be provided with an opportunity to be heard during the decision making process. Before deciding to release a prisoner on parole, various factors may be taken into consideration. These include the possibility of the prisoner re-offending during the period under parole supervision and thus continuing to pose a risk to the community. The views of the victim may be considered and any previous criminal and disciplinary records of the prisoner may also be reviewed. Important relevant factors will also include whether the prisoner has learnt a skill or benefited from any of the treatment programs offered by the prison and whether the prisoner has accommodation, employment and/or a support system after release back into the community.

Parolees will be required to comply with conditions that will be stipulated to them during their parole period. In addition to the standard requirements that the offender does not re-offend during the remainder of the sentence, individualised conditions can also be stipulated. These can include:

- the payment of compensation or the making of reparation to victims;
- entering into treatment for drug or alcohol misuse or any other treatable condition associate with the commission of crime;
- working or following some other approved occupational activity, for instance, education or vocational training;
- participation in personal development programmes;
- a prohibition on residing in, or visiting, certain places.[162]

The infrastructure required to implement these conditions is similar to that required for the implementation of non-custodial sentences. A probation service can assist offenders who are conditionally released in meeting the conditions that are set for them, while also ensuring that they do so. In the absence of a probation service the supervision of parolees should be the responsibility of the social workers of the area where the prisoner will be residing after release. In areas where there are no social workers, the chief, headman or the police may do the supervision. The community must also cooperate to make some early release conditions viable. A major concern will be finding work for offenders who are subject to conditional release. Educational or vocational training and personal development programmes offered to conditionally released offenders must also be available in the community.

An established, fair, an impartial procedure must also exist for judging alleged infringements of the conditions of release, particularly where such infringements could result in withdrawal of early release and re-imprisonment. Authorities should not order withdrawal for trivial breaches of conditions. Where they consider withdrawal unavoidable, they should consider the period of time served on conditional release when deciding for

[162] Council of Europe Recommendation Rec (2003) 22 of the Committee of Ministers to member States on conditional release (parole)

how long an offender is to return to prison. An appellate structure needs to exist to review decisions relating to early release. Whatever form these reviews take, the structure must allow prompt action to review any decision resulting in early release that substantially affects the rights and duties of offenders. Prompt and effective reviews are critical for decisions on matters such as release, conditions of release, significant alteration of the conditions of release, and decisions to withdraw release.

Even though release on parole is recognised under the Prisons Act, it is not widely used. Between 1990 and 1997 there were only five recorded cases of release on parole. More recent statistics are not available but it would appear that only one or two prisoners are granted parole each year. This is an area that requires a detailed analysis to be undertaken of the systems operation in order to ascertain any shortcomings in the present system and what may need to be done to develop its full potential. In this respect, before any firm proposals on improving the parole system may be adopted, full statistical information needs to be gathered and collated and research undertaken into the operations, structure and management of the parole system.

c) Extra-mural labour

Extra mural labour is the conditional release of an inmate from prison to complete his sentence outside prison under the supervision of a public authority. Under section 98 of the Prisons Act, where the Commissioner or an official visitor is satisfied that an offender whose remaining term of imprisonment does not exceed twelve months may be usefully employed on public work or service carried on outside prison, he may, with the consent of the offender, order the release of that offender from prison and the offender's employment under the immediate control and supervision of a public authority on such public work or service as the officer in charge of the prison shall approve.[163] During the year 2006 a total of 490 prisoners were released on extra-mural labour by the Commissioner of Prisons and a further 110 were released to perform extra-mural labour by the Official visitors.[164]

Extra-mural labour has been considered elsewhere in this Report in the context of introducing community service orders as an alternative to imprisonment. If community service orders are introduced then the continued use of the extra-mural labour provision contained in section 98 of the Prisons Act may be open to question. The resources and community employment currently utilised by the extra-mural labour programme may be better used in developing community service orders as an alternative to imprisonment. As regards those prisoners already serving custodial sentences, extra-mural labour as a form of early release from a prison sentence may be replaced with a more effective early release mechanism. In this respect a study should be undertaken of the practical operation of the extra-mural labour provision contained in section 98 of the Prisons Act with a view to replacing extra-mural labour with a more developed system of parole.

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[163] Prisons Act Cap. 21:03

98. (1) Notwithstanding the provisions of this Act or any other law, where the Commissioner or an official visitor is satisfied that an offender whose remaining term of imprisonment does not exceed twelve months (whether that term consists of a single punishment or punishments running concurrently or consecutively) may be usefully employed on public work or service carried on outside prison, he may, with the consent of the offender, order the release of that offender from prison and the offender's employment under the immediate control and supervision of a public authority on such public work or service as the officer in charge of the prison shall approve.

(2) The provisions of subsection (1) shall not apply to an offender serving sentence for the offence of rape.

[164] Botswana Prison Service, Annual report 2006

d) Prerogative of Mercy - Pardon

Section 53 of the Constitution empowers the President to exercise the prerogative of mercy, including a pardon, either free or on lawful conditions; a respite of any punishment imposed; the substitution of a less severe form of punishment for any punishment imposed; and the remission of any punishment imposed.[165]

A pardon, which ordinarily means release following the setting aside of the conviction or sentence, is a form of unconditional release. It is usually an act of grace and favour by the head of State and can take two forms. In one, a pardon releases the offender and entirely sets aside his conviction and sentence. The other form, also known as amnesty, moves forward the release date of an offender or class of offenders. A head of State would also order an amnesty. This terminology is not fixed, though, and pardon and amnesty are used interchangeably.

Pardons and amnesties are particularly vulnerable to the criticism that they may be arbitrary and lead to abuse of power and corruption. The traditional view is that these powers exercised by the Head of State are not subject to judicial review. This is also expressed in the Tokyo Rules, which provides that "post sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon the application of the offender".[166] More modern administrative law in a number of jurisdictions recognises, however, that, while Heads of State have very wide discretion when exercising these prerogative powers, they are still bound by constitutional principles that outlaw arbitrariness and unfair discrimination. If they infringe against these principles, they, too, can be challenge in court.

In considering the exercise of the prerogative of mercy in respect of a prisoner under sentence of death, the President shall cause the case to be considered at a meeting of the Committee on the Prerogative of Mercy established under section 54 of the Constitution.[167]

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[165] Constitution of Botswana Prerogative of Mercy
Section 53. The President may –
(a) grant to any person convicted of any offence a pardon, either free or subject to lawful conditions;
(b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
(c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; and
(d) remit the whole or part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Government on account of any offence.

[166] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) Rule 9.3

[167] The Constitution of Botswana Advisory Committee on Prerogative of Mercy
54. (1) There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of –
(a) the Vice-President or a Minister appointed by the President by instrument in writing under his or her hand;
(b) the Attorney General; and
(c) a person qualified to practise in Botswana as a medical practitioner, appointed by the President by instrument in writing under his or her hand.
(2) A member of the Committee appointed under subsection (1)(a) or (c) of this section shall hold his or her seat thereon for such period as may be specified in the instrument by which he or she was appointed:
Provided that his or her seat shall become vacant-

(i) in the case of a person who, at the date of his or her appointment, was the Vice-President or a Minister, if he or she ceases to be the Vice-President or a Minister; or

After obtaining the advice of the Committee, the President shall then decide whether to exercise any of his powers under section 53 of the Constitution.[168] Again, the traditional view was that any decision of such a committee, when reviewing a sentence of death and advising the Head of State on the exercise of the prerogative of mercy, was not subject to review before the courts. In those jurisdictions subject to the jurisprudence of the Judicial Committee of the Privy Council this is no longer the case. It has now been held that prisoners having their cases considered by a mercy committee are entitled to have the rules of natural justice observed and such prisoners do, therefore, have the right to be heard.

