

DRAFT POLICY PAPER

**SUPPORTING THE DEVELOPMENT OF A
SENTENCING POLICY ENCOMPASSING
ALTERNATIVES TO IMPRISONMENT IN THE
ADMINISTRATION OF JUSTICE**

BOTSWANA

2013

PRESENTATION TOPICS

25th- 26th July 2013

1. (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 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

2. (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 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**

3. (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 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**

4. (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 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**

5. (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**