The trend in many common law jurisdictions in matters concerning the exercise of the Prerogative of Mercy is therefore to subject both the decisions of the Head of State and those of the Mercy Committee to judicial review. Any review of criminal sentencing may therefore provide an opportunity for the Constitutional provisions relating to the Prerogative of Mercy to be reconsidered in the light of the developments in judicial review taking place elsewhere in the Commonwealth.

iii) Temporary release

Any review of early release mechanisms may also provide an opportunity to consider the formalisation under the law of short periods of release in respect of prison inmates for a number of specific purposes. These can include:

- Release for compassionate or family grounds, including illness of the prisoner or a family member or bereavement.
- Day release for other significant family events such as weddings, or religious sacraments or ceremonies.
- Christmas release or release for other equivalent religious events.
- Release for purposes of employment or training in preparation for full release.
- Weekend or daily release in preparation for full release.

Clear criteria should be set out for how a prisoner can qualify for such release; decisions should be made in an open and transparent manner; full reasons should be given for each decision; and decisions should be open to appeal. Any proposed legislation should also

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(ii) if the President, by instrument in writing under his or her hand, so directs.

(3) The Committee shall not be summoned except by the authority of the President who shall, as far as practicable, attend and preside at all meetings of the Committee, and, in the absence of the President, the member of the Committee appointed under subsection (1)(a) of this section shall preside.
(4) The Committee may act notwithstanding any vacancy in the membership and its proceedings shall not be invalidated by the presence or participation of any person not entitled to be present at or to participate in those proceedings.
(5) Subject to the provisions of this section, the Committee may regulate its own procedure.

[168] 55. (1) Where any person has been sentenced to death for any offence, the President shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as he or she may require, to be considered at a meeting of the Advisory Committee on the Prerogative of Mercy; and after obtaining the advice of the Committee he or she shall decide whether to exercise any of his or her powers under section 53 of this Constitution.
(2) The President may consult with the Committee before deciding whether to exercise any of his or her powers under the said section 53 in any case not falling within subsection (1) of this section.

make a clear demarcation between the purposes and criteria of short-term temporary release and parole, which is release on licence for the purpose of ending the period of detention. The use of short-term temporary release as a prelude to parole should be carefully structured within sentence planning.

iv) Day-to-Day release

Day-to-day release may also be considered as a part of any revised sentencing policy. Such release usually arises to permit prisoners to participate in work outside the prison, but may also be used to support the building of family relationships. In some circumstances a prisoner may be accompanied by a prison officer (under escort), or may go unaccompanied. Day-to-day release and weekend release offer great potential to facilitate work training as well as supporting the development of family relationships – particularly in relation to longer-term prisoners – if utilised carefully in order to gradually prepare them to re-join the community in a safe, structured and supported manner.

v) Early release on compassionate grounds – the terminally ill and elderly

An established system of early release provides the prison system with alternatives for dealing with offenders who may be particularly vulnerable to the rigours of imprisonment, a vulnerability that may emerge after initial sentencing.

The terminally ill are a category of prisoner for whom early release would be considered appropriate, if not automatic. Some criminal justice systems have special procedures to consider accelerated parole for the terminally ill; others might make use of special pardons. Once it is established that these inmates have no hope of recovery, the criminal justice system should release them without delay and make arrangements for their continued medical treatment in the community. As they are highly unlikely to reoffend, courts generally need not set strict conditions governing their release.[169]

Criminal justice systems may also consider releasing the very elderly on compassionate grounds, even if they are not terminally ill. Prisons are not suitable institutions for old people. A practical difficulty is that the elderly may not have a ready-made support network when they return to society. The criminal justice system should therefore pay particular attention to finding them appropriate accommodation on release.

[169] In South Africa, to assist the parole board, physicians submit monthly medical reports for all offenders under consideration for early release. The procedure for release in such cases is as follows:

- A thorough medical examination should be conducted to assist decisions by parole boards.
- Two independent medical doctors must examine the prisoner who is to be considered for early release.
- Social work reports should also be submitted to indicate the available of aftercare and care providers.
- In all cases of referrals to other care providers, the offender must give an informed consent.
- Early identification of the relatives and other service providers for HIV/AIDS infected prisoners is important to facilitate placement after release. This can be achieved through partnership with other service providers including the families.
- Each prison must identify community structures to assist with placement after release. Such services should include hospice care, social workers, and others to assist in training relatives.

VI. CHILDREN IN CONFLICT WITH THE LAW

A. Policy Objectives

The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. The objective of sentencing a juvenile offender must be his or her reintegration into society or rehabilitation.

B. Policy Issues

1. Is the Children's Act working? What steps need to be taken for the Act to become fully operational?

2. Should the age of criminal responsibility be raised from eight years?

3. Should the rebuttable presumption of *doli incapax* be abolished in respect of children under the age of 14 years?

4. What is the role, if any, of the customary courts in respect of children who come into conflict with the law?

5. How effective are the powers of the children's court when dealing with a child charged with an offence?

C. Policy Recommendations

1. The international and regional instruments relating to children and young offenders should be periodically reviewed by the State with a view to ratification or accession and, where necessary, their transformation into domestic law.

2. Consideration should be given to raising the age of criminal responsibility from eight years to either 10 or 12 years of age.

3. Consideration should be given to abolishing the rebuttable presumption of *doli incapax* in respect of children under the age of 14 years so as to expose to automatic criminal liability those between the new minimum age of criminal responsibility and the age of fourteen years.

4. Immediate steps should be taken to clarify the legal jurisdiction of the courts in respect of children who come into conflict with the law. In particular the role, if any, of the customary courts in respect of juvenile offenders should be clarified.

5. A probation service should be established for Botswana in order, *inter alia*, to fulfil the provision in section 85 of the Children's Act.

6. An immediate review should be undertaken of the operation of the School of Industries with a view to the better utilisation of the facilities available at the school and the integration of the school into the Botswana prison system under the jurisdiction of the Ministry of Justice, Defence and Security.

7. When introduced, community service orders should be applied with particular emphasis to children and juvenile offenders over the age of 16 who come into conflict with the law.

8. Alternative non-custodial sentences to corporal punishment for juvenile offenders should be developed and incorporated into the criminal justice system.

9. Clear sentencing guidelines should be formulated for use by the courts when dealing with offenders below the age of 18 years.

10. Immediate steps should be taken to provide educational and training facilities for boys held at the Moshupa prison and a structured timetable formulated and introduced stipulating the minimum number of hours of classroom teaching and vocational training each boy must undergo each week.

11. A comprehensive review should be undertaken of the holding, treatment and rehabilitation of juvenile offenders within the penal system with a view to the formulation of a new juvenile justice policy for children who come into conflict with the law.

Commentary

1) The importance of compliance with international instruments when formulating a sentencing policy for children
2) The current law relating to children in conflict with the law
3) Who is a child?
4) The age of criminal responsibility
5) Should the age of criminal responsibility be raised?
6) The rebuttable presumption of "*doli incapax*"
7) Do the customary courts have lawful jurisdiction in respect of children?
8) The powers of the children's court when dealing with a child charged with an offence

- **a) Placing the child on probation**
- **b) Sending the offender to a school of industries**
- **c) Sentencing the child to community service**
- **d) Sentencing the child to corporal punishment**
- **e) Sentencing the child to imprisonment**

1) The importance of compliance with international instruments when formulating a sentencing policy for children

One aspect of sentencing that has become the focus of much attention is that relating to children who come into conflict with the law. Child sentencing has now become subject to increasing levels of international scrutiny and the United Nations has developed several human rights instruments applicable to the child justice sector. Accordingly, any sentencing policy must pay particular attention to the relevant international instruments relating to the treatment of children and young offenders. These instruments include:

- United Nations Convention on the Rights of the Child
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty
- United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)
- Guidelines for Action on Children in the Criminal Justice System
- United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)
- United Nations Committee on the Rights of the Child General Comment No. 10

Of these Instruments only the United Nations Convention on the Rights of the Child is binding on Botswana. All the other instruments are non-binding and while they may contain objectives and provisions that the State should aspire to achieve, non-compliance will not attract international responsibility.

However, as human rights and children's rights are increasingly globalised and States increasingly reviewed by their peers, domestic policy and law reform can no longer be formulated in isolation from international law. Accordingly, in the formulation of its sentencing policy, it will be necessary for the State to pay close attention to the requirements and guidelines of these international instruments. There are also significant domestic advantages to participating fully with the international treaty monitoring bodies. Importantly, such participation requires regular reporting to the appropriate international bodies by the State and ensuring that such reporting is fair and accurate. Compliance will therefore encourage the systematic collection of accurate information and data that will be available to the State and it will ensure continuous monitoring of implementation.

For example there is currently uncertainty about the number of children who come into contact with the criminal justice system. The Police service does not collect this information in any publicly accessible format. There is no central register that records the number of children who are tried, convicted or acquitted. How many children are arrested annually? How many children's cases are diverted away from the formal court procedure? All this information needs to be gathered and collated to facilitate the reporting requirements of the State and help monitor the effectiveness of the child justice system.

2) The current law relating to children in conflict with the law

The current Children's Act came into force on 19 June 2009. The Act is an attempt to transform into domestic law the international obligations of the State under the United Nations Convention on the Rights of the Child. However despite being in force for over four years the State appears to have done little to establish the infrastructure and put in place the mechanisms for the Act to fully operate. There also appears to be some inconsistencies and ambiguities in the manner in which certain provisions of the Act are being applied.

In general, the Children's Act now sets out the law applicable in respect of children who may come into conflict with the law. It is expressly provided in the Act that, subject to

certain exceptions, in the event of any conflict or inconsistency between the provisions of the Act and any other legislation, the provisions of the Act will take precedence.[170]

Under the Act, jurisdiction over matters concerning children set out in the Act is vested in Children's Courts. It is expressly provided that for the purpose of the Act, every magistrate's court shall be a children's court.[171] As regards children in conflict with the law, Section 36(2)(e) of the Act provides that a children's court shall adjudicate any matter involving the hearing and determination of charges against children aged between 14 and 18 years.

3) Who is a child?

The United Nations Convention on the Rights of the Child defines a child as a person under the age of 18 years.[172] Other United Nations instruments use the term "juvenile". The term "juvenile" also denotes a person under the age of 18 years and may be used interchangeably with "child". In practice many of the principles set out in the international instruments are also applicable to young adults older than 18 years and wherever possible it is recommended that States apply the same principles to them as well.

The Children's Act, 2009 defines a child as any person who is below the age of 18 years.[173] The Act contains provisions for dealing with children who come into conflict with the law and confers jurisdiction to hear and determine charges against persons aged between four and 18 years on the children's court. However, unlike the law applicable in other jurisdictions, the Children's Act does not contain detailed provisions that differentiate the procedures to be followed and penalties to be applied in respect of the differing age categories of children.

For example in the United Kingdom the age of criminal responsibility in England and Wales is 10 years old. This means that children under 10 cannot be arrested or charged with a crime. Instead there are other punishments that can be given to children under 10 who break the law. Children between 10 and 17 can be arrested and taken to court if they commit a crime. However they are treated differently from adults and are dealt with by

[170] Section 3. In the event of any conflict or inconsistency between the provisions of this Act and any other legislation, the provisions of this Act shall take precedence, except where the exercise of the rights set out in this Act has or would have the effect of harming the child's emotional, physical, psychological or moral well-being, or of prejudicing the exercise of the rights and freedoms of others, national security, the public interest, public safety, public order, public morality or public health.

[171] 36. Establishment and jurisdiction of children's court
(1) For the purpose of this Act, every magistrate's court shall be a children's court.
(2) A children's court shall adjudicate any matter involving –
(a) the holding of an investigation in respect of a child alleged to be in need of protection;
(b) an application for a protection order;
(c) an application for foster care or adoption;
(d) the neglect, ill-treatment, abuse or exploitation of a child;
(e) the hearing and determination of charges against children aged between 14 and 18 years;
(f) the removal or abduction of a child from Botswana; and
(g) any other matter which may be conferred upon it by this Act or any other law.
(3) Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper custodian of all children.

[172] Article 1 provides that for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

[173] Section 2. Interpretation. "child" means any person who is below the age of 18 years.

youth courts, given different sentences and sent to special secure centres for young people, not adult prisons Young people aged 18 are treated as an adult by the law. However if they're sent to prison, they will be sent to a place that holds 18 to 25-year-olds, not a full adult prison.

The Prisons Regulations (made under section 147 of the Prisons Act Chapter 21.03) provide for the classification of prisoners having regard to their age, character and previous history.[174] Under the Regulations prisoners under the apparent age of 18 or young convicted prisoners of whatever age who in the opinion of the officer in charge should not, having regard to their age and character, be classed with adult prisoners, are specifically categorised into a "Young Prisoner Class".[175] It is expressly provided that, as far as practicable, prisoners in this class should be segregated from other classes of prisoners at all times.[176]

While convicted prisoners under the apparent age of 18 years must remain in the Young Prisoner Class, those convicted prisoners aged 18 years or older categorised in the Young Prisoner Class may be reclassified into the Star Class at any time at the discretion of the officer in charge.[177] This Star Class consist of convicted prisoners not being in the Young Prisoner Class, who are first offenders or well behaved prisoners and who the officer in charge is satisfied have no vicious tendencies or habits.[178]

Section 27(1) of the Penal Code provides that no person under the age of 14 years shall be sentenced to a term of imprisonment. In practice boys under the age of 18 may be sent to the School of Industries. Boys aged 16 to 18 will be sent to the Boys Prison at Moshupa. This prison also houses some boys up to the age of 21. Persons sentenced to custodial sentences over the age of 18 will be sent to an adult prison. It is difficult to discern any criteria applied by the courts when sentencing boys to the School of Industries rather than the Moshupa prison. Furthermore the categorisation of young offenders under the Prison Regulations and the resulting overlaps between age groups, particularly those between 18 and 21, makes it difficult to gather accurate statistics for the purpose of measuring compliance with the Convention on the Rights of the Child.

Furthermore, although international law requires that children must at all times be separated from adults in prisons and police cells, this does not always happen. Difficulty with age determination may result in adults being detained with children in prisons and police cells. Many police stations are also without the necessary cell capacity to enable the separation of the sexes and children from adults. Vehicles used to transport prisoners to court are not fitted to allow for the segregation of children from adults. The use of the words "as far as

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[174] Rule 5(1) With a view to facilitating the training of prisoners and minimizing the danger of contamination, prisoners shall be classified having regard to their age, character and previous history in the following classes -)

[175] Rule 5(1)(a) provides:

> Young Prisoner Class, which shall consist of convicted prisoners under the apparent age of 18 years or young convicted prisoners of whatever age who in the opinion of the officer in charge should not, having regard to their age and character, be classed with adult prisoners.

[176] Rule 5(2) provides that

> Arrangements shall be made at all prisons, as far as practicable, for effective segregation of the various classes of prisoners from each other at all times.

[177] Rule 6(1) provides that:

> The officer in charge may in his discretion at any time remove from the Young Prisoners Class a prisoner of 18 years of age or over whom he regards as unsuitable by character for that class, and may place him in the Star Class.

[178] Rule 5(1)(b) provides. Star Class, which shall consist of convicted prisoners not being in the Young Prisoner Class who are first offenders or well behaved prisoners and who the officer in charge is satisfied have no vicious tendencies or habits.

practicable" in Rule 5(2) does confer the discretion on the prison authorities to mix child prisoners with adult prisoners. This is in contravention of the Convention on the Rights of the Child.

4) The age of criminal responsibility

All legal systems set a minimum age below which children are not held responsible for what they do. These minimum ages show a wide variation, from the age of seven in countries such as Ireland, Switzerland or South Africa, to 14 in Germany, Italy, Japan and Vietnam, to 18 in Luxembourg, Brazil and Peru.

This relatively wide variation in the ages of criminal responsibility adopted by States in domestic law accords with international law and the principles embodied in the United Nations Convention on the Rights of the Child. The Convention is silent as to what should be the appropriate minimum age of criminal responsibility, save for the general provision in Article 1 of the Convention that a child is a person below the age of 18 unless the age of majority is attained earlier under the domestic law as applicable to the child. [179] Furthermore, under Article 40 of the Convention, it is stipulated that States parties are required to give recognition to the rights of every child who has allegedly acted contrary to the penal law of the land, and to take account of his age.[180]

In pursuance of this objective, Article 40(3) of the Convention refers to the age of criminal responsibility and requires States parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. [181] However no international standards exist that establish this minimum age of criminal responsibility. Some guidance may however be found in the Beijing Rules, Rule 4.1 of which stipulates that the age of criminal responsibility should not "be fixed at too low an age level bearing in mind the facts of emotional, mental and intellectual maturity". [182]

The Commentary to Rule 4.1 gives further guidance on what is meant by emotional, mental and intellectual maturity. It states that:

"The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and

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[179] Article 1

[180] Article 40

States parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in the a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

[181] Article 40(3)

States parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

[182] Rule 4.1 of the Beijing Rules:

4.1 In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally."

Section 13(1) of the Penal Code[183] provides that the minimum age of criminal responsibility is eight years. This provision creates a conclusive or irrebuttable presumption that a child under the age of eight years is *doli incapax* (incapable of committing a crime). Under the law as it stands, any person under the age of eight will be fully and legally excused from criminal responsibility, even if there is cogent evidence which unequivocally points to the child's commission of a crime.

In respect of a child of eight but under 14 years of age, section 13(2) of the Penal Code follows the common law rule that a *rebuttable* presumption of *doli incapax* will apply. The section provides for a rebuttable presumption that children lack criminal responsibility between the ages of eight and 14 years with the onus being on the State to prove criminal responsibility. This means that under the age of eight a child is presumed to have no criminal capacity; and between eight and 14 the State presumes that a child lacks criminal capacity, but this presumption is rebuttable if the State can prove the child has criminal capacity beyond all reasonable doubt.

The Children's Act, 2009 in Article 82 also provides for the age of criminal responsibility and reiterates the rebuttable presumption that children under the age of 14 years lack criminal responsibility unless it can be prove that at the time of committing the offence the child had capacity to know that he or she ought not to do so. Under the Children's Act the relevant date for determining the age of a child who is alleged to have committed an offence shall be the date of the alleged offence.[184]

By adopting this graduated approach to the age of criminal responsibility, the legislation requires that, for children of a certain age group, the individual child's capacity to understand the difference between right and wrong must be assessed. For children falling within this age range, the State bears the burden of proving that the child had the capacity to differentiate between right and wrong at the time the offence was committed and was able

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[183] 13. Immature age.
(1) A person under the age of eight years is not criminally responsible for any act or omission.
(2) A person under the age of 14 years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.
(3) A male person under the age of 12 years is presumed to be incapable of having carnal knowledge.

[184] 82. Age of Criminal Responsibility
(1) A child under the age of 14 years shall not be presumed to have the capacity to commit a criminal offence unless it can be prove that at the time of committing the offence the child had capacity to know that he or she ought not to do so.
(2) The relevant date for determining the age of a child who is alleged to have committed an offence shall be the date of the alleged offence.

to conform is behaviour to that understanding. This approach is attractive, because it allows for the subjective consideration of the child's capacity and does not rely on an arbitrary cut-off point.

5) Should the age of criminal responsibility be raised?

By raising the minimum age of criminal responsibility the State will automatically exclude a number of children from the criminal justice system who cannot be legally held in a prison.

In recent years, in many jurisdictions, there have been calls for the minimum age of criminal responsibility to be raised. The formulation of a new sentencing policy may provide an opportunity to reconsider the minimum age of criminal responsibility and review both the irrebuttable and rebuttable presumptions of *doli incapax* on the general ground that the relevant ages set for the two presumptions are unrealistically low; and are thus contrary to the interests of children and the community at large. In England and Wales, for example, the minimum age of criminal responsibility has been raised from eight years to a more mature age of ten years[185] and the rebuttable presumption of *doli incapax* has been abolished. In other countries the minimum age currently adopted is generally set within the range of ten to 12 years of age

In support of raising the minimum age of criminal responsibility it can be argued that it is undesirable to subject young children who are still socially and mentally immature to the full panoply of criminal proceedings, with their attendant sanctions and stigma. An eight-year-old child may be considered too young to take full criminal responsibility and to be made subject to complex and perhaps lengthy criminal proceedings, which flow from a prosecution. Is it appropriate to expose a child of, say, nine years of age to the full rigours of the criminal justice system?

Alternatively, in support of maintaining the minimum ages of criminal responsibility, it can be argued that bringing young delinquents into the criminal justice system in their formative years provides an opportunity for systematic rehabilitation. Sanctions imposed on a child at an early age reduce the likelihood that he will develop a life-long pattern of criminal behaviour. It can also be argued that, because of the greater opportunity for education, children today acquire mental and social maturity relatively early and can readily distinguish right from wrong at an early age.

In endeavouring to determine whether or not change is necessary to the existing minimum age of criminal responsibility, it is relevant to examine the approach adopted in other jurisdictions. A comparative study of the rules applicable in other States will show that there is considerable disparity as to the minimum ages adopted for imposing criminal responsibility. However there is no doubt that Botswana's minimum age is at the low end, comparatively speaking, with minimum ages ranging internationally from seven to 18 years. The international trend towards a raising of the minimum age of criminal responsibility must be viewed with some caution, however. Equally, while the practice in other jurisdictions is of relevance, it cannot be regarded as presenting a conclusive case for a change, particularly in an area of the law, which even more than most reflects the cultural and social values of the particular jurisdiction.

A legitimate concern aroused by proposals to raise the minimum age of criminal responsibility would be that it would allow deviant behaviour of those below the minimum age of criminal responsibility to go unchecked. A number of European jurisdictions have adopted measures designed to ensure care and control of these children. In most European

[185] (Section 16 of the Children's and Young Persons Act, 1963)

countries for example, children under 14 who commit offences do not appear before the criminal courts, but are dealt with by family courts concerned with the need for compulsory measures of care.[186] For example, in France, although a child below the age of 13 cannot be held criminally responsible, a child aged ten or above can be brought to a civil court in relation to certain offences for a detention order to be made.

In Canada, the age of criminal responsibility has been raised from the established common law rule of seven to 12 years of age. The rebuttable presumption of *doli incapax* has also ceased to operate in Canada. Section 13 of the Canadian Criminal Code provides that:

> No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.

While no child under 12 years of age may be held criminally responsible, a child below this age whilst involved in criminal activity may, however, be subject to provincial child welfare legislation. Children aged between 12 and 14 years of age are not dealt with by ordinary criminal courts, but are instead brought before a youth court, where special procedures are adopted at the hearing, which make allowance for their relative young age. Those between 14 and 18 years of age are, under normal circumstances, tried in youth courts. Where serious indictable offences are involved, however, they would be transferred to ordinary criminal courts for trial should the arrangements be considered appropriate under all the circumstances of the case, including the interests of both the community and the young defendants.

Raising the age of criminal responsibility need not necessarily prompt an increase in juvenile crime by those no longer falling within the net of criminal liability. There already exist alternatives to prosecution that enable unruly children to be brought under control. For example, the Children's Act is designed to protect children and juveniles who are in need of care or protection. Under section 40 of the Act, a children's court may make a range orders in respect of a child in need of care and protection. Thus, a child who is beneath the age of criminal responsibility may nonetheless still be susceptible to control. Orders would be available under the Children's Act. This may be considered preferable to criminal prosecution as the counselling and supervision provided under such orders to young delinquent children may prove more beneficial than a criminal sanction.

6) The rebuttable presumption of "*doli incapax*"

Any review of the law governing the minimum age of criminal responsibility must also consider the rebuttable presumption of *doli incapax* that applies in respect of children between the ages of eight and fourteen. The Children's Act, by section 82(1)[187] provides for a rebuttable presumption that children under 14 years of age lack criminal responsibility. This means that in the case of a child under 14 years of age the law presumes that the child, lacks criminal capacity, but this presumption is rebuttable if the State can prove beyond all reasonable doubt that the child, at the time of committing the offence, knew that he or she ought not do so. But, unlike section 13 of the Penal Code, section 82(1) does not stipulate

[186] P Cavadino, "Children Who Kill: a European Perspective" (1996) September 13 New Law Journal, at 1325.

[187] Section 82. Age of criminal responsibility

(1) A child under the age of 14 years shall not be presumed to have the capacity to commit a criminal offence unless it can be proved that at the time of committing the offence the child had capacity to know that he or she ought not to do so.

(2) The relevant date for determining the age of a child who is alleged to have committed an offence shall be the date of the alleged offence.

any minimum age below which children are not held responsible for what they do. Indeed section 83(1) of the Act confers jurisdiction on a children's court to hear and determine any charge against a person aged between four years and 18 years of age.[188]

While section 36(2)(e) therefore confers jurisdiction on a children's court to determine charges against children aged between 14 and 18 years, section 83(1) extends the jurisdiction of the court to determine charges against children aged between four years and 18 years. Presumably this extension of jurisdiction by section 83(1) will fall within the jurisdiction conferred upon the children's court by section 36(2)(g) to adjudicate any other matter conferred upon it by this Act or any other law.

But what of the conflict between the Children's Act, section 83(1) and the Penal Code, section 13(1)? Section 13(1) of the Penal Code[189] provides that the minimum age of criminal responsibility is eight years. This provision creates an irrebuttable presumption that a child under the age of eight years is *doli incapax*. Under the Penal Code, any person under the age of eight will be fully and legally excused from criminal responsibility, even if there is cogent evidence that unequivocally points to the child's commission of a crime. However under the combined application of section 82 and section 83(1) of the Children's Act, children from the age of four years may now have charges heard and determined before a children's court. Was it in fact the intention under the Children's Act to repeal section 13(1) of the Penal Code and replace the presumption that a child under the age of eight years is *doli incapax* with a rebuttable presumption of *doli incapax* applicable to children between the ages of four and 14 years? If not, to what age group should the presumption apply or indeed, should the opportunity be taken to abolish the rebuttable presumption of *doli incapax* altogether?

The option of raising the age of criminal responsibility would require consideration of the appropriate level to which the new minimum age of criminal responsibility should be raised. The removal of the rebuttable presumption of *doli incapax* would expose to automatic criminal liability those between the new minimum age of criminal responsibility and the age of fourteen. The difficulty lies in determining who within the ages of eight to 14 years should be included in the revised minimum age. The selection is by no means an easy one. In England and Wales the minimum age is now ten years. The abolition of the rebuttable presumption of *doli incapax* means that all persons at or above the age of ten years in England and Wales are now made fully responsible for their criminal acts. If a similar approach is to be adopted in Botswana, it is necessary first to be satisfied that children here are sufficiently mature at the age of ten years (or indeed whatever is the chosen age) to justify the imposition on them of full criminal responsibility.

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[188] Section 83. Trial of children

(1) Subject to section 82, a children's court shall not have jurisdiction to hear and determine any charge against any person other than a person aged between four years and 18 ears.

(2) Where a child is charged jointly with a person who is aged 18 years or over, the child shall, subject to the evidence, be given a separate trial from the other accused person.

(3) Where, having regard to the evidence, a child cannot be tried separately from an offender aged 18 years or over, the trial shall be held in a children's court.

[189] 13. Immature age.

(4) A person under the age of eight years is not criminally responsible for any act or omission.

(5) A person under the age of 14 years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

(6) A male person under the age of 12 years is presumed to be incapable of having carnal knowledge.

One advantage of this option is that it would greatly simplify the law by applying only one test as to criminal responsibility. It would also mean that children who had formerly been exposed to criminal proceedings at an inappropriately young age would be spared that ordeal. One disadvantage of the abolition of the rebuttable presumption of *doli incapax* would be the loss of a protective mechanism to take account of those aged between the revised minimum age and 14 years who are less mature than their peers. Under this option, these young persons would be subject to full adult criminal justice.

7) Do the customary courts have lawful jurisdiction in respect of children?

Under the Children's Act jurisdiction under section 36 is conferred on children's courts and it is provided that every magistrate's court shall be a children's court. Two questions therefor arise:

(a) Do children's courts have exclusive jurisdiction over criminal charges involving children in conflict with the law aged between four and 18 years of age?
(b) Is the jurisdiction to hear and determine charges in respect of children in conflict with the law now vested exclusively in magistrate's courts sitting as children's courts in accordance with the provisions of the Children's Act?

The customary courts are hearing and determining cases involving children. But under the Children's Act jurisdiction to hear and determine charges against children aged between four and 18 is vested in the children's courts. The Children's Act provides that every magistrate's court shall be a children's court. It further provides that every magistrate shall be a presiding officer of a children's court. Where in any area, there is no magistrate, the district commissioner or the district officer of the administrative district shall preside over matters involving children. Nowhere in the Children's Act is any mention made of the customary courts.

Furthermore the provisions contained in the Children's Act relating to officers of the children's court,[190] the application of the Magistrate's Court Act and rules,[191] the sittings of

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[190] 37. Officers of children's court

(1) Every magistrate shall be a presiding officer of a children's court.
(2) Where, in any area, there is no magistrate, the district commissioner or the district officer of the administrative district shall preside over matters involving children.
(3) The Chief Justice may assign a magistrate as a dedicated presiding officer of a children's court.
(4) The Director of Public Prosecutions shall assign, to a children's court, an officer (in this Act referred to as "a children's court assistant"), who, at any proceedings of a children's court, shall –
    (a) adduce any available evidence relevant to the proceedings; and
    (b) generally assist the court in performing its functions under this Act.
(5) A probation officer shall be an officer of a children's court and shall be present at any sitting of a children's court.
(6) There shall be attached, to every children's court, a clerk of the court, who shall perform the same functions as those of a clerk of a magistrates court.

[191] 38. Application of Magistrates' Court Act and rules

Except as is provided in this Act or any other law, the provisions of the Magistrates' Court Act and the rules made thereunder in relation to the -

(a) appointment and functions of officers;
(b) issue and service of process;
(c) conduct of proceedings;
(d) execution of judgment; and
(e) imposition of penalties for non-compliance with an order of the court or an obstruction of execution of any judgment, or contempt of court shall apply in like manner to a children's court.

the children's court [192] and the right to legal representation before the court [193] are all incompatible with any jurisdiction that the customary courts may exercise.

8) The powers of the children's court when dealing with a child charged with an offence

The powers of the children's court dealing with a child charged with an offence are set out in section 85 of the Act.[194] The section provides that where a child charged with an offence is tried by a children's court and the court is satisfied of his or her guilt, the court must firstly consider the general conduct, home environment, school records and medical history (if any) of the child. The court then has the following five options available:

(a) placing the child on probation for a period of not less than six months or more than three years;
(b) sending the offender to a school of industries for a period not exceeding three years or until he or she attains the age of 21 years;
(c) sentencing the child to community service for such period as the court considers appropriate;
(d) sentencing the child to corporal punishment; or
(e) sentencing the child to imprisonment.

But how are these options being implemented in practice and how effective are they?

a) Placing the child on probation

Magistrates presiding over children's courts are placing children on probation. However it is not clear if the "probation officers" have been appointed as such by the Minister acting under section 91 of the Children's Act or whether they are merely social workers performing the functions of a probation officer. Section 91 requires the probation officers appointed by the Minister to be qualified in matters relating to child welfare. The section

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[192] 39. Sitting of children's court
(1) A children's court shall be held informally and shall sit a room other than that in which any other court ordinarily sits.
(2) No person shall be present at any sitting of a children's court except –
(a) officers and members of the court;
(b) the child concerned and his or her parents, other relatives or guardian;
(c) the social worker concerned in the case; and
(d) such other person as the court may specially authorize to be present.

[193] Section 95. Legal representation
(1) A party in a matter before a children's court may appoint a legal representative of his or her own choice and at his or her own expense.
(2) The State shall provide counsel to represent any person involved in proceedings before a children's court if that person cannot afford the cost of legal representation.

[194] Section 85. Manner of dealing with child charged with offence
Where a child charged with an offence is tried by a children's court and the court is satisfied of his or her guilt, the court shall, after taking into consideration the general conduct, home environment, school records and medical history (if any) of such child dispose of the case by –
(a) placing the child on probation for a period of not less than six months or more than three years;
(b) sending the offender to a school of industries for a period not exceeding three years or until he or she attains the age of 21 years;
(c) sentencing the child to community service for such period as the court considers appropriate;
(d) sentencing the child to corporal punishment; or
(e) sentencing the child to imprisonment.

also sets out in detail the functions the probation officer is to perform.[195] Probation officers are a vital part of the Children's Act. Steps should be taken to ensure that sufficient, qualified probation officer are available. In this respect the University of Botswana should be encouraged to establish courses to train and qualify probation officers. Steps should also be taken to appoint a probation committee as envisaged in section 92 of the Children's Act.[196]

b) Sending the offender to a school of industries

Section 2 of the Children's Act defines "school of industries" as a child welfare institution licensed under the Act which provides vocational training and rehabilitation services to children who are or have been in conflict with the law."

There is currently one school of industries (Ikago) serving the whole of Botswana located at Molepolole. The school was established before the Children's Act in 2001 as a pilot project to initially cater for three groups of children:

(i) Children in conflict with the law aged 8-14 years old.
(ii) Children in need of care aged 8-14 years old.
(iii) Juveniles in conflict with the law aged 14 -18 years old.

The school was built to have a holding capacity of 100 children, comprising equal numbers from each of the three groups. However since opening in 2001 only boys falling into the third group have been detained there. The number of boys accommodated at the school has fluctuated but has always been well below the school's capacity. The highest number of boys accommodated at the school was 48 achieved in 2009. Presently the number is 15.

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[195] Section 91. Probation officers
(1) The Minister shall appoint such number of persons as he or she considers necessary, to be probation officers.
(2) A person shall not be appointed as a probation officer unless he or she is of good character and qualified in matters relating to child welfare.
(3) The functions of probation officers shall be to –
(a) make an assessment of the risk posed by a child offender to the community;
(b) prepare a pre-sentence report for the court setting out relevant personal information about the child offender, an analysis of the offences committed, and a proposal about the manner in which the child should be sentenced;
(c) devise and carry out any measures for the observation and correction of tendencies to delinquency in children, and for the discovery and removal of any conditions causing or contributing to the delinquency of children;
(d) supervise or control any child or other person convicted of an offence and placed under the supervision of the probation officer (including children sentenced to community service), in order to change the offender's attitude and behaviour;
(e) work with any child convicted under this or any other Act both during and after sentence;
(f) make arrangements for the release, from prison, of any child sentenced to imprisonment and to assist in the resettlement of that child in the community; and
(g) to perform such other appropriate duties as may be conferred on them under this Act or regulations made thereunder.

[196] Section 92. Appointment of probation committee
The Minister may appoint a probation committee consisting of such number of persons as he or she may consider desirable, chosen by reason of their experience and character, who shall review the work of probation officers and perform such other functions, in connection with probation, as may be proscribed.

The boys accommodated at the School of Industries are sentenced by the courts to a minimum of three months and a maximum of three years detention. Those boys who have families willing to receive them are allowed a 2 weeks home visit during their sentence. Initially the school received offenders who had committed minor crimes but now the school also takes serious offenders, including those convicted of stock theft, assault, rape and murder. The boys are therefore a mix of minor criminal offenders and serious criminal offenders. The school however is not a prison and since its inception has always been viewed as being a place of safety rather than a prison.

Security at the school is minimal and the boys often leave the school compound to visit the nearby village. The school is involved in community projects to allow the boys to engage with the community. However there is a poor relationship between the school and the nearby villagers making it difficult to gain community acceptance of the boys. Some boys have committed further offences while absent from the school. One boy was stabbed to death after he left the school to visit the village and got into a fight. Boys who commit further offences while at the school are usually remanded in the local police station for a few days following their arrest by the police and then returned to the school.

The school provides training in bricklaying, wielding, carpentry and auto-mechanics. There are relatively well equipped and staffed workshops at the school and the boys receive vocational training three days per week. The school provides certified courses accredited by Madirelo Training and Testing Centre. However the poor literacy skills of the boys means that the academic content of these courses must be omitted. After serving their sentences, arrangements may be made for the boys to upgrade their skills and qualifications. The school works with Vocational Training Colleges (VTCs) in this regard. Boys may be released three months prior to their custodial term to enable them to attend VTCs.

Despite being a pilot project established in 2001 the school has never been reviewed or assessed and those operating the school are unsure as to whether it is still a pilot project or not. Since the School was opened it has been operating without any regulations. Apparently draft regulations were prepared but never adopted. In 2009 draft Administrative Procedures were prepared for the School but again never implemented. The director has noted that it is difficult to run an institution which is recognised as a legally binding institution but which lacks the necessary regulations to govern its operations.

The school falls under the jurisdiction of the Ministry of Local Government. Currently there is 46 staff members employed at the school. These comprise four professional staff, eight technical staff, six support staff and 27 manual workers. However the school is under-resourced as regards specialist staff. The school has no psychologists and therefore has to depend entirely on generic social workers with no speciality in psychology, criminology or child justice. The senior personnel employed at the school are all women and as such they experience difficulty in supervising all male detainees.

Having visited the School of Industries it is apparent that the school is underutilised and has lost its way. There appears to be a total lack of structure and discipline at the school. There are several classrooms on the compound that are locked and never used. Workshops designed to accommodate up to 30 boys have, at the most, four boys in attendance. No attempt is made to introduce any academic content into the curriculum of the school. On the four days a week when they are not attending the workshops the boys are largely left to their own devices.

The current operation of the School of Industries is a waste of a valuable national resource. The problem may be because the school is placed under the Ministry of Local Government. This may have been acceptable when the school was originally created as a place of safety for children up to the age of 14 in need of care. But it has always been used for the

detention of children in conflict with the law sentenced by the courts. Such an institution requires a disciplines staff, security and a structured rehabilitation programme. It may therefore be more effective if the school were placed under the jurisdiction of the Ministry of Justice, Defence and Security.

c) Sentencing the child to community service

While the Children's Act may provide for community service as a punishment, in fact is not available as a sentencing option. This is a matter that needs to be addressed as a matter of urgency. Community sentences are one of the main forms of non-custodial sentences available.

In the United Kingdom, for example, a juvenile offender may get a community sentence if he is convicted of a crime by a court but is not sent to prison. The offender may have to do unpaid work in his local community. This is called Community Payback. The work may involve for example removing graffiti, clearing wasteland and decorating public places and buildings. Individuals and community organisations may nominate a Community Payback project and can suggest a Community Payback project that would benefit their area. The offender will usually work in his local area, and be managed by a Community Payback supervisor. He will be required to wear a high visibility orange vest while he works. Offenders can expect to complete anything from 40 to 300 hours of Community Payback, depending on how serious their crime was. If unemployed the offender will have to work 3 or 4 days each week. If the offender has a job, the Community Payback work will be arranged outside his working hours, like evenings or weekends.

Community sentences can be given for crimes such as damaging property and assault. An offender may get a community sentence if: (i) the court thinks that he is more likely to stop committing crime than if he goes to prison; (ii) it's the first time the offender has committed a crime; (iii) the offender has a mental health condition that affects his behaviour.

d) Sentencing the child to corporal punishment

Corporal punishment has been considered elsewhere in this Report. Here it is simply necessary to reiterate that the award of corporal punishment by the courts in respect of children is incompatible with the Convention on the Rights of the Child and that the continued use of corporal punishment in these circumstances will attract international condemnation. Steps should be taken immediately to stop the customary courts from usurping the role of the children's court and exercising jurisdiction over and awarding corporal punishment in respect of children in conflict with the law.

e) Sentencing the child to imprisonment

The Children's Act provides that any child who is a repeat offender shall be sentenced to imprisonment.[197]The Act expressly stipulates that any term of imprisonment imposed on a child shall be subject to the provisions of the Penal Code. Section 27(1) of the Penal Code provides that no person under the age of 14 years shall be sentenced to a term of imprisonment.[198] Section 89(2) of the Children's Act provides that a child convicted of murder shall not be sentenced to death. The section further provides in paragraph (3) that a child charged with a capital offence other than murder shall, subject to the provisions of the

[197] Section 88. Repeat offenders
A children's court shall, in the case of a child who is a repeat offender, sentence that child to imprisonment for such term as the children's court considers appropriate, subject to the provisions of the Penal Code, Cap. 08.01.

[198] 27(1). Sentence of imprisonment shall not be passed on any person under the age of 14 years.

Penal Code, be sentenced to imprisonment for such term as the court considers appropriate. Presumably this section should refer to children convicted of capital offences other than murder as opposed to children who have merely been charged with a capital offence.[199]

When sentencing young people who offend the approach should be different when compared with the approach used for adult offenders and the sentence imposed in an individual case should reflect this. In sentencing young offenders the following factors should always be considered:

(i) offending by a young person is frequently a phase that passes fairly rapidly and therefore the reaction to it needs to be kept well balanced in order to avoid alienating the young person from society;

(ii) a criminal conviction at this stage of a person's life may have a disproportionate impact on the ability of the young person to gain meaningful employment and play a worthwhile role in society;

(iii) the impact of punishment is felt more heavily by young people in the sense that any sentence will seem to be far longer in comparison with their relative age compared with adult offenders;

(iv) young people may be more receptive to changing the way they conduct themselves and be able to respond more quickly to interventions;

(v) young people should be given greater opportunity to learn from their mistakes;

(vi) young people will be no less vulnerable than adults to the contaminating influences that can be expected within a custodial context and probably more so.

The general rule should be that a custodial sentence should only be awarded to a child offender if the crime is so serious there is no other suitable option, or if the child has committed crimes before, or the judge or magistrate thinks that the child is a risk to the public

The Boys Prison located at Moshupa was built to accommodate all boys sentenced to imprisonment. The prison was recently constructed but has not yet been handed over to the Government by the contractor because of some issues regarding the quality of workmanship and compliance with the contract specifications. The prison has no built classrooms and there are no workshops or other training facilities. No emphasis is placed on imparting even basic educational or other skills to the boys held at the prison. The rehabilitation of young offenders is considered to be one of the most important aspects of sentencing. However at Moshupa a new prison has been constructed with no facilities aimed at the rehabilitation of the boys held there. There appears to be no adequate provision made for juvenile offenders below the age of 18 years held in custody. The State is failing in its obligation to provide even the most basic education and training for children held under its care and control.

[199] Section 89. Capital offences
(1) A child charged with murder shall be tried in the High Court which shall, for purposes of the trial, sit as a children's court.
(2) A child convicted of murder shall not be sentenced to death.
(3) A child charged with a capital offence other than murder shall, subject to the provisions of the Penal Code, be sentenced to imprisonment for such term as the court considers appropriate.

VII. A Sentencing Commission for Botswana

A. Policy Objectives

To improve the transparency, predictability and consistency of sentencing within the criminal justice system and address the problems of prison over-use and sentencing disparity.

B. Policy Issues

1. Is there a need to provide greater guidance to judges and presiding officers on the exercise of their sentencing discretion, and if so what would be the most appropriate mechanism for achieving this?

C. Policy Recommendations

1. Consideration should be given to the establishment of an independent sentencing commission mandated to formulate sentencing guidelines.

2. In consultation with the judiciary and other stakeholders a working paper should be prepared containing detailed recommendations for the establishment of a sentencing commission.

Commentary

1) Functions of a sentencing commission
2) Purposes and functions of the proposed sentencing commission
3) Sentencing education for judicial officers
4) Transparency in the development of sentencing policy
5) Membership of the sentencing commission

1) Functions of a sentencing commission

It is generally acknowledged that the sentencing system does little to prepare judicial officers for sentencing the offenders that come before the courts. The sentencing situation in Botswana is particularly acute since many offenders are sentenced before the customary courts presided over by persons with little or no legal training. The creation of a sentencing commission would be a means of improving the transparency, predictability and consistency of sentencing as regards both the customary and the common law courts. It would help address the problems of prison over-use, sentencing disparity and provide a means of avoiding the politicisation of sentencing practice and policy.

Sentencing Commissions or Councils have been established in many jurisdictions including England and Wales, Scotland, New Zealand, Canada, Victoria, New South Wales, and over

20 American states. Broadly speaking, they are expert bodies established to assist with the development of sentencing policy. The way in which they do this varies, but often it includes drafting sentencing guidelines.

A sentencing commission could serve three main functions:

- providing guidance to sentencers;
- gathering and providing information and statistics for monitoring, planning and policy development;
- community engagement – to inform and consult with the public.

A sentencing commission that discharged all three functions could assist judicial officers in many ways. It would play an important role in achieving a higher degree of uniformity in sentencing and bring about a more rational and scientific approach to the imposition of punishment. A sentencing commission could collect and disseminate sentencing information, develop sentencing guidelines and provide judicial education and training for judicial officers. The compilation of detailed statistical data on sentencing is important as a means of promoting uniformity. Many judicial officers lack adequate feedback about the effect of the penalties they actually impose and there is a general lack of information amongst judicial officers about their own sentencing practices, and those of judicial colleagues, appellate courts and other jurisdictions.

There is also a gross level of misunderstanding of the sentencing process. This can result in misinformation being reported by the media leading to the erosion of public confidence in the criminal justice system. A sentencing commission would play a valuable role in producing accurate but readily accessible information about sentencing issues to the media and the public.

The sentencing commission would also carry out an evaluation of the impact of both existing and proposed sentencing legislation. This is particularly important in respect of the legislative imposition of mandatory minimum sentences.

2) Purposes and functions of the proposed sentencing commission

When New Zealand introduced proposals for the establishment of a sentencing council it was stated that the Council should have the following purposes:
(a) promote consistency in sentencing practice between different courts and judges;
(b) ensure transparency in sentencing policy;
(c) promote consistency and transparency in Parole Board practice;
(d) foster the development of sentencing and parole policy, informed by a breadth of experience and expertise;
(e) facilitate effective management of penal resources;
(f) inform politicians and policy makers about sentencing and parole practice and reform options;
(g) inform the general public about sentencing and parole policies and decision-making, and thereby promote public confidence in the criminal justice system.

It was also stated that he Council should have the following functions:
(a) draft sentencing guidelines;
(b) draft parole guidelines;
(c) assess and take account of the cost-effectiveness of the guidelines;
(d) provide advice on sentencing and parole issues that relate to the development and use of the guidelines, either at the request of the Minister of Justice, or on its own initiative;
(e) collate and provide information about the extent of compliance with the guidelines for sentencing judges and the Parole Board;
(f) publish and make accessible information about sentencing and parole to the general

public.

The duties and powers of the proposed sentencing commission could be similar to those of the New Zealand Council and could include:

i) The establishment and administration of a specialised sentencing information system that would include:

- The collection of sentencing data from the common law and customary courts and the police service;
- The analysis and dissemination of sentencing data to sentencing judges, presiding officers and others involved in the criminal justice system;
- The evaluation of sentencing guidelines to determine their degree of applicability and relevance in particular cases as well as their effect on the use of incarceration and community sanctions;

ii) Develop and revise national guidelines for the type and range of sentences for specific offences and /or categories of offence.

iii) Make recommendations to Parliament regarding the revision of maximum penalties, mandatory minimum sentences, the structure of particular offences, the categorization of offences as to degree of seriousness and other matters relating to sentencing.

iv) Make recommendations to the Minister of Justice for the improvement or reform of sentencing laws and procedures.

v) Provide the Minister of Justice with information, research material and study results concerning sentencing.

vi) Provide (for the purpose of its consideration of any guideline judgment) at the request of the Court of Appeal, information relevant to the establishment and issues of guidelines.

vii) Provide training in sentencing to members of the judiciary, presiding officers of the customary courts and other criminal justice professionals.

viii) Convene members of the judiciary and presiding officers of the customary courts for consultation in the formulation of recommendations regarding consistency of approach in sentencing and the development and revision of sentencing guidelines.

ix) Consult with the judiciary, bar associations, institutions and persons engaged in teaching and conducting research on matters relevant to criminal law, and other professional or interested organisations and persons including members of the public. This would include inviting proposals and submissions and holding public hearings when necessary.

x) Initiate and carry out, on its own or by contract, such studies and research as the Commission deems necessary for the proper discharge of its functions.

xi) Prepare each year and submit to the Minister of Justice an annual report of its activities which the Minister would table in Parliament.

3) Sentencing education for judicial officers

The need for sentencing education is now generally recognised and sentencing education for judicial officers is now an established feature of many judicial systems. Accordingly, an important task for a sentencing commission will be the development and organization of

judicial education programmes in relation to sentencing. Most judicial officers learn about the intricacies of sentencing in the course of their daily duties. Few judges come to criminal work with an extensive background of criminal practice at the bar. In the customary courts the problem goes even deeper. There may be a basic lack of knowledge of the legislation under which the presiding officer must act, the sentences available to the presiding officer and the circumstances in which individual sentences may be imposed. The need to broaden the knowledge of the presiding officers in the customary courts as regards sentencing will become even more pressing as new non-custodial measures are introduced to reduce the reliance on imprisonment.

4) Transparency in the development of sentencing policy

Sentencing policy development is not transparent. It is largely left to parliament and the courts, both of which are unsuited to the development of the principled resolution of sentencing policy issues. Parliament is largely guided by political considerations when formulating sentencing policy. The major impediment as regards the judges is that the courts are primarily concerned to decide the instant case rather than to consider policy implications. The appeal court is not a forum that can take full account of the views of every interested party. It issues its judgments in the context of a particular case, based upon submissions from prosecution and defence counsel. Wider perspectives need to be considered, including those of the public. Having a sentencing commission will help make the system more responsive to everybody's views.

This lack of a transparent policy can also make the sentencing system unpredictable. Prison resources cannot be effectively managed. When the government passes sentencing legislation, it must try to forecast the prison population and assess other likely impacts. However, it does this largely in the dark, because it cannot guess how judicial sentencing practice will change in response to the legislation. A sentencing commission may help alleviate this problem.

5) Membership of the sentencing commission

The composition of sentencing commissions and sentencing councils varies. It will be necessary to determine who will comprise and chair any sentencing commission to be established. Usually this is a function performed by the judiciary. In Canada for example it was proposed that the sentencing commission would consist of a chairperson, a vice-chairperson and at least five other members for a minimum of seven members. The chairperson would be a judge and would also be the chief executive of the Commission. The majority of members would be judges selected from various levels of courts while other members would be selected from as wide a range as possible of relevant constituencies. All members, except the chairperson, would serve on a part-time basis.

In New Zealand, it was proposed that the sentencing council should have a membership of 10, comprising:

- four judicial members: two from the District Court; one from the High Court; one from the Court of Appeal;
- the Chair of the Parole Board;
- five members with expertise or understanding in one or more of the following areas: criminal justice matters; policing; the assessment of risk; the reintegration of prisoners into society; the promotion of the welfare of victims of crime; the impact of the criminal justice system on Maori and minorities; community issues affecting the courts and the penal system; public policy